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NAVIGATING ENERGY DISPUTES: INSIGHTS INTO THE ENERGY CHARTER TREATY AND ALTERNATIVE RESOLUTION METHODS

Abstract

This article first takes a closer look at the historical and economic processes that underpinned the Energy Charter Treaty. After a brief examination of the Energy Charter Treaty, dispute resolution methods of the Treaty are studied, and especially the resolution of investment-related disputes is explored. One of the inevitable phenomena of the interaction of trade forces is disputes, which is analyzed in the study. The global energy industry is no exception. The global energy industry is arguably the most controversial industry in international business. Therefore, since the results can be very negative, there is a need for mechanisms to eliminate errors. It is established and substantiated that the law addresses these issues through energy dispute resolution mechanisms and codifications incorporated into various international and municipal energy treaties and laws. An important reason for the emergence of alternative dispute resolution methods and this system is that the court service provided by the state through courts is a time-consuming and economically profitable method. In other words, the desire of the parties to resolve disputes quickly and on their own initiative has led to the emergence of alternative dispute resolution methods. All over the world, even in the least developed countries, the burden imposed by legal systems and commercial transactions, and the difficulties faced by courts in managing this burden, result in the need for a faster and more satisfactory method of arbitration for parties to legal and commercial disputes. Based on the study, it is suggested that the energy charter agreements and other international energy agreements should be strengthened with dispute resolution mechanisms. These mechanisms can increase confidence in the industry and ensure the continuity of trade by providing a quick, effective and fair solution to the parties. Therefore, the establishment of alternative dispute resolution methods specifically designed and adapted for the parties in the energy sector can be recommended. This can provide a more effective and cost-effective way to resolve disputes that parties in the industry may face.

Keywords: *Energy Charter Treaty, arbitration, investment, public service concession agreement, energy industry*

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Enerji mübahisələrinin naviqasiyası: enerji xartiyası müqaviləsinə və alternativ həll metodlarına münasibətlər

Xülasə

Məqalədə, ilk növbədə, Enerji Xartiyası Müqaviləsinin əsasını təşkil edən tarixi və iqtisadi proseslərə daha yaxından nəzər salınır. Enerji Xartiyası Müqaviləsi qısaca araşdırıldıqdan sonra müqavilənin mübahisələrin həlli üsulları öyrənilmiş və xüsusilə investisiya ilə bağlı mübahisələrin həlli tədqiq olunur. Ticarət qüvvələrinin qarşılıqlı təsirinin qaçılmaz hadisələrindən biri mübahisələrdir ki, onlar da tədqiqatda təhlil edilir. Qlobal enerji sənayesi də istisna deyil. Qlobal enerji sənayesi, şübhəsiz ki, beynəlxalq biznesdə ən mübahisəli sənaye kimi qeyd edilir. Buna görə

də nəticələr çox mənfi ola biləcəyi təqdirdə səhvləri aradan qaldırmaq üçün mexanizmlərə ehtiyac yaranır. Qanunun bu məsələləri enerji mübahisələrinin həlli mexanizmləri ilə müxtəlif beynəlxalq, bələdiyyə enerji müqavilələri və qanunlarına daxil edilmiş kodifikasiyalarla həll etdiyi müəyyən edilir və əsaslandırılır. Mübahisələrin alternativ həlli üsullarının və bu sistemin yaranmasının mühüm səbəbi dövlətin məhkəmələr vasitəsilə göstərdiyi məhkəmə xidmətinin vaxt aparan və iqtisadi cəhətdən sərfəli üsul olmasıdır. Başqa sözlə, tərəflərin mübahisələri tez və öz təşəbbüsü ilə həll etmək istəyi mübahisələrin alternativ həlli üsullarının yaranmasına səbəb olmuşdur. Bütün dünyada, hətta ən zəif inkişaf etmiş ölkələrdə belə, hüquq sistemlərinin və kommersiya əməliyyatlarının tətbiq etdiyi yük və bu yükün idarə olunmasında məhkəmələrin yaşadığı çətinliklər hüquqi və kommersiya mübahisələrinin tərəfləri üçün daha sürətli və qənaətbəxş arbitraj metodunun zəruri olması nəticəsinə gəlinir. Tədqiqat əsasında təklif edilir ki, enerji xartiyası sazişlərinin və digər beynəlxalq enerji sazişlərinin mübahisələrin həlli mexanizmləri ilə gücləndirilməsinin vacibliyi irəli sürülsün. Bu mexanizmlər tərəflərə sürətli, effektiv və ədalətli həll yolu təqdim edərək sənayeyə olan inamı artıra və ticarətin davamlılığını təmin edə bilər. Buna görə də enerji sektorunda tərəflər üçün xüsusi olaraq hazırlanmış və uyğunlaşdırılmış alternativ mübahisələrin həlli üsullarının yaradılması tövsiyə oluna bilər. Bu, sənayedəki tərəflərin üzləşə biləcəyi mübahisələri həll etmək üçün daha effektiv və sərfəli üsul təmin edə bilər.

Açar sözlər: *Enerji Xartiyası Müqaviləsi, arbitraj, investisiya, dövlət xidməti konsessiya müqaviləsi, enerji sənayesi*

Introduction

In the energy sector, one of the sectors where the effects of globalization are felt most, the search for cooperation has accelerated, especially with the end of the Cold War and the dissolution of the Union of Soviet Socialist Republics (USSR). Cooperation efforts between the former Soviet Union countries, which are rich in energy resources but limited in investment resources, and developed European countries, which are poor in energy resources but rich in investment resources, were first mentioned at the meetings of the European Council in Dublin in 1990 and the first official studies began. has been started. The road map on this issue was determined with the European Energy Declaration published in 1991. Finally, these efforts bore fruit with the Energy Charter Agreement signed in 1994, and a comprehensive and multilateral agreement was reached for the first time in the energy sector.

The shaping of the EU's energy policy started with the European Coal and Steel Community, which was established with the Paris Agreement of 1951, which formed the basis of the Union; It gained momentum with the signing of the agreements establishing the European Atomic Energy Community and the European Economic Community in 1958. In the 1960s, 60 percent of energy demand was met by coal, while the share of oil was only ten percent. During these dates, various directives were published and some protocols were signed in order to create a common energy policy. The oil crisis in the 1970s made it necessary for the Union to create a new energy strategy, and the European Council adopted the "New Energy Policy Strategy" in 1974, which envisaged reducing energy consumption, ensuring supply security and protecting the environment in the production and consumption processes of energy. has adopted a policy (Ilhan, 2004: 26). In the 1980s, efforts to establish a single market and liberalization in the energy sector gained importance. However, due to the dependence of electricity and natural gas on relatively new developing technologies and their transportation and distribution being dependent on networks, free circulation in these sectors occurred later, and both energy sectors remained dependent on national markets for decades.

The end of the Cold War in the early 1990s and the emergence of independent states rich in energy resources gave rise to the idea of cooperation between EU countries poor in energy resources and newly independent states with limited investment opportunities (Andrew, 1998: 435). At the meeting of the European Council in Dublin in 1990, the Netherlands stated that the economic development in Eastern Europe and Russia would gain momentum with the cooperation

in the energy sector, and with the acceptance of this opinion by the Council, studies were carried out on how to carry out this cooperation (Bilgin, 2007: 336). In February 1991, the European Community Commission proposed the concept of the "European Energy Charter" and in the same year, to start EU negotiations, it included all Western and Eastern European countries, the not yet dissolved USSR and the non-European Organization for Economic Co-operation and Development (OECD). invited their countries to the conference held in Brussels. The USA, Canada, Australia and Japan also joined the conference shortly afterwards. Finally, on 17 December 1991, almost at the same time as the dissolution of the USSR, the European Energy Charter Declaration (ECSC) was signed in The Hague by 38 states and the EU, including Turkey and the USA (Bilgin, 2007: 55), and a political framework aimed at ensuring cooperation in the energy sector. It emerged as a statement of intent. No binding international agreement has been signed between the parties. ESC has currently been signed by 58 states and continues to exist as a mandatory stage for the signing of ECA.

Insights into the Energy Charter Treaty and Alternative Resolution Methods

ECA was originally developed on the basis of the 1991 ESC. With the signing of the ESC, the preparatory work for a binding international agreement text began, and as a result of these studies, the ESC, which will create the necessary legal infrastructure for international cooperation in the energy sector, was opened for signature in Lisbon on 17 December 1994. ECA is the first comprehensive and multilateral international agreement regulating the rights and obligations of actors playing a role in the energy sector in areas such as investment, trade, energy transportation, environment, competition, market entry, technology transfer, efficient use of energy and dispute resolution. It has currently been signed by 51 countries, including Turkey, as well as the EU and the European Atomic Energy Community, and came into force on 16.04.1998. 23 countries, including the USA and Canada, and 10 international organizations, which have signed the AESD, still have observer status. Although the Russian Federation signed the ECA on 17.12.1994, it declared on 20.08.2009 that it would not ratify the ECA and would not be a party, especially in order not to lose its monopoly power in the field of energy and to increase investment opportunities with its own resources (4).

Since the trade-related provisions of the ECA were signed before the Marrakesh Agreement of 1994, which established the World Trade Organization (WTO), the trade provisions included in "The General Agreement on Tariffs and Trade" (GATT) signed in 1947. In addition, with these amendments, the scope of the ISA was expanded to include energy-related equipment and the energy materials, products and services of Azerbaijan, Belarus, Bosnia and Herzegovina, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan, which are parties to the ISA but not yet members of the WTO, By taking energy-related equipment as a reference, the way was opened for them to become familiar with WTO practices and disciplines.

Consisting of eight chapters, fifty articles and many annexes, ECA does not aim to determine national energy policies or finance investments in energy producing countries, nor does it provide any recommendations or obligations for opening energy networks to third parties. We can say that two basic understandings played a role in signing the ECA. Firstly, the importance of the energy sector in revitalizing the economies of Central and Eastern European countries, which are in the transition phase to a liberal system, is understood. Secondly, developed Western European countries understand that they need to find alternatives to the insecurity of the North Sea, Middle East and North African resources from which they obtain the energy they need, and therefore they consider supply security as the main problem (Kolosov, 1971: 514). While some headings, such as investment and energy transit, are regulated with stricter rules, some headings are subject to more flexible and non-binding rules; From time to time, in some titles, strict and flexible rules are included in a way that complement each other (Kolosov, 1971: 438). Apart from these, other technical agreements are also frequently referred to in the ECA.

The conference is authorized to establish subordinate bodies to carry out its duties. In this context, the Energy Efficiency Group, Investment Group, Trade Group and Transit Group were

established and these groups have a regular work program. The Budget Committee and the Legal Advisory Committee do not have a regular work schedule, but they work under the Conference (Aliyev, 2011: 24).

The contracting party or its competition authority that receives the notification examines the situation and, if deemed necessary, exchanges information with the competition authority of the notifying contracting party, decides whether any measures need to be taken, and notifies the notifying contracting party with its reasons for its decision. If the decision is that a measure should be taken, the notifying party will also inform the contracting party of the measures taken and developments (Sadigov, 2008: 160).

Investment-Related Disputes

There is no agreed upon definition of the concept of investment. In the legislation and scientific works, such a definition is avoided due to the concern that the definition will not be able to cover all investment types. For this reason, in agreements regarding the protection of investments, investment is generally not defined, but assets and rights that can be considered as investments are listed (Arzu, 2009: 170).

ECA, which is an international agreement, also preferred a similar method and instead of defining the concepts of investment and investor, it chose to specify the assets that will be considered as investments. Accordingly, all kinds of property rights, such as real or in-kind, movable and immovable assets and mortgages, liens and guarantees; a company or enterprise, or shares, bonds or other forms of participation in a company or enterprise, promissory notes and debts of a company or enterprise; claims for money and performance of services that have an economic value and are related to a contract for an investment; intellectual property; earning; Rights granted based on laws, contracts or licenses and permits issued in accordance with the laws regarding any economic activity initiative in the energy sector are considered within the scope of investment (Bilgin, 2007: 36).

Considering these issues, states undertake to each other to protect foreign investment and investors by making bilateral or multilateral agreements aiming at the protection and promotion of foreign investments. However, these agreements have always been a matter of controversy because they limit the state's sovereign rights to a certain extent (Ercument, 2009: 24).

Article 10 of the ECA is titled "Promotion, Protection and Implementations of Investments" and does not foresee clearly defined obligations for the protection and promotion of investments, but only sets basic standards. According to the first paragraph of the said article, the Agreement parties are obliged to establish stable, fair, appropriate and transparent conditions for investors of other Agreement parties to invest in their own countries. In addition, the Agreement parties undertake to provide equal and fair treatment to the investments of other Agreement parties. This provision emerged from the OECD investment contract models and was taken as a basis by NAFTA in many decisions. Furthermore, investments shall enjoy stable and continuing protection and security, and no Contracting Party shall act in a manner that creates inequality in the management, maintenance, benefit, right of use or transfer of investments by unreasonable or discriminatory measures. In no case shall such investments be subject to procedures less than those imposed by international law, including Treaty obligations (10).

Article 11 of the ECA regulates that the Agreement parties are obliged to examine in good faith the requests of investors of other Agreement parties and key personnel appointed by these investors to enter their own countries for investment activities. In addition, the parties to the Agreement will allow the appointment of a key personnel for investors with investments in their countries or for their investments, regardless of nationality and citizenship status (James, 2006).

Article 13 of the agreement regulates the protection of investors against expropriation, nationalization or transactions that will result in similar results, which is an important issue and a fundamental risk for investments in the energy sector. According to the said article, if a Contracting Party wishes to expropriate the investments of another Contracting Party, it must do so for a purpose in the public interest, without discrimination, in a completely lawful manner and by

providing adequate compensation in a timely manner. When determining the expropriation value, the value before the expropriation process (if the issue of expropriation has affected the value of the investment, the value before it is affected) should be taken into account. Commercial interest will also accrue for the period until the payment date, and payment must be made in convertible currency. These provisions will also be applicable if the foreign investor owns shares (Cengiz, 2002).

The resolution method regulated in Article 26 of the ECA is applied to investment-related disputes involving the claims of the Agreement party investor that the obligations in the third part of the Agreement have been violated by the Invested Agreement party state. The third part of the agreement contains many vague obligations and its scope is very broad; However, the absence of strict obligations for the pre-investment stage relatively eliminates these drawbacks. It is not possible to apply this provision in other disputes arising from provisions other than the third part of the agreement (Cemal, 2002).

For the resolution of investment disputes, the investor can apply to the International Center for the Settlement of Investment Disputes (ICSID) established in accordance with the "Convention on the Settlement of Investment Disputes Occurring Between States and Nationals of Other States" dated 1965 and ICSID arbitration within this scope. ICSID arbitration, an institutional arbitration, specializes in investment and operates under the World Bank (Salih, 2007: 243). It was established by an international agreement and a self-governing system was created, independent of domestic law. Decisions made as a result of ICSID arbitration are final, just like the decisions of the courts of the states whose enforcement is sought.

In order to apply for ICSID arbitration, as a rule, the state of the investor, which is a party to the investment dispute, and the state of the investment must sign the ICSID Convention. However, the "ICSID Conciliation and Arbitration Additional Mechanism Rules" were accepted in 1978 and the way for arbitration was opened even if only one of the parties was a party to the ICSID Convention. This arbitration, which is carried out in accordance with the additional mechanism rules, is carried out by the ICSID Secretariat and is not technically an ICSID arbitration (Craig, Jan, Thomas, 2000: 33).

United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, which are widely adopted and used around the world, are designed to be used in ad hoc arbitration and consist of rules that are applicable to almost all types of ad hoc arbitration. It is not an institutional type of arbitration and is not monitored, supervised or managed by a specific institution. These rules were created by the United Nations (UN) Commission on International Trade Law in 1976 to ensure that those who prefer ad hoc arbitration can carry out arbitration procedures within the framework of international rules without being subject to local arbitration regulations.

The third international arbitration institution to which the investor can apply under the ECA is the arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Institute). SCC Arbitration Institute was established in 1917 and is an institutional arbitration institution widely used to resolve disputes arising from commercial and economic contracts between the East and West bloc through arbitration, especially during the Soviet Union. It has a legal entity independent from the chamber and the arbitration rules revised in 1999 are applied. Here, the substantive law rules deemed appropriate by the parties are applied, and if the substantive law rule is not chosen by the parties, the law to be applied is determined by the arbitral tribunal.

In accordance with the fifth paragraph of the article, it is stipulated that arbitral awards arising from investment disputes will be enforced in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958. The agreement in question applies only to arbitral decisions arising from commercial relations. For this reason, the ECA accepted that all arbitration claims arise from commercial relations and made it possible for these claims to be subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Feyiz, 2004: 15). In accordance with the provisions of the

Washington Convention, since the parties agree that the arbitral decisions are binding and enforceable, resorting to ICSID arbitration is in the favor of the parties.

Conclusion

In ECA, which constitutes the multilateral legal structure in international energy cooperation; Basically, issues concerning investment, trade, transit, competition and environment in the energy sector are regulated. With its comprehensive structure, it aims to encourage and facilitate international energy cooperation. The agreement recognizes state sovereignty over national resources and also attempts to help improve energy supply security, which is of vital importance for Europe. Ensuring energy security through the functioning of an open and competitive energy market through ECA; protecting the investor based on the principles of national treatment or most favored nation registration; to protect investors against non-commercial legal and political risks; trade on terms based on WTO rules; to resolve disputes between contracting states and between investors and host states; The aim is to support energy efficiency and try to minimize the environmental impacts of energy production and use.

Although ECA regulates trade, competition, environment and energy efficiency problems and relations in the energy sector, its most important pillars are investments and investor protection. In this context, the provisions regarding the protection of investors and the resolution of investment disputes are regulated in detail in the ECA. "Giving the investor the right to go to international arbitration for the resolution of investment disputes", adopted in the resolution of investment disputes, is an important right envisaged to minimize legal risks and costs in investment.

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