

Progressive Development of International Law Concerning Energy Security

Pokrokový rozvoj medzinárodného práva v oblasti energetickej bezpečnosti

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LEGAL ASPECTS OF THE PROMOTION OF THE PRODUCTION AND USE OF ENERGY FROM RENEWABLE SOURCES IN THE EUROPEAN UNION

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Abstract: Energy security and formation of an efficient internal energy market is one of the common topics of the member states of the European Union. Currently, the European Union is forced to answer truly crucial questions such as: how to deal with their energy needs, increase the efficiency of primary energy consumption, decrease the dependence on energy imports and mitigate climate changes. Without a proper attention paid to these questions, the European Union will not be able to achieve its objective of becoming a leading economic and political world power. Adoption of an appropriate European legislation shall be considered as a valuable means to address these unprecedented challenges; including the obligation of member states to implement it into their national legal orders. The measures of European Union regulating production and use of energy from renewable sources constitute essential parts of the package of measures needed to reduce greenhouse gas emissions and promote the security of energy supply. In this paper legal framework of production and use of energy from renewable sources in European Union is to be analysed.

Key words: European Union, European legal framework, energy security, renewable resources, energy efficiency, energy consumption.

1 INTRODUCTION:

In the recent years the energy market in the European Union was subject to significant changes. Energy security, reinforcement of environmental goals, growing dependency of imported fossil fuels and volatile energy prices are among the main driving forces shaping EU's energy policy. In this context, the promotion of energy from renewable energy sources, together with energy saving and increased energy efficiency, constitute a high EU priorities that should contribute to the security and diversification of energy supply, environmental protection and social and economic cohesion. In addition, the development of new energy alternatives is also seen as a way to sustain Europe's competitiveness in growth and job-creating new industries. There is no doubt that achieving these objectives requires a strong legislative framework in renewable energy sources at Union level. And of course, it also requires its appropriate adaptation at regional and national level as well.

In this paper the legal development of promotion of the energy from renewable sources in European Union is to be analysed. Further, the present paper takes into consideration the future potential as to give some indication of what could be the future developments in the legal framework in renewable energy sector in European Union.

2 LEGAL FRAMEWORK

2.1 Primary legislation

The fundamental principles related to regulation of energy policy in European Union are to be found in the primary law of the European union. The core legal basis for promotion renewable resources in European Union is Article 194 of the Treaty on Functioning of the European Union (hereinafter "TFEU"). The Article stipulates that in the context of the establishment and functioning of internal market and with regard for need to preserve and improve the environment, Union policy on energy shall aim to (1) ensure the function of the energy market, (2) ensure security of energy supply in the Union, (3) promote energy efficiency and energy saving and the development of new and renewable forms of energy, and (4) promote the interconnection of energy networks. In this context the European Parliament and the Council shall establish the measures necessary to achieve these objectives.

It is important to note that the Union policy on energy is also governed by the principle of subsidiarity and proportionality. It means that the Union does not have exclusive competence in the energy area. In areas in which the Union does not have exclusive competence, the principle of subsidiarity seeks to protect the capacity of the Member States to take decisions and to take action and authorises intervention by the Union when objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level.¹ In this context, taking into consideration the provisions of TFEU defining circumstances in energy area, we can establish that the Union is supposed to set overall objectives for renewable energy sources, but leaves it largely to member states how to achieve these objectives.

2.2 Policy and secondary legislation

In order to promote and support the ambition to achieve Union's aims laid down in primary legislation, European Commission has been setting, step by step, throughout the years Union framework for the promotion of renewable energy sources. The EU renewable energy policy started in 1997 with the adoption of the White Paper „Energy for the future: Renewable Energy Sources“, that set a target of 12 % share of gross inland energy consumption to be supplied from renewable sources the Members state by 2010².

Following the White Paper the first Renewable Electricity Directive was adopted in 2001³. The directive set an overall target to source 21 %⁴ of electricity from renewable sources by 2010. In order to reach the target, each member state was given a national indicative i.e. non-binding target for renewable electricity. It was left to the discretion of member state which Instruments to use in order to reach their target.⁵ The Directive also established definitions for different types of energy from renewable sources (wind, solar, geothermal, wave, tidal, hydropower etc.).

In 2007, the European Council adopted ambitious energy and climate change objectives for 2020: cutting greenhouse gas emissions by 20 %, sourcing 20 % of energy from renewable sources and increasing energy efficiency by 20 %.⁶ Furthermore, the Council also gave a long term commitment to reduce its carbon footprint with target of 80 to 95 % cuts in emissions by 2050.

2.3 Directive 2009/28/EC

Second Renewable Energy Directive that amended and repealed earlier the Directives 2001/77/EC and 2003/30/EC was adopted in 2009.⁷ The new Directive set the target of reaching at least a 20 % share of renewable energy in EU's final energy consumption by 2020. It is important to note, that the Directive sets a target covering not only electricity but also energy consumption as a whole, thus including heating and cooling as well as transport. That's the significant difference between directive from 2001 and directive from 2009.

In contrast to the EU's previously loose legislative framework which set only indicative targets, the 2009 Directive set mandatory i.e. legally binding national target for each Member State for the overall share of renewable energy sources in gross final energy consumption as well as mandatory share 10 % in transport. Among the reasons that prompted a change in policy approach was the insufficient rate of progress towards agreed targets, and the need to foster renewable energy development in all Member State.

It's generally known, that the costs of renewable electricity generation are higher than the conventional coal-fired generation. In order to renewable sources to become competitive it's clear

¹ See: Article 5(3) of the Treaty on European Union and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

² EUROPEAN COMMISSION (COM(1997)599 Final): Communication from the Commission. Energy for the future: Renewable sources of energy. White Paper for a Community Strategy and Action Plan. 1997.

³ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in internal electricity market.

⁴ Initially set at 22,1% after the 2004 enlargement the overall target became 21%.

⁵ See: Article 3 of Directive 2001/77/EC.

⁶ These targets are also known as the 20-20-20 targets.

⁷ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

that renewables must be supported. This support is usually provided through subsidies. Related to this, the Directive envisages the introduction of support schemes which should enable the achievement of the targets, whereas the decision on specific scheme is left to each country. To date, two major market policy options to promote renewable energy operate in the marketplace: (1) price-based feed-in tariff, which require mandatory purchase of renewable energy at a fixed price (for instance it is used in Germany, Spain and France); (2) quantity-based renewable energy portfolio standards, which require a minimum share of power or minimum level of installed capacity in a given region is met by renewable energy (for instance it is used in Denmark, Italy and Netherlands). Each approach has its own advantages and disadvantages. The selected types of support schemes should be based on objectives, country conditions, and power sector structure. Each policy option must also consider who will pay for the incremental costs between renewable energy and conventional energy sources. Taking these into consideration as well as national energy policy of every member and geological particularities, European harmonisation of the support schemes is rejected by some Member states for a long time.

Next significance of Directive is that each EU country is obliged to make a national action plan for 2020, setting a share for renewable energy sources in transport, heating and the production of electricity.

To help achieve targets cost-effectively, the Directive provides cooperation mechanism between the Member States. To count toward their action plans, EU countries can also receive renewable energy from countries outside the EU, provided that energy is consumed in the EU and that is produced by modern/efficient installations. Developing renewables in cross border support schemes can remove possible distortion to single market arising from different national approaches.

Other crucial issues necessary for encouragement of electricity production from renewables envisaged in the Directive are grid system related. Member states shall take the appropriate steps to develop transmission and distribution grid infrastructure. Member states shall also adopt transparent rules on grid-connection costs as well as provide priority access or guaranteed access to the grid system of electricity from renewable sources. The Directive encompasses detailed provisions regarding the access and operation of grid. Open grid access, together with transmission, constitutes crucial elements for the successful integration of renewable energy into the market. The upgrade and extension of Union grid system is just as important as support schemes for the promotion of renewable energy in the Union market. In this respect harmonisation of Union regulatory frameworks and coordination of the operation and development of the integrated transmission network has been progressively developing as part within the formation of an Internal Energy Market.

3 RESULTS OF PROMOTION

The latest report from 2015 show that growth in renewable energy has increased significantly and reaching the 2020 renewable energy targets remains fully possible for the Union as a whole and the majority of the Member States.⁸ The latest available figures from also indicate that renewable energy accounted for 15,3 % of energy consumption in the EU-28 in 2014. At that point we can establish that Union is on the good way to achieve their objectives.

On the other hand the concerns regarding the progress in some Member States still exists and causes lesser optimistic assumptions related to future development, namely: deviations from their own national renewable energy action plans; failure to address certain administrative and grid-related barriers to the uptake of renewable energy; recent disruptive changes to national support schemes for renewable energy; and, finally, the slow transportation of the Directive into national law. For instance The Commission has already taken out infringement proceedings over some Member States non-transposition of the directive (notably in case of Poland and Cyprus).

It's obvious that achieving Unions goals set out in the 2009 Directive is not the end of Unions ambition to achieve sustainable development in renewable energy sources. The Union has already started preparing for the period beyond 2020, in order to provide early policy clarity on the post 2020

⁸ EUROPEAN COMMISSION (COM(2015) 293 final): Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Renewable energy progress report. 2015.

regime for investors. In this context regulation and legal framework in renewable energy will play a key part in the Commissions long term strategy as outlined in its „Energy Roadmap 2050“.⁹

4 CONCLUSION

Renewable energy is an effective approach to strengthen the energy security and mitigate climate changes. In the Union, renewable energy technologies are growing rapidly and renewable energy is becoming a widely accepted, mainstream source of energy. The Directive 2009 with legally binding Union and national targets and 10% target for renewable energy use in transport became the key driver for European led global investment in renewable technologies and supportive renewable energy policies far beyond Europe's frontiers. This momentum needs to continue. With five years to go to the end of 2020, majority of the Member States are well on track to meeting the renewable energy targets laid down in the Directive 2009.

The key to success for renewable energy development is the implementation of sound legal, policy, and regulatory framework that will attract large-scale investment in renewable energy. Successful renewable policies must be long-term and consistent; have a secure and predictable payment mechanism; provide fair and open grid access; possess strong governance conditions, clear administration procedures, have strong public acceptance; and enforcement is key.

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⁹ EUROPEAN COMMISSION (COM(2011) 885). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Roadmap 2050. 2011.

THE EU AND THE FUTURE OF CLIMATE AND ENERGY POLICY

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Abstract: The climate and energy policy faces a major challenge to limit climate change, to secure energy supplies by increased energy demand and at the same time to get out from the nuclear power technology. These parallel tasks must be solved by the European climate and energy policy. In particular, the industrialized countries have to reduce their CO₂ emissions in a relatively short time. In order to reach this goal it will be inevitable to fully convert Europe's energy supply to renewable energies. This is the concept for a sustainable, secure and affordable energy supply.

Key words: Climate Policy, Energy Policy, EU

1 INTRODUCTION

The EU energy consumption is growing. The external by-costs of energy consumption and production in the form of greenhouse gas emissions and other air pollutants are also growing. The consequence of progressive global warming and the rising fossil fuel prices - all this support the need for a fundamental change of our energy system. The good news is as follows: to reach a 100% renewable energy goal in Europe by 2050 is possible. Particularly, the EU provides a good basis for an energy policy that relies on renewable efficiency and savings. Saving and efficiency belongs to energy transition. There is an enormous untapped technical and economic potential. The running costs of our economy will be reduced. Especially, the European solutions are of global influence: whoever wishes to import to Europe has to meet our efficiency and ecological standards. Thousands of new jobs will be created in the EU which will allow the Union to remain a leader in a high-technology world. The EU should see the key climate and energy policy challenges of our time as an opportunity. That is, at least, the vision.

2 THE CURRENT EU CLIMATE AND ENERGY POLICY

The EU has set the goal to drastically reduce its greenhouse gas emissions by 2050 - by 80 to 95%. The use of the renewable energy sources should play a key role. But how big can and should the role be? The expansion of renewable energies has begun from Portugal to Poland. The interconnexion of the European electricity grids is also pushed slowly. But the alignment of the European energy policy on **climate-friendly renewable energy sources** lies behind the real possibilities. Despite the enormous **renewable energy potentials** is the future of energy supply between the EU member states highly controversial. Some of the Member States, due to economic and socio-political reasons, see their future associated with nuclear energy, coal and gas. They follow different regulatory approaches on their energy markets. The different energy and market structures in the Member States make the coherent European energy (internal) politics more difficult. The first steps towards a single European market for energy started with the 1952 European Atomic Energy Community¹ and the 1957 **European Atomic Energy Community**.² With the 2008 European energy and climate package and the 2009 Treaty of Lisbon have been defined the energy policy objectives. The Lisbon Treaty emphasizes the common energy market, the common supply security, the joint development of efficient and renewable energies in a spirit of solidarity.³ The EU Member States have not committed to the spirit of solidarity concerning their national energy policy, but only for their actions at the European level.

The motive of "strength" plays in the context of energy and climate policy, especially when we speak about supply security a central role. The rapid rise in global energy demand, increasing import dependence, volatile prices of fossil fuels have serious economic consequences, not just for

¹ SVOBODA, P.: Úvod do evropského práva.

² KARAS, V., KRÁLIK, A.: Právo Európskej únie.

³ SIMAN, M., SLAŠŤAN, M.: Primárne právo Európskej Únie.

the future of the European welfare model. Energy saving, energy efficiency and renewable energies are strategies to strengthen the EU in a global economy. But overall, the European energy policy is still politically and institutionally too weak to meet the energy challenges outlined above.

This also applies to the global EU climate policy. The EU is globally the biggest economic trading bloc. On the one hand it exports energy-intensive lifestyles throughout the world. On the other hand it is still a global pioneer in the effort to reduce the consequences of rising energy consumption. The EU has set up the **2 degree Celsius** temperature target concerning global warming and created draft legislation to limit climate change. The EU countries have established a far-reaching legally binding legislative package for 2020. It stands on three pillars: a minimum of 20 percent renewable energy in the total energy consumption, 20 percent of greenhouse gas reduction compared to 1990 and 20 percent increase in energy efficiency to 2020.⁴

The achievement of the first two targets is on track. The EU energy efficiency fails. With the current measures are only 10 percent reachable. On the other hand the overall reduction target in greenhouse gas emissions is likely to be achieved. In addition, the above mentioned objectives are overall too weak. Also the external climate policy is showing deficits. The international climate negotiations in Copenhagen could be seen as a signal for the EU that only a joint political representation can bring success. The visible disagreement between the Member States, in regards to the EU strategy, leads to an outbreak which is not beneficial to the EU and its climate change interests. This raises the question whether the different national ideas about climate and energy policy can be usefully bundled at European level and whether there is a need for more European competences.

3 THE ADDED VALUE OF EU CLIMATE AND ENERGY POLICY

The current weaknesses and problems of EU climate and energy policy can not hide the fact that a common roadmap and joint efforts are essential for a sustainable and competitive Europe. The EU needs to create a stable environment, energy infrastructures and new markets for energy services in order to be successful globally. Climate and geography (natural diversity) determine the potentials and the cost of the development of renewable energy sources. The EU has excellent tools: wind on the coasts, sun in the southern countries, hydropower in the mountains. This allows a more cost-effective and more rapid expansion of renewables in Europe. A pan-European approach guaranties the security of supply through renewable energies.

Although the EU accounts for about one fifth of global energy consumption, it has little influence on the international energy markets. An effective advocacy of the EU is necessary for the security of the European welfare model. This applies, for example, for an ambitious emissions reduction target. Only a functioning, competitive European energy market can guarantee that the energy policy will not be dominated by regional monopolies or national energy companies. In most of the EU Member States, we still have monopolistic structures that often do not contribute to a meaningful, sustainable and consumer-friendly energy policy. A real European market can help to break up these structures and boost the European competition for the best ideas and lowest prices.

Despite the potentials there are several trade-offs on the way to an efficient and renewable energy industry. The EU energy policy has to meet the following trade-offs: bioenergy (important in order to achieve a full EU conversion to renewable energy); infrastructure expansion (the EU needs a modernized electricity network across national borders); minimize conflicts in setting of priorities (because the power supply in Europe is designed very differently); EU foreign energy policy (in order to agree on a common EU energy and climate policy). These trade-offs are not easy to solve. The success of a sustainable European climate and energy policy depends on what solutions will be found and how they will be implemented in practice.

4 TOWARDS A SUSTAINABLE EU CLIMATE AND ENERGY POLICY

The future EU climate and energy policy should be based on the following basic needs: The EU has to reach till 2020 the 30% target for greenhouse gas reduction in order to comply with the Intergovernmental Panel on Climate Change (IPCC) requirement for developed countries target of 25-40%. This is possible and would be an important signal to the rest of the world. The EU energy saving target of at least 20% by 2020 has to be legally binding and extended to 30% by 2030. The EU has to adopt a legally binding target for 2050, which will require a development of appropriate

⁴ FUNTA, R., NEBESKÝ, Š., JURÍŠ, F.: Právo Európskej únie.

policies and measures. In this regard, the EU has to focus on renewable energy. From a global perspective, the EU has to ensure that the international bodies such as the United Nations (UN) or the G20 will focus their policies to the target of a maximum warming below 2 degrees Celsius. The EU has also to work on the exit of nuclear power energy by 2050.

4.1 FUTURE EU POLICIES (A LOOK INSIDE)

Especially in the field of energy saving and market regulation new laws and financial⁵ instruments are needed. The measures aimed to increase energy efficiency and reduce energy consumption are well known and range from the promotion of energy performance of buildings, highly efficient products and vehicles to alternative mobility concepts and behavioral changes. In the future the energy market has to be regulated in a way to put strong incentives for efficiency and savings measures and energy services in the foreground - and not the amount of electricity. The Euratom Treaty is no longer up to date. Instead, we need a treaty which has the goal a further spread of renewable energies. After 2020, with a rising share of renewable energies, we will have to lead a discussion on how the energy market of the future should look like and what mechanisms have to be used to determine the price. It will play an important role, which provider can guarantee at what point in the future a certain amount of electricity. In this context, there will be a need to reform the national and European funding structures for renewable energies. They will on the one hand to allow a further rapid expansion of renewable energies and, on the other hand to achieve an optimal mix of centralized and decentralized system of renewable energies in Europe. The EU also needs to promote the construction of energy storage systems. The funds, which still largely flow in fossil and nuclear programs, should be conducted in renewable energy programs. The International Energy Agency (IEA) has calculated that government subsidies for fossil energy in 37 countries around the world cost more than 550 billion US dollars per year - a more intelligent use of these funds could result in a more sustainable energy supply.

In the electricity sector there is a need to ensure that the cost for investment in renewable energy and modernization of power lines are kept stable. Based on the experience, it will be important to coordinate the allocation of all public funds. At the same time, the EU has to develop an industrial policy that supports investment in renewable energies and support sustainable production methods. The EU has applied the EU Emissions Trading System (ETS). The EU emissions trading scheme is important to set standards for the globalized production processes (steel, automobile or paper production to make more efficient).

The EU also needs to change its agricultural sector towards sustainable cultivation methods and at the same time to promote the reduction of meat consumption. The strong links between economic and agricultural policy in the EU, the resistance of some EU member states concerning a sustainable agricultural policy, needs to be overcome. An important element is the energy recovery from agricultural wastes. In order to overcome existing conflicts between old and new EU member states, the EU needs a stronger focus concerning its energy policies on inner-European solidarity.⁶

4.2 FUTURE EU POLICIES (A LOOK OUTSIDE)

The EU neighborhood, development and foreign policy have to be designed more climate friendly and promote sustainable energy and climate policies. This would provide the developing countries energy supply security and lower costs as well as social and health benefits. Poverty reduction and the fight against climate change are not only compatible but support each other. A foreign and security policy with priority focus on an intelligent energy and climate policy makes the South and the emerging economies, but also the United States, better partners for the EU. However, this type of cooperation is still limited and fragmented - through the UN, bilateral or multilateral agreements or IRENA (the International Renewable Energy Agency based in the city of Abu Dhabi in the United Arab Emirates).

The negotiations about the UN Framework Convention on Climate Change (UNFCCC) build a key tool to establish the EU's common external climate policy. The EU must be ready to take a leading role. Such a leading role is given by the historical responsibility of the EU concerning the climate change. Also the developing countries are pointing out that the EU and the US have

⁵ PAULIČKOVÁ, A.: Ekonomické nástroje a financovanie starostlivosti o životné prostredie.

⁶ DREGER, J.: The European Commission's Energy and Climate Policy.

established high standards, among others with energy and resource waste. They have now a so called climate obligation. With the EU-Russia summit in 2010, both sides have agreed on a Partnership for Modernization, showing willingness for energy cooperation and the fight against climate change. To date, the energy cooperation with Russia is largely dominated by bilateral co-operation. Main focus of the cooperation lies on investments and import agreements in the field of oil and gas.

5 WHO SHOULD DECIDE ABOUT THE ENERGY MIX IN THE EU?

Does the EU has enough competencies⁷ to realize the vision of a sustainable energy supply for the whole EU? This leads to the question of who should decide about the future energy mix in the EU: each Member State for itself (as a reason of national matter) or the EU in an ordinary legislative procedure (thus, with the full involvement of the European Parliament and with a qualified majority in the Council)? The current Treaty (Art. 194 TFEU) is unambiguous on this point: „Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment. The Union’s policy on energy shall aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy market; ensure security of energy supply in the Union; and promote energy efficiency and energy saving and the development of new and renewable forms of energy. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions“. The reasoning adheres to the right of a Member State to decide about the conditions for exploiting its energy resources, the choice between different energy sources and the general structure of the energy supplies. As a result of this national self-determination the decisions at EU level can be passed only with the consent of all Member States in the Council. The European Parliament has only a right to be heard in this case.

The national self-determination is contrary to the fundamental idea of the EU integration path, namely that only than should be jointly decided about a policy at EU level - or the national policies should be at least coordinated - when national decisions influence many or all Member States. Or should each member state poses a veto right about the energy mix? From 1 November 2014, a qualified majority in the Council⁸ is seen as a majority of at least 55% of the members (in the current EU 28 at least 16 member states) representing at least 65% of the EU population. A blocking minority will have to include at least 4 members. Currently, 14 member states operate nuclear power plants; they together represent roughly 70% of the EU population. Germany has decided to phase out nuclear power, but from the countries which currently do not operate a nuclear power station, Poland and Lithuania are likely attributable to the nuclear power proponents. Thus, as the revision of the Treaties is unlikely in the very near future the EU member states can leverage on the enhanced cooperation, as provided by the Treaty in Art. 20 TEU and Art. 326 to 334 TFEU.

6 CONCLUDING REMARKS

Due to the global challenges in the area of climate and energy a fast and comprehensive change of course in EU climate and energy policy is essential. If Europe will use its great potentials, this realignment can succeed. The EU has to switch its energy supply in the next decades on renewable energy. Energy savings und energy efficiency measures are linked to this step. Apart from enormous economic opportunities, this may be also a pan-European project, leading to economic dynamism and prosperity. But the EU is still away from it. At European level as well in many EU member states there is a need to overcome the opposition. In addition, some trade-offs on the way to an economical and renewable energy are to be resolved. Europe must face these obstacles and difficulties. Only sustainable climate and energy policy secures the future prosperity of the European Union.

⁷ DUPONT, C., OBERTHÜR, S.: Insufficient climate policy integration in EU energy policy: the importance of the long-term perspective".

⁸ FUNTA, R.: Európske právo - otázky a odpovede.

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PROVISIONAL APPLICATION OF THE ENERGY CHARTER TREATY /THE RUSSIAN MATHRYOSKA DOLL'S EFFECT/

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Abstract: Extraordinary times require extraordinary measures. Extraordinary measures demand a truckload of sheer strength. Extraordinary strength commands an enormous power. The power to enforce what has not been fully gulped down yet and the power to do, what needs to be done, while blowing away all airy talks about the 're' or 'de' politicization of several inherent parts of international law, at least, to some degree (and not just for sake of a shallow argument). Provisional application of international treaties (the Energy Charter Treaty including) may swiftly pass for such measure. As a matter of fact, this well-known institute of international law really does so, unobtrusively, but with a sort of assertive eloquence. Calling a spade a spade, it is exactly the provisional application of the ECT in its whole controversial entirety, to which the paper bearing this title is going to be dedicated. Due to courtesy of the recent Yukos ruling it has already become a hot topic of many international debates. Be that as it may, ruffling a few nosy parkers' feathers with piercing its veil a bit thus might be definitely worth trying.

Key words: the provisional application, an international treaty, the Energy Charter Treaty, Yukos, Rosneft, the Russian Federation, an expropriation, taxation measures, arbitration, an energy sector, the VCLT

1 INTRODUCTION

“Provisional application as it appears at Art.45 is a deceptively simple concept. Like the Russian nested matryoshka dolls, one issue leads to another.”

Kaj Hobér, 2007

Institute of the provisional application of international treaties, usually libelled in international writings with the „work-around solution“² libel, that commands a subordination to treaty terms prior to the treaty ratification, is nowadays nothing new, lest unusual. Quite opposite in fact - it was recognised more than forty years ago in Article 25 of the 1969 Vienna Convention on the Law of Treaties /hereinafter referred to as “the VCLT”/.

Virtually, the term “provisional” was used for the first time much earlier in the Fitzmaurice report of 1956, in which Art 42 Sect 1 dealt succinctly with the treaty’s “*provisional entry into force*.”³ Far from exaggerating, the provisional application currently really serves well to „work-around“ to solve uncomfortable situations, arising in the sensitive⁴ waiting time after signature of the treaty, but still before its ratification, especially when the ratification seems to be put off and the ratification procedure has been unnecessarily slowed down.

¹ The author of this article alone is responsible for any accidental blunders included. The opinions divulged are those of the author and have no ties to any financial compensation received from any source.

² LAIDLAW, P.C., Provisional Application of The Energy Charter Treaty as Seen in The Yukos Dispute /hereinafter referred to as the Provisional Application of The Energy Charter Treaty/p.659.

³ Fitzmaurice, Special Rapporteur, Law of Treaties, [1956] 2Y.B. ITr’L L. COMM’N 127, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

⁴ ROGOFF, M., GAUDITZ, B., The Provisional Application of International Agreements / hereinafter referred to as The Provisional Application of International Agreements/, p.33.

As a matter of fact, signing the treaty cannot be assimilated with imposing a legal obligation on the signatory to ratify it, nor with – without something more - creating the duty of compliance with the treaty's provisions.⁵ The provisional application of international treaties is heavily relied on in those treaties, which require an immediate enforceability – for instance in order to keep off the international crisis.⁶

In addition, the provisional application comes as a useful tool also in cases, when the quick enforcement of the treaty is unavoidable in order to achieve its effectiveness.⁷ Indeed, according to Niebruegge,⁸ “...provisional application imposes duties and obligations on signatories during this gap period and can be best understood as an attempt to solve collective action problems created by this gap.”

However, when considering its application in the foreign investment law, Belz⁹ observed: “While provisional application is a relatively common practice for treaties demanding immediate enforcement, it is a new development in investment agreements.” On the other hand, and perhaps not without reason, the provisional application of international treaties /in spite of its incontestable usefulness/ is sometimes considered relatively obscure,¹⁰ being disappointedly described as “amorphous”, because of the vagueness of the whole concept, underlined by its own ambiguity.¹¹

Equally, from the whole category of specific states' practices, destined to create some form of obligation for signatories, before being successfully through with the formal ratification, the provisional application proved to be the most difficult, being peppered by inventive unflattering comments, ranging from being disparaged as “anomalous” to having been mercilessly chastised as “awkward”.¹²

Perhaps, one of the reasons for these complaints may be a missing closer determination of the scope of the provisional application of international treaties in Article 18 and 25 of the VCLT. Except for this, it is highly likely that another reason for criticising the provisional application is not the institute itself, but its not very fortunate and a bit unclear formulation in the relevant international treaty. In this respect, the 1994 Energy Charter Treaty /hereinafter referred to as “the ECT”/ with its controversial Article 45 has become quite a vivid example.

Art 25 Sect 1 VCLT stipulates that “A treaty or a part of a treaty is applied provisionally pending its entry into force if: a/ the treaty itself so provides, or b/ the negotiating States have in some other manner so agreed. In turn, under Art 25 Sect 2 VCLT “Unless the treaty otherwise provides, or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention to become a party to the treaty.”

Although not at all embracing generalization, it is notable that Article 25 has clearly laid down the rules *when* the treaty is applied provisionally and *when* and *how* the provisional application of the treaty stops under the red light upon initiative of the relevant State. Nonetheless, the very scope of application of the provisional application /or “up to which extent”/, and by which manners /or “how at all”/?/ the provisional application is going to bind the obliged state has not been comprised in Article 25.¹³

⁵NIEBRUEGGE, A. M., Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law /hereinafter referred to as Provisional Application of the Energy Charter Treaty: The Yukos Arbitration/, p.357.

⁶HOBER, K., Provisional Application and the ECT: the Russian Doll Provision /hereinafter referred to as The Russian doll provision/, p.53.

⁷ The Provisional Application of International Agreements, p.35.

⁸ Provisional Application of the Energy Charter Treaty: The Yukos Arbitration, p.355.

⁹ BELZ, M., Provisional Application of The Energy Charter Treaty: Kardassopoulos v. Georgia and Improving Provisional Application in Multilateral Treaties /hereinafter referred to as “Provisional Application of The Energy Charter Treaty: Kardassopoulos v. Georgia”/, p.728.

¹⁰ See e.g. the short discussion about various theoretical and practical obstacles in provisional application of international treaties in BARTELS, L.: Withdrawing Provisional Application of Treaties: Has the EU Made a Mistake?, p.112.

¹¹ Provisional Application of The Energy Charter Treaty, p.660.

¹² The Provisional Application of International Agreements, p.38.

¹³ See also The Russian doll provision, p.53.

At the very least, the uneasiness is partially rectified by Art 18 b/ of the VCLT, stating that “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

On the whole and unequivocally, Article 25 of the VCLT promotes the provisional application, but apparently within substantially loose ropes, leaving the details to the signatories of the treaty. As Belz¹⁴ readily remarked, “The extent to which provisional application grants legal rights and imposes obligations on states is still developing in international law, particularly through international arbitration.”

Not surprisingly then, due to a massive Yukos 50 billion USD verdict, rendered on July 14, 2014 in the ECT arbitration against Russian Federation,¹⁵ the most recent accounts in international legal writings have disclosed a genuine revival of interest not only in the problematic application of the enigmatic Article 45 of the ECT, but also triggered out a comeback of evaluation of Article 25 of the VCLT. Suffice it to say - there could not have been simply a better confirmation of the aforementioned remark.

This article does not aspire on embracing the reader with an in-depth analysis of the multifaceted Yukos case and three parallel arbitral awards, rendered recently against the Russian Federation. All of them are mind boggling essays, and their overview is beyond the content of this article, which is neither confined, nor focused on the comparison of numerous critical /or appraising/ annotations, published with regard to the Yukos verdict.

Rather, an emphasis is on the introduction of provisional application of the ECT in its entirety, pointing to its inherent deficiencies and uncertainties, which may arise due to an imprecise wording of Article 45 of the ECT, as well as its possible dual conceptual and a classical interpretation. In addition, echoing a recent idea of Italy to withdraw from the provisional application regime of the ECT, a brief overview of the ECT, together with a short evaluation of its contemporary importance will also form one part of this article.

The thesis of this Article is that, although the impeccable reasoning, provided by arbitrators in the Yukos case appears to be literally almost impregnable, it is impossible to overlook at least two flaws in the arbitrators' otherwise meticulously tailored verdict, which pose a few problems.

The very fact that one of these two flaws has been the backlash between the conceptual and classical interpretation of Article 45 of the ECT perhaps may be even if not predicted, then at least expected. Consequently, for the theoretical purposes, the impregnable stardom of the Yukos verdict is certainly available for little penetration.

This article is divided into five chapters, starting with this introduction. The second chapter introduces the Energy Charter Treaty and describes its main goals. The focus is on those provisions, which aim at protection of foreign investments in the energy sector, including the specific dispute resolution mechanism.

The next chapter examines the provisional application of the ECT within the context of controversial Article 45 of the ECT, serving as an overture to the fourth chapter, which incorporates a short polemic comment on the recent Yukos verdict, rendered in the most expensive multiparty ECT arbitration. At the very end, the article rather pessimistically predicts the development of the related future enforcement proceedings, while evaluating briefly the current status of the ECT, indicating its gradual consolidation.

2 ENERGY CHARTER TREATY AND ITS MAIN GOALS

The ECT was adopted in 1994 as the first multilateral treaty, including the detailed regulation of foreign investment in an energy sector. It is the most ambitious project ever adopted in the area of foreign investments. According to Baltag,¹⁶ “The ECT is a unique treaty aiming at strengthening the rule of law in the energy field, by setting minimum standards of action in three main areas: trade, transit and investment protection”.

¹⁴ Provisional Application of The Energy Charter Treaty: Kardassopoulos v. Georgia, p.729.

¹⁵ GIORGETTI, CH., International Decision /hereinafter referred to as the international Decision/, p.387.

¹⁶ BALTAG, C.: The Energy Charter Treaty: The Notion of Investor /hereinafter referred to as The ECT: The Notion of Investor/, p.221 .

Generally, the ECT follows five pathways- protecting and stimulating foreign energy investments,¹⁷ encouraging free trade in energy-related goods, securing the freedom of energy transmission, aspiring on the improvement of environmental protection and granting investors a robust mechanism for solving their disputes with host states in 'Article 26' ECT arbitration.¹⁸

The Treaty was adopted by 49 states from Europe, Japan and Australia.¹⁹ From the start, the member states of the ECT have become well known as the biggest producers and purchasers in the energy sector. In contrast, and expectedly, the US - the strongest resister of regimes other states want - refused the membership in the ECT, as according to the view of the US, it did not protect enough the foreign investors in comparison with BITs, muscled by the US for US investors.²⁰

As a result, the US and Canada are not the member states of the ECT, nor is Russia since 2009, when it terminated the provisional application of the treaty, as a consequence of the hugely popular Yukos affair.²¹ Today the ECT has forty eight members with the latest member being Iceland, which ratified the treaty on July 7, 2015, with entering into force for Iceland on October 18, 2015.

The number of signatories is higher, as the current amount has increased to fifty four signatories. The ECT entered into effect in 1998. Its main goal is to support the capital inflow and the „import“ of know-how from developed states from the Western Europe, Australia and Japan into the states of the former Eastern bloc.

It is the result of initiative of European states to cooperate more closely with Russia and new countries in the Central Europe and the Middle Asia in the energy sector. Thus it is highly important that the main purpose of the ECT is to stimulate the cooperation in the energy sector, but the most important thing is to create the considerable space for foreign investments in the energy sector in the Eastern Europe.

Naturally, the ECT is not confined only to foreign investments, but regulates also trading and transport in the energy sector, the confirmation of the state sovereignty over its natural resources, protection of the environment, etc. The nuts and bolts of ECT scope of applicability are contained in its fifty articles, divided into eight parts.

From the aspect of the foreign investments' protection, the most important has been the Part II. of the ECT /especially Article 10 „*Promotion, Protection and Treatment of Investment*“/, regulating support, the protection and treatment of foreign investments in the energy sector. Third part addresses in Article 12 „*Compensation for Losses*“, suffered by investors within the host state's territory because of war, an armed conflict etc. /Art.12 sect.1 ECT/.

It is important, that the compensation for the investor must be prompt, adequate and effective, fully conforming to criteria of the Hull formula.²² Essential provision located in the third part of the ECT is Article 13 „*Expropriation*“, determining modern rules of expropriating the investor's property by the host state, and Article 14 „*Transfer Related to Investments*“, stating the scope of the right of investor to transfer his profit from the host state territory.

Mechanism of investment dispute resolution is in the ECT included in its fifth part in Article 26 „*Settlement of Disputes between an Investor and the Contracting Party*.“ Over the years, it has proved to be an inspirational way of solving disputes of the investor and the host state, as it has enacted the direct right of the investor to initiate the investment arbitration under the ECT, not depending on whether there was or was not concluded the arbitration agreement between the disputing parties.²³

¹⁷ Access on <http://www.energycharter.org/what-we-do/investment/overview/>.

¹⁸ Provisional Application of the Energy Charter Treaty, p.657.

¹⁹ On the topic of ECT see more in CHOVANCOVÁ, K., *International Arbitration of Investment Disputes: Introduction and Basic Characteristics* /hereinafter referred to as the *International Arbitration of Investment Disputes: Introduction and Basic Characteristics*/, p.180.

²⁰ See in detail MUCHLINSKI, P.T., *Multinational Enterprises and the Law*, p.20.

²¹ MIRONOVA, I., *Russia and the Energy Charter Treaty*. Access on <http://www.energycharter.org/what-we-do/knowledge-centre/occasional-papers/russia-and-the-energy-charter-treaty/>

²² See more on Hull formula in SUBEDI, S.P., *International Investment Law: Reconciling Policy and Principle*, pp.16-18.

²³ The ECT also addresses in Article 27 the dispute resolution mechanism between its member states. The ECT member countries are under Art 27 Sect 1 obliged to solve their mutual disputes

Under Art 26 Sect 2, the investor from the ECT member country, claiming the breach on the ECT contractual obligations, is entitled to submit his claim directly against the host state - another member state of the ECT a/ before the courts or administrative bodies of the host state, b/ according to the dispute resolution mechanism agreed on in advance, or c/ in arbitral proceedings.

Negotiations in advance are welcome during a three month long cooling-off period, enacted in Art 26 Sect 2. In case no cooling off takes place, it is exclusively the investor and not the host state, who has the right to start the ECT arbitration / Art 26 Sect 2/.

When commencing the ECT arbitration, the claimant is absolutely unbound by his former choice of solving disputes and may opt for a/ the arbitration under the ICSID Arbitration Rules, b/ the ICSID Additional Facility Rules arbitration, c/ the UNCITRAL ad-hoc arbitration with one- single arbitrator, or d/ the arbitration in accordance with the SCC Arbitration Rules.

The ECT dispute resolution mechanism has been apparently busy with deciding many multiparty "solar claims" in the last three years against Spain and the Czech Republic. As Baltag²⁴ reported, "*The number of investor-state arbitration cases under Article 26 of the ECT doubled in this time span, going from thirty known cases to sixty-eight.*"

It may be submitted, that since the ECT adoption in 1994, those were exactly the ECT provisions, aimed at the protection and the steady investments' increase in the energy sector, which together with the Article 26 arbitration massively improved the investors' trust in realizing their foreign direct investments in a highly risky energy business, when being backed up by the ECT.²⁵

3 PROVISIONAL APPLICATION OF THE ENERGY CHARTER TREATY

As Belz²⁶ observed, "*Provisional application of the ECT is unique because it is a multilateral investment treaty, not one dealing with international security or regulation.*" Undoubtedly, it has been included among ECT provisions in order to make the implementation of the ECT quicker, and thus time efficient, still before the ratification.

Going back to Art 45 Sect 1, it is quite clear, that the ECT will be applied provisionally as long as its application does not violate the law, constitution or regulations of the signatory. However, it is precisely the word "such", included in Art 45 Sect 1, which has been little puzzling and uncertain both for academics and practitioners.²⁷

It may be thought that two versions of the Art 45 Sect 1 theoretical interpretation have been triggered by nothing else, but this uncertainty, which is small, when counting the letters of the aforementioned word, but considerable, when reviewing a multibillion \$ Yukos case.

Following the meaning of Art 45 Sect 1 and 2 closely, a related enigma inevitably arises: Should every bona fide signatory rather better check in advance, whether the ECT is consistent in realities of everyday life with its own legal order and its nuances and basic pillars, or have the godfathers of the ECT had only the overall concept of provisional application in their mind when drafting the ECT, pushing the signatory toward the good boy's behaviour within the borders of Art 45 Sect 2 when opining that the provisional application of the ECT is out of the question before the ECT ratification?

Far from being invented precipitously, two theoretical interpretations have been hitherto set up due to courtesy of the troublesome "such" in Art 45 Sect 1. The first interpretation recommends the provisional application of the ECT in case the signatory's national law permits the concept of provisional application of international treaties in its entirety.

concerning the application and interpretation of the Treaty via diplomatic channel. In case it fails, the disputes will be decided by the special ad hoc arbitration under the UNCITRAL Arbitration Rules.

²⁴ BALTAG, C., What's New with the Energy Charter Treaty? /hereinafter referred to as What's New with the Energy Charter Treaty?/ Access on <http://kluwerarbitrationblog.com>

²⁵ See alternatively also The ECT: The Notion of Investor, p.225.

²⁶ BELZ, M.: Provisional Application of The Energy Charter Treaty: Kardassopoulos v. Georgia and Improving Provisional Application in Multilateral Treaties //hereinafter referred to as Provisional Application of The Energy Charter Treaty: Kardassopoulos v. Georgia/, p.734.

²⁷ See e.g. The. Russian doll provision, p.54. Provisional Application of the Energy Charter Treaty: The Yukos Arbitration,p.368. See also STEPHAN, P. B.: Taxation and Expropriation-The Destruction of The Yukos Oil Empire /hereinafter referred to as the Taxation and Expropriation-The Destruction of The Yukos Oil Empire/, p.36.

As Laidlaw²⁸ noted, “*In this case, only the legal concept of provisional application must be compatible with national law.*” This is obviously the conceptual interpretation, nowadays promoted both in international arbitration writings as well as in practice, with the ECT arbitration in the complicated Yukos case as a flagship of its righteousness and a reassuring predictability.

The second, classical interpretation is broader, asking the signatory in Art 45 Sect 1 to apply the ECT provisionally only when the ECT terms, its provisions and the ECT itself as a considerable body of substantial law is in line with the national law of the signatory. It may be submitted that the second approach to the interpretation appears to be more natural, when considering the wording of Art 45 Sect 1. Even Baltag²⁹ noted in her notoriously famous ECT volume: “*Some scholars consider the above expression³⁰ should be understood as referring to both: the compatibility of the provisional application per se and of the ECT with the laws of the signatory.*”

Equally, according to Hober,³¹ “*The language at Art.45 of the ECT can be interpreted in either, or both, of the following ways..*”, with one way, requiring the consistence of the provisional application of the ECT with the state’s municipal law, thus paying the tribute to the conceptual interpretation, while the other way of interpretation requires the ECT’s substantive provisions to be consistent with substantive provisions of municipal law. So far, so good.

It is then undoubtedly little entertaining, that had it not been for the above-mentioned “such” obstacle, with the definite article “*the*” replacing the puzzling “*such*,” the second interpretation probably would not be necessary, but it is not the case. Perhaps this is the reason why the defence of the Russian Federation, although not flawless, and recently sufficiently smashed by the most expensive verdict in the ECT arbitration history, was not completely without merit.

At the same time, this is probably also the reason of small uneasiness clouded around the whole Yukos case and the celebrated 50 billion \$ award, which is currently on a very long journey before /if ever/ being enforced, while its one hundred percent sure justiciability still stays up to certain extent bamboozled by the fog. Naturally, except for the Yukos v Russia case, of significance may be also other famous cases, such as *Petrobart v Kyrgyzstan*,³² or *Kardassopoulos v Georgia*,³³ in which Article 45 of the ECT has been broadly reviewed and well tested by arbitrators.

4 YUKOS V RUSSIA – THE ANNOINTED MATRIX FOR THE FUTURE CASES

Article 45 of the ECT automatically invoked the provisional application of the ECT by all signatories, unless they refused to apply the ECT provisionally *expressis verbis* by opting out of the provisional application, relying on Art 45 Sect 2 opt-out clause. Russia signed the ECT in 1995, but has never ratified it, nor tried to rely on the Art 45 Sect 2 opt-out provision.³⁴

Instead, it has decided to apply the ECT on provisional basis only. Although the ratification process had started before the Russian Duma in 1996, it was permanently put off because of the lack of consent on its ratification, which stemmed from various suspicions and serious concerns regarding the serenity of several ECT provisions.³⁵

On the 18th of July 2014 the arbitral tribunal in Article 26 ECT arbitration, conducted under the UNCITRAL Arbitration Rules under the auspices of the Permanent Court of Arbitration rendered three, for a long time predicated arbitral awards against Russia in three connected parallel

²⁸ Provisional Application of the Energy Charter Treaty, p.662.

²⁹ The Energy Charter Treaty: The Notion of Investor, p.40.

³⁰ The wording of Art 45 Sect 1.

³¹ The. Russian doll provision, p.54.

³² See the detailed analysis in CHOVANCOVÁ, K., *Medzinárodná obchodná arbitráž vo vybraných štátoch Európskej únie*, pp.114-129.

³³ In detail see e.g. Provisional Application of The Energy Charter Treaty: *Kardassopoulos v. Georgia*, pp.738-360.

³⁴ The. Russian doll provision, p.54.

³⁵ Provisional Application of The Energy Charter Treaty, p.665. See also <http://www.energycharter.org/what-we-do/knowledge-centre/occasional-papers/russia-and-the-energy-charter-treaty/>

investment “mammoth” arbitrations,³⁶ which had been conducted in **Yukos v Russia** case between 2005 and 2015.³⁷

Although not being consolidated, hearings were performed in parallel and discussed /because of many similar features/ as a single proceeding.³⁸ The 50 billion \$ verdict of the ECT arbitral tribunal does matter not only with respect to the multiplied disputing parties, but also with regard to the broader international community, as the arbitral tribunal /among other issues/ decided finally also on the provisional application of the ECT in favour of foreign investors.³⁹

Simultaneously, all three Yukos awards are enormously important because the ECT tribunal decided that Russia expropriated foreign investors, which occurs only rarely in the ECT jurisprudence.⁴⁰ Nonetheless, the arbitral tribunal concluded that all the mischievous deeds of Russia led in the end to the indirect expropriation of Yukos. Consequently, Russia breached on its obligations under the ECT, which was applicable via provisional application mechanism, included in its Article 45 since Russia signed the Treaty in 1994 until sixty day long time limit in Art 45 Sect 3 a/ of the ECT for the notification of termination of the signatory’s provisional application to the depositary of the treaty expired in October 2009.

No one can blame arbitrators for their decision, as in fact, the jurisdiction of the ECT arbitral tribunal in the Yukos saga was confirmed in all three arbitrations much earlier in November 2009. Here arbitrators firstly had to decide on the issue of Russian obligatory declaration under Art 45 Sect 2 of the ECT - which the claimant’s argument was - in order to be able to invoke Art 45 Sect 1 of the ECT.

According to the claimant, this was not possible as except for not invoking Art 45 Sect 1 when signing the ECT, Russia did not make any reservation under Art 45 Sect 2 when signing the ECT, claiming that it could not accept the provisional application of the ECT, so it had never even tried to opt out of the provisional application consequences. On this account, arbitrators agreed with Russia and recognized the legal regulation, stipulated in Art 45 Sect 1 and Art 45 Sect 2 of the ECT as two independent legal regimes.

However, at the same time, the tribunal decided that the provisional application as enacted in Article 45 of the ECT meant that the whole ECT had to be applied toward Russia in complex way, by applying an “all or nothing” approach to the provisional application,⁴¹ unless the very concept of provisional application of the ECT contradicted the Russian law, which was not the case, as Russia was applying provisionally at that time almost fifty other treaties.

Apparently, the arbitral tribunal decided the case in line with the “full effects” doctrine⁴² during the provisional application of international treaty, considering dutifully relevant Articles 18, 25 and 27 of the VCLT. As Stephan⁴³ criticised bravely, “*With respect to the ECT, this finding was bold, because Russia had not yet joined the treaty.*”

Russia contested the ECT tribunal’s jurisdiction on no less than five grounds, with the objected ECT inoperativeness due to the fact that Russia had never ratified the ECT included, but to no avail. Moreover, keeping in line with the former Dutch judgments, rendered in older **Yukos v Rosneft** case,⁴⁴ the ECT tribunal refused to accept an obvious large investment scheme,

³⁶ *Hulley Enterprises Ltd (Cyprus) v Russian Federation* PCA Case No.AA 226, *Veteran Petroleum Ltd (Cyprus) v Russian Federation* PCA Case No.AA 228, *Yukos Universal Ltd (Isle of Man) v Russian Federation* PCA Case No. PCA Case No.AA 227

³⁷ For the simple overview of all three arbitrations see a compact commentary in MONGE,L., *Commentary on Yukos award. Expropriation, tax measures and fault of the party suffering the damages /hereinafter referred to as the Commentary on Yukos award/, p.137-146.*

³⁸ International Decision, p.388.

³⁹ Ibid, p.391.

⁴⁰ The Commentary on Yukos award, p.142.

⁴¹ Provisional Application of The Energy Charter Treaty, p.675.

⁴² HONG-LIN, YU: *Road to nowhere?: A Comparative Legal Analysis on the Enforcement of Yukos Awards /hereinafter referred to as the Road to nowhere?/ p.82.*

⁴³ STEPHAN, P., *Taxation and Expropriation-The Destruction of The Yukos Oil Empire /hereinafter referred to as the Taxation and Expropriation-The Destruction of The Yukos Oil Empire/, p.36.*

⁴⁴ **Yukos Capital s.a.r.l. v OAO Rosneft**. Netherlands No.34.,Hoge Raad, Decision of 25 June 2010.

supervised by Russian nationals, hiding safely behind the useful shell company status of the UK investor, coming from problematic Gibraltar.⁴⁵

Three similar interim decisions on jurisdiction from 2009 led later to the issuance of astronomically expensive arbitral awards in merit, rendered the last year in the ECT arbitrations against Russia. According to Yu and Giupponi,⁴⁶ *“Armed with awards with more than \$50 billion against the Russian Federation, the Yukos team is now expected an uphill battle to identify a forum which can satisfy such amount.”*

5 CONCLUSION

As should be clear from the previous chapters, the ECT becomes steadily consolidated, in spite of the Russian farewell, and the rumour about identical future plans of Italy, which substantiated itself in the end of the previous year, when Italy notified the Government of Portugal of its intent to withdraw from the ECT due to its overstretched budget. Unlike the Italian withdrawal, signing the International Energy Charter on May 21 2015 by 65 states and various organizations may be deemed to be success.

With regard to the execution of all arbitral awards, rendered in three Yukos arbitrations, even now it is more than crystal clear that the upcoming very demanding enforcement stage does not need a breeze - it needs a gale. Russia will never comply voluntarily with its humiliating payment obligations from arbitral awards and with one hundred percent guarantee will rely on the state immunity doctrine in order to prevent their execution.

As Stephan⁴⁷ stoically concluded, while pointing to the diplomatic pressure as a possible safeguard for the claimant, *“...both the existing awards and any future ones face substantial barriers to enforcement.”* Those, who still wallow in the mire of their own dubiousness, know nothing about Russia. Setting aside procedure has already been started in the Netherlands⁴⁸ and it will be very difficult for the claimant now to travel the world in order to find a suitable set of the defendant's assets available for execution.

With a bit of irony, we may wish him good luck, as at the end of the day, fulfilling this Sisyphian task may turn out to be more demanding, than tackling the bumpy ride of various vulture funds, which like a nemesis of their poor state victim always show an insatiable appetite for snatching globally any available assets for satisfying their claims.

Last but not least, Hobér's introductory words may echo as a final farewell, drawing on Russian customs and traditions, when claiming the provisional application of the ECT under Article 45 to be a 'deceptively simple concept' with an inevitable matryoshka doll's effect. However, it is a bit ironic that the whole concept of the ECT Article 45 itself might be 'simply deceptive' too.

Paraphrasing Hobér tenderly, there is no doubt that the matryoshka doll's effect really does exist, spiralling silently one of its charming components in a proper way, so it leads with no hesitation to another. But in case of the very long Yukos saga, those are not quick gains, but heroic efforts expected to enforce all hardly won awards, that will be brought up by the aforementioned doll's double edged effect.

As one American commentator⁴⁹ wisely prophesied, *“It remains to be seen how much Russia will actually pay.”* Laughably enough, one issue then definitely led to another, stopping at the gate of the enforcement stage. With the Pyrrhic winner, and the strong-armed loser, who /as a matter of fact/ has not lost yet, the enigmatic matryoshka is thus complete now and - quite likable. The story has ended, the curtain is down.

⁴⁵ BLYSCHAK, P., Yukos Universal v. Russia: Shell Companies and Treaty Shopping / hereinafter referred to as the Yukos Universal v. Russia: Shell Companies and Treaty Shopping/, p.188.

⁴⁶ The Road to nowhere? p.80.

⁴⁷ The Taxation and Expropriation-The Destruction of The Yukos Oil Empire, p.49.

⁴⁸ Road to nowhere?, p.89.

⁴⁹ International Decision, p.393.

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INTERACTIONS BETWEEN INVESTMENT PROTECTION REGIME UNDER ENERGY CHARTER TREATY AND ENVIRONMENTAL LAW

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Abstract: Within the field of energy law, special importance is attached to the protection of investments. At the same time, the entire energy sector is under pressure to take due account of the growing environmental considerations. Satisfying the two distinct obligations (protection owed to foreign investors and a duty to protect the environment) might, however, represent quite a challenge for a state. In investment arbitration proceedings brought against the Federal Republic of Germany, the investor, who constructed a power plant in Germany, argued that state's actions imposing limits to the functioning of the power plant were paramount to indirect expropriation. Nevertheless, the European Commission recognised the environmental hazards of the power plant and concluded that Germany breached EU legislation by allowing the construction of the power plant at the first place. Bearing this example in mind, the paper proceeds to assess the overall functioning of the investment disputes settlement system and its readiness (or lack of it) to cope with a particular challenge of striking a fair and effective balance between international energy investment law and environmental law.

Key words: energy law, Energy Charter Treaty, environment, *Vattenfall v. Federal Republic of Germany*, investment arbitration, Habitats Directive

1 INTRODUCTION

One of the biggest challenges international community has been facing over the last decades is the urge to find effective means to satisfy the ever increasing energy demands of the world's population. Being subject to vast regulation, energy sector entails various theoretical and practical legal issues that are governed by various sources of law existing within the field of energy law.

The paper focuses on two particular issues and their mutual interference – the need to protect investments made within the energy sector and a growing environmental regulation within the sector. The paper first presents the obligations owed by states to private investors investing within the energy sector. With this respect, a particular legal source – Energy Charter Treaty – and legal obligations stipulated therein are presented. The paper then proceeds to illustrate how state's obligation to protect foreign investors might clash with its intentions to implement stricter environmental standards on its territory. A concrete dispute between host state (Federal Republic of Germany) and an investor (*Vattenfall*), who brought a claim against the host state on the grounds of imposing strict environmental standards which allegedly were tantamount to expropriation, is analysed. The environmental aspect is further discussed by presenting more examples on possible clash between investors' protection and environmental policy, mainly a recent action of the European Commission brought against Germany on the grounds of an alleged violation of the EU environmental legislation.

After illustrating the above-mentioned cases, the paper proceeds to assess the overall functioning of the investment disputes settlement system and its readiness (or lack of it) to cope with a particular challenge of striking a fair and effective balance between international energy investment law and environmental law.

1.1 Energy Charter Treaty and protection of investments within energy sector

Energy Charter Treaty ("ECT") represents a fundamental legal act within the field of energy law. It is a multilateral international treaty, dealing specifically with inter-governmental cooperation in the energy sector. It is the only treaty of its kind dealing with inter-governmental cooperation in the energy sector, covering the entire energy chain (from prospecting of sites to final use), as well as

any and all energy products and related facilities. The ECT is also considered as the first international multilateral treaty for the protection of investments.¹

The issue of protection of investments represents one of the areas that are covered by the ECT, which aims to ensure that investors enjoy access to energy resources and are protected against non-commercial risks, such as discrimination, direct or indirect expropriation, or violation of individual investment treaties. The need for stable relations between investors and host states is especially acute in the energy sector. The reason is that projects implemented in this particular sector are intended to last for a longer period of time and often involve huge capital investments. International energy enterprises, primarily those that have experienced problems in certain countries – especially in connection with their privatization projects – have already availed themselves of the new possibilities offered by the ECT.²

The advantages of the ECT (mainly from the investor's point of view) are the following: i) it offers broad territorial and temporal application more than 50 states parties to the ECT³; ii) it provides for extensive interpretation of the term "investment"; and iii) it provides for an ample choice of dispute settlement methods.

The broad protection granted to investments under ECT is expressed already at the introductory part of the ECT, which states the objectives of the treaty. One of the main objectives of the ECT is to "create a favourable environment for investments, including joint venture investments, for design, construction and operation of energy installations."⁴

With regards to dispute mechanism, disputes arising between investor and a host state can be submitted to International Centre for Settlement of Investment Disputes ("ICSID"), which is a judicial organ established under the ICSID Convention for resolving the international investment disputes. The Centre is nowadays considered to be the leading international arbitration institution devoted to resolving disputes between States and foreign investors.

In the following section, the paper presents an investor-to-state dispute, arising from alleged breach of ECT, which was submitted to ICSID.

2 INVESTOR'S PROTECTION UNDER ENERGY CHARTER TREATY - VATTENFALL VS. GERMANY CASE

On April 17, 2009 a claim was filed at the ICSID against the Federal Republic of Germany on the grounds of an alleged breach of Germany's obligations set forth by the ECT (Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, Case No. ARB/09/06). The claim was brought by an investor – a Swedish company, alleging that Germany imposed strict environmental standards that endangered the project of construction of a power-plant, making the whole project less profitable, and therefore the investor's rights were breached.

2.1 Factual background

In this investor-state arbitration, claimant is a Swedish company Vattenfall, which is a state-owned company of a considerable size operating in the energy production sector. The claim was filed by Vattenfall AB – a Swedish mother company and two companies belonging to Vattenfall group, incorporated in Germany – Vattenfall Europe AG and Vattenfall Europe Generation AG (the claimants are collectively referred to as "Vattenfall" in this paper). The dispute concerns construction and operation of a coal-fired power plant that Vattenfall operates in a German city called Moorburg, located in the close vicinity of Hamburg.

¹ BELOHLAVEK, Alexander J.: Institutionalized Promotion and Protection of Investments in the Energy Sector. In: Czech Yearbook of International Law. The Role of Governmental and Non-governmental Organizations in the 21st Century, 2014, Volume V, pages 102 - 103

² BELOHLAVEK, Alexander J.: Institutionalized Promotion and Protection of Investments in the Energy Sector. In: Czech Yearbook of International Law. The Role of Governmental and Non-governmental Organizations in the 21st Century, 2014, Volume V, page 107

³ The official webpage <http://www.energycharter.org> indicates that as of date, fifty-two European and Asian countries have signed or acceded to the Energy Charter Treaty. All EU states are individual signatories, but the Treaty has also been signed collectively by the European Community and Euratom so the total number of parties to the Treaty is fifty-four.

⁴ see the consolidated text of Energy Charter Treaty, in its part entitled as: *Title One: Objectives*

In 2007, Vattenfall received a preliminary construction permit from a pertinent German authority, which allowed the Swedish investor to begin the construction works. The power plant project has been regarded as controversial by local population and also part of the opposition in local government – mainly the Green Party – strongly opposed the project.

A year after granting a permission to build the plant, new municipal elections took place in Moorburg and the Green Party gained access to the coalition. The consequences of such a political change on Vattenfall power-plant projects were rather radical. The Green Party, even before ascertaining its seat in the municipal government, made it clear that it insists on imposing heavy environmental restriction on Vattenfall, in order to ensure effective protection of environment, namely of the river Elbe, which Vattenfall intended to use in the functioning of the power plant in the cooling system. As a result of Green Party's pressure, in 2008, the final construction permit was issued for Vattenfall which included additional restrictions on the power plant's impact on the river Elbe. For instance, the new set of restriction included a revised water-use permit, which required Vattenfall to set up district heating pipelines and to build and operate a discharge cooler.

In its memorial submitted to the ICSID, Vattenfall argued that the set restrictions were so strict, that they rendered the whole project much less profitable or even at loss. The project of the plant allegedly became uneconomical, which constituted indirect expropriation, and thus an illegal interference with investor's investment.

2.2 Result of the arbitration proceedings

There are not many details available about arbitration proceedings, since both parties requested the arbitration tribunal to keep the proceedings entirely secret. All documents of the case, including notice of arbitration and memorials are confidential. The amount claimed by Vattenfall as a monetary compensation is therefore not confirmed by any official ICSID document; however, several press news and arbitration-related sources⁵ indicate that the claimant sued Germany for EUR 1.4 bn.

Shortly after the composition of the arbitration Tribunal was agreed upon and the Tribunal's first session was held in Paris, the proceedings before the ICSID were suspended based on the demand of both parties, who entered the process of negotiating an out-of-court settlement. Negotiations finally turned out to be effective and the settlement agreement was concluded. The parties requested the Tribunal to embody their settlement in an award, and subsequently, on March 11, 2011, the Tribunal rendered its final award, embodying the parties' settlement agreement.⁶ By concluding a settlement agreement Germany avoided the risk of losing the dispute and paying compensation to the claimant in exchange for lowering restrictions imposed on the power-plant project. According to the terms of the arbitral award⁷, Germany agreed that:

- a) Germany-based company Vattenfall Europe Generation AG and Free and Hanseatic City of Hamburg, as a competent public authority, terminate administrative proceedings regarding the water use permit issued by Free and Hanseatic City of Hamburg;
- b) modified water use permit shall be issued by pertinent public authority;
- c) Free and Hanseatic City of Hamburg gives written confirmation that Vattenfall Europe Generation AG has been released from its undertaking to set up district heating pipelines and to build and operate a discharge cooler.⁸

The outcome of the dispute outlined above can be said to be convenient for the claimant. The plant was allowed to use more water and measures intended to increase the protection of fish were significantly weakened. Investor achieved their goals and the power plant has been in operation since.

⁵see, for example, a reliable arbitration news site <http://globalarbitrationreview.com/>

⁶for a detailed summary of the proceeding, see official website of the ICSID at <https://icsid.worldbank.org/apps/ICSIDWEB/cases/pages/casedetail.aspx?CaseNo=ARB/09/6&tab=PRD>

⁷the full text of the award can be found at <http://www.italaw.com/sites/default/files/case-documents/ita0890.pdf>

⁸ Article (2) of the ICSID award in the case Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/06

2.3 A few remarks on the case

Investor-state dispute between Germany and Vattenfall was quite unique, or eye-catching, as some commentators had observed. In 2009, at the time of its initiation, several aspects of this dispute were regarded as a novelty in the practice of investment arbitration. The claim brought by Vattenfall was the first ICSID arbitration case ever brought against Germany. This particular aspect of the case alone carries certain level of irony.

Firstly, Germany had been regarded rather as a country anxious to appear investor-friendly. In addition, Germany could even be regarded as the grandfather of investor-state arbitration, as it was German businessmen, led by Deutsche Bank chairman Hermann Abs, who first conceived of a way to protect their overseas investment as a wave of developing countries gained independence from European colonial powers and proposed to draft some kind of “international magna carta” for private investor. The idea was later taken up by the World Bank, the institution that initiated adoption of International Convention to Settlement of Investment Disputed and creation of International Centre for Settlement of Investment Disputes.⁹

Furthermore, the dispute attracted an increased level of attention amongst arbitration professionals, since it was the first dispute based on the alleged violation of the ECT that arose between two Western European countries. In 2009 (prior to initiation of the arbitration proceedings between Vattenfall and Germany), the Energy Charter Treaty Secretariat listed only 20 cases that have been brought by investors on the grounds of alleged violations of the ECT and all those cases have been brought mainly against post-communist countries.

There were even discussions whether this particular dispute was the sign that a whole new trend within the system of investment arbitration was on the rise. The predictions were made that as concerns about environmental degradation were growing amongst public opinion, more governments might try to impose greater and more stringent regulations, triggering investment litigation.¹⁰

Such predictions actually proved to be correct. As of date, the number of investor-state disputes documented by the Energy Charter Treaty Secretariat has increased to 77. It is quite common nowadays that European countries - Member States of the European Union – are parties to international arbitration proceedings, since investors/claimants (themselves coming from EU countries) oppose the host state’s public (including environmental) policies.¹¹ State hosting a foreign investment within the energy sector has to proceed with great caution if it wishes to impose strict standards, the cause of which might be environmental concerns or other issues within public welfare.

3 INVESTOR’S PROTECTION VS. ENVIRONMENTAL POLICY

According to some authors, world policymakers increasingly discuss energy and environment as constituting a single system, largely because energy production has major consequences in environmental protection.¹² The theory of energy regulations and environmental regulations both forming one system does not seem to be easily applied, since finding the right balance between investors’ interests and environmental concerns might represent a true challenge.

⁹ KENNARD, Matt; PROVOST, Claire: The Obscure Legal System that Lets Corporations Sue Countries. In: The Guardian. October, 2015. [accessed online on October 8, 2015 at <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>]

¹⁰ see, for example: ROMANO, Cesare: Vattenfall v. Germany: Anomaly or New Trend? In: Kluwer Arbitration Blog, May 2009. [accessed online on October 8, 2015 at <http://kluwerarbitrationblog.com/2009/05/06/vattenfall-v-germany-anomaly-or-new-trend/>].

¹¹ Currently, Spain leads with the number of investment arbitration proceedings that have been brought against it. Foreign investors have brought claims against Spain on the grounds of alleged violations of the ECT in 27 instances; for example, in 2015 quite an impressive amount of claims were brought against Spain as a result of its implementing legislative changes touching on the issue of renewable energy. Other EU countries that have been involved in investor-state disputes (number of lawsuits indicated in the brackets): Czech republic (7), Italy (4), Hungary (4), Bulgaria (3), Germany (2), Romania (1), Poland (1), Latvia (1)

¹² TOMAIN, Joseph P. and others: Energy Law in a Nutshell. 2nd edition. USA: West Publishing Co., 2011 (Kindle edition)

Countries are being sued for implementing policies which are, on one hand, deemed necessary and even demanded by civil society¹³, but which, on the other hand, are viewed by investors as threatening their investments.

If arbitration proceedings brought against Germany by a Swedish investor in 2009 were regarded as a rather surprising new occurrence in the world of investment arbitration, the existence of another dispute between the same parties, dated from 2012, might not be such a surprise. After Fukushima nuclear power plant disaster, Germany decided to proceed to phasing out of nuclear power plants located on its territory. The phasing out project concerned also Brunsbüttel nuclear plant (in which Vattenfall has 66.7 percent ownership) and Krümmel nuclear plant (in which Vattenfall has 50 percent ownership). As a result, Vattenfall again brought action against Germany in front of the ICSID on the grounds of destroying the value of claimant's assets. The case is still pending.

Furthermore, German situation has been made more complex by a quite recent intervention of the European Commission. On March 15, 2015, the Commission has referred Germany to the Court of Justice of the EU after coming to the conclusion that Germany has breached the EU environmental protection rules by allowing the installation of Moorburg plant at the first place. Such action is allegedly in breach of obligations under the Habitats Directive 92/43/EEC (1992), the main aim of which is to promote maintenance of biodiversity.

According to the Commission, the project of Moorburg power plant has negative impact on a number of protected fish species (salmon, European river lamprey and sea lamprey) passing near the power plant when migrating from the North Sea. More specifically, the Commission argues that fish species are harmed by the water abstraction process used to cool the power plant.

Germany was sent a reasoned opinion on this matter in November 2014. In view of its continuing refusal to conduct an assessment of viable alternatives, the Commission has decided to launch proceedings against Germany before the Court of Justice of the EU.

4 CONCLUSIVE REMARKS

Without more precise legal guidelines, it appears to be difficult for a state to strike an adequate balance between the core principles and values, which include: i) principle of state sovereignty; ii) a right of an individual (investor) to be granted protection against state power and protection of individual's economic interests and iii) public interests in environmental protection and other matters.

Interestingly, the system of investment dispute settlement has been subject to criticism over certain period of time, whilst arguments have been put forward that the whole system might have derogated from its original purpose. Originally, the system was mainly intended to protect investors coming from economically strong countries against developing countries and dictatorships and related potential political instability, uncertain regulatory regimes, risks of expropriation, etc. The system appears to have gone beyond this original idea and a fundamental question that arises is: can foreign investors force governments to change their laws or reshape the relevant policies to please the investor, or should investors comply with the legal rules of the host states and pay due respect to the policies reflecting the core values of the society and international community?

To ensure that a fair balance between diverging interests and fundamental principles is struck within the field of international energy investment law, there might be a time for a thorough revision of the system. In order to achieve a desirable amount of progress in this matter, efforts leading to a reform should be made. It might happen gradually, and establishing some guiding principles for arbitration tribunals on how to adequately assess and balance the investors' interests and environmental concerns would be a good starting point.

¹³Some organisations, particularly environmental activists groups (e.g. Friends of Planet) have been keen on promoting the alleged dangers of ICSID system, using Vattenfall v. Germany case as an example of privileging investors to the detriment of environmental protection

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THE APPLICATION OF EU COMPETITION LAW IN THE ENERGY SECTOR¹

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Abstract: The European Commission is strongly determined that consumers in the European Union should enjoy the benefits of an integrated and competitive single European energy market that secures supplies of energy at affordable prices. In particular this means ensuring the diversification of sources and the free flow of gas once it has entered the European Union. Whereas the European energy legislation should serve to remove public barriers to an open energy market, competition rules should serve to ensure that private players do not replace these barriers by anticompetitive conduct.

Key words: liberalisation, energy sector, competition, European Commission, dominant position, Gazprom

1 INTRODUCTION

The energy sector has been under investigation by the competition authorities throughout Europe in the recent period. The European Commission has started to investigate several major energy companies alleging that some of their business practices in Europe amount to abuse of their dominant positions or otherwise violate competition law.

2 LEGISLATIVE INITIATIVES OF THE EUROPEAN COMMISSION

"Liberalisation of the Energy Market", the project of the European Union, started with the first EU Directives in 1996 (electricity) and 1998 (gas) that should have been implemented into Member States' legal systems by 1998 (electricity) and 2000 (gas).² The project deals with common rules for the internal market in electricity and natural gas respectively, which gave rise to a long and controversial discussion among the Member States on the theory of monopolies and signalled the start of a larger plan towards more integration and competition in the European Union.³ Directive 96/92/EC and Directive 98/30/EC [4] have made significant contributions towards the creation of an internal market for electricity and gas. Experience in implementing these EU Directives showed the benefits that may result from the internal market in electricity and gas separately, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness. It was because during the 1990s most of the national electricity and natural gas markets were still monopolized. The European Union and the Member States opened discussion to gradually liberalise these markets and to promote competition within them. The European Commission came to the conclusion that there is enough room for improvements and more competition in this sector and adopted a number of rules to help the Member States and the market in this respect.⁴

In a broader sense, it was necessary to distinguish clearly between competitive parts of the industry that represent e.g. supplies to customers and non-competitive parts that secure the

¹ This paper was supported by the Grant APVV-0158-12 "The Effectiveness of Competition Law in the Context of its Application in Praxis"

² Albers Michael, Energy Liberalisation and EC Competition Law, Fordham 28th Annual Conference of Antitrust Law and Policy, 2001 [online] http://ec.europa.eu/competition/speeches/text/sp2001_028_en.pdf

³ The First Energy Legislation Package:

Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity

Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas

⁴ http://ec.europa.eu/competition/sectors/energy/overview_en.html

operation of the networks and to oblige the operators of the non-competitive parts of the industry to allow third parties to access the infrastructure. Moreover, freeing up the supply side of the market and removing barriers preventing alternative suppliers from importing or producing energy, together with gradual removal of any restrictions on customers from changing their supplier were considered as crucial parts of the whole process of liberalisation. Last but not least the initiative emerged to introduce independent regulators to monitor the energy sector.⁵

From the beginning of 2001 and as the results of the first step of the liberalisation process were not the ones desired the debate on a second energy package started. The new rules for the internal market in electricity and natural gas, repealing the old ones, were adopted in 2004. [5] Main development was the introduction of strengthened provisions on the separation of the transmission and distribution and the mandatory establishment of national energy regulators. The new provisions aimed at increasing competitiveness and improving service quality, at guaranteeing reasonable prices for consumers, establishing rules on public service obligations, improving interconnection and bolstering security of supply. Measures were to be put in place to protect consumer interests and allow them to actually exercise the right to choose their supplier. The Second Energy Legislation Package consisted of two EU Directives (Directive 2003/54/EC and Directive 2003/55/EC) and two EU Regulations (Regulation 1228/2003/EC and Regulation 1775/2005).⁶ It further focused on the concepts of unbundling and third party access and defined the need for independent regulatory authorities. Moreover, the Second Energy Legislation Package set two different specific deadlines for the liberalisation of electricity and gas retail markets, namely July 2004 for industrial customers and July 2007 for private households.⁷

Although significant progress had been made, competition was slow to take off, with markets remaining largely national, with relatively little cross-border trade, and highly concentrated. Companies trying to enter the market, business leaders, parliamentarians, and consumer groups were concerned about the slow development of wholesale gas and electricity markets, high prices and limited choice for consumers.⁸ The Commission therefore launched a sector inquiry in 2005 to identify the barriers preventing more competition in these markets pursuant to Article 17 of Regulation 1/2003.⁹ Article 17 provides possibility for the European Commission to conduct its inquiry into a particular sector where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market.¹⁰

According to the conclusion of the Communication from the Commission, the sector inquiry has identified a number of serious shortcomings which prevent European energy users and consumers from reaping the full benefit of the liberalisation process.¹¹ The European Commission

⁵ CPB Document, Liberalisation of European energy markets: challenges and policy options, The Hague, CPB Netherlands Bureau for Economic Policy Analysis, 2006, ISBN: 90-5833-305-1

⁶ The Second Energy Legislation Package:

Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC

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⁷ <http://fsr-encyclopedia.eu.eu/eu-energy-legislation-packages/>

⁸ http://ec.europa.eu/competition/sectors/energy/overview_en.html

⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

¹⁰ Article 17 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

¹¹ COMMUNICATION FROM THE COMMISSION

Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), 2007

published its final sector inquiry report on 10 January 2007 and identified several deficiencies still remaining in the internal market of the European Union. Its main concerns were:¹²

- High market concentration especially at the wholesale level;
- Insufficient cross-border capacities and different market designs constituting an obstacle to further market integration;
- Vertical foreclosure resulting from an insufficient level of unbundling between network operation on the one side and supply and/or generation activities on the other side;
- Lack of efficient and transparent price formation as well as information asymmetry between incumbents and market entrants;
- Long contract duration and restrictive practices in relation to the operation of supply contracts resulting in the foreclosure of downstream markets;
- Regarding balancing markets, the existing balancing regimes were often found to favour incumbents and create obstacles for new market entrants.¹³

To combat the concerns identified and to strengthen competition in the electricity and gas markets, the European Commission brought forward in September 2007 further regulatory and structural measures. Core elements of the third liberalisation package consisted of ownership unbundling (separation of sales operation from transmission networks), and the establishment of National regulatory authority for each member State, and the Agency for Cooperation of Energy Regulators which interconnects all national authorities and promotes mutual cooperation. The Third Energy Legislation Package consists of two Directives and three Regulations.¹⁴

To tackle the problems that emerged in relation to the sector inquiry, the European Commission has pursued individual cases under EU competition rules, mainly anti-trust and initiated further actions to develop the regulatory framework.¹⁵

3 ENFORCEMENT ACTIONS OF THE EUROPEAN COMMISSION – INSPECTIONS IN THE ENERGY SECTOR

In May 2006 the European Commission confirmed that it initiated unannounced inspections at the premises of gas companies in five Member States, and thus Austria, Germany, Italy, France and Belgium. The European Commission was of the opinion that companies concerned may have violated EU competition rules that prohibit restrictive business practices and/or abuse of a dominant position (Articles 101 and 102 TFEU respectively). Surprise inspections are usually a preliminary step in investigations into suspected anti-competitive practices. It has to be understood that the mere fact that the European Commission is carrying out an inspections does not mean that the companies are immediately charged with anti-competitive behaviour. The European Commission must respect the rights of defence, in particular the right to be heard applicable to companies in the Commission's proceedings against them. Duration of such inspection depends on a number of factors, including the complexity of each case, the extent to which the undertakings concerned cooperate with the European Commission and the exercise of the rights of defence.

¹² Scholz Ulrich, Purps Stephan, *The Application of EU Competition Law in the Energy Sector*, Journal of European Competition Law & Practice, Vol. 4, No. 1, 2013, pp. 63 – 82

¹³ Scholz Ulrich, Purps Stephan, *The Application of EU Competition Law in the Energy Sector*, Journal of European Competition Law & Practice, Vol. 4, No. 1, 2013, pp. 63 – 82

¹⁴ The Third Energy Legislation Package:

Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC[7]

Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC[8]

Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003[9]

Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005[10]

Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators

¹⁵ http://ec.europa.eu/competition/sectors/energy/2005_inquiry/index_en.html

3.1 Legal framework

As to the legal background, with regards to common interest of both business and consumers, the EU has adopted legislation that outlaws anti-competitive agreements between undertakings that e.g. fix prices or carve up markets between competitors. The EU also tries to prevent undertakings from abusing their dominant position in a market. Abuse of dominant position usually occurs in form of charging unfair prices or limiting production.

Regulation 1/2003¹⁶ as a relevant legislative act, implements the EU competition rules laid down by Article 101 and Article 102 TFEU. It introduced rules that changed, above all, the enforcement process of EU competition policy managed by the European Commission. Generally, it allows for competition law previously applied by the European Commission to be enforced on a decentralised basis by EU countries' competition authorities.¹⁷ It stressed the importance of national antitrust authorities and courts in implementation of EU competition law. The European Commission has been able to focus more its resources on enforcing the most serious competition infringements that reach cross border dimension.¹⁸

A national competition authority or the European Commission may open an investigation on its own initiative, following a complaint, or an application under a leniency programme (only 101 TFEU). Once the European Commission launches an investigation, it has wide-ranging powers. According to Article 18 Regulation 1/2003 in order to carry out the duties assigned, the European Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information. Moreover, it can enter undertakings' premises, seize their records and interrogate their representatives.

Afterwards, based on the outcome of the investigation, the European Commission either decides to pursue deeper investigation, or it sets out a statement of objections which it sends to the undertakings in question. This document informs the parties of the European Commission's objections raised against them. It gives the companies the possibility to exercise their rights of defence.¹⁹

Undertakings may request to access the European Commission's file and respond to the statement of objection. They may also request a hearing according to Article 27 Regulation 1/2003. If, after this stage, the European Commission is still convinced there is an infringement, it may issue an infringement decision which may include the imposition of fines on the parties.

Alternatively, the Commission may take a commitment decision under Article 9 Regulation 1/2003. Commitment decision represents a quick way of restoring effective competition on the market. Under these decisions, the European Commission is not obliged to prove an infringement of the competition rules and does not impose fines. It only stresses its concerns and undertakings concerned may propose commitments to address these concerns. If the European Commission finds these commitments sufficient, it 'approves' them and takes a decision to make them legally binding.²⁰

3.2 From Distrigas and E.ON Ruhrgas AG cases to Gazprom case

This part of the paper should give to the reader the overview about the most important antitrust cases. Moreover, it has to be stated that the European Commission except of antitrust cases also deals with merger cases and controls the necessity and proportionality of state aid to energy companies.

In antitrust, the European Commission has carried out the above mentioned inspections in a number of energy companies since 2006.

The first fines for antitrust case in energy sector totalling €1 106 000 000 were imposed by the European Commission on **E.ON Ruhrgas AG** and on **GDF Suez SA**²¹ for market sharing in breach of EU competition rules on agreements restricting competition and restrictive business

¹⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

¹⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l26092&from=EN>

¹⁸ Ibid

¹⁹ Ibid

²⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

²¹ Case COMP/39.401 — E.ON/GDF

practices. The fine was later decreased by the decision of the General Court.²² Companies concerned agreed in 1975, when they decided to build the MEGAL pipeline to import Russian gas into Germany and France, not to sell gas transported over this pipeline in each other's home markets. They maintained the market-sharing agreement after the liberalisation of European gas markets, and only abandoned it definitely in 2005.²³

In the second important case the European Commission has adopted a decision against **Distrigas**,²⁴ the incumbent gas supplier in Belgium. However, Distrigas offered commitments to open the Belgian gas market and the European Commission made these commitments legally binding by a formal decision as described above. Commitments address concerns raised by the European Commission in the course of an investigation under EU competition rules prohibiting the abuse of a dominant market position according to Article 102 TFEU. Concerns dealt with supply problems on the Belgian gas market because of the existence of long-term contracts concluded by Distrigas with gas customers. Under the commitments, Distrigas offered mainly reduction of the gas volumes tied in long-term contracts.

In 2013 the European Commission has accepted a set of commitments offered by **CEZ**, the Czech electricity incumbent and made them legally binding by the decision.²⁵ The main concern in this case was that CEZ may have abused its dominant market position pursuant to Article 102 TFEU by reserving capacity in the transmission network in order to block competitors from entering the market. After the Commission opened an investigation under EU competition rules that prohibit such behaviour, CEZ offered to divest a significant generation capacity.

Last but not least, on 27 September 2011 the European Commission confirmed unannounced inspections at the premises of companies active in the supply, transmission and storage of natural gas in several Member States. The European Commission had concerns that the companies concerned may have engaged in anticompetitive practices in breach of EU antitrust rules or that they are in possession of information relating to such practices. The European Commission has been investigating potential anticompetitive practices in the supply of natural gas in Central and Eastern European Member States. The investigation focuses on the upstream supply level, where, unilaterally or through agreements, competition may be hampered or delayed. The European Commission suspected exclusionary behaviour, such as market partitioning, obstacles to network access, barriers to supply diversification, as well as possible exploitative behaviour, such as excessive pricing.

3.3 Gazprom case – recent development

As a result of such unannounced inspections the European Commission has opened formal proceedings to investigate whether **Gazprom**, the Russian producer and supplier of natural gas, might be hindering competition in Central and Eastern European gas markets, in breach of EU antitrust rules. The European Commission had concerns that Gazprom may be abusing its dominant market position in upstream gas supply markets in Central and Eastern European Member States, in breach of Article 102 TFEU. Gazprom is the dominant gas supplier in a number of Central and Eastern European countries (with market shares well above 50% in most, and in some countries up to 100%).

In light of its investigation, the European Commission's preliminary view included in the statement of objection sent to Gazprom is that it is hindering competition in the gas supply markets in eight Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia). The Commission finds that Gazprom implements an overall abusive strategy in these gas supply markets, in particular:

- **Territorial restrictions**

Gazprom imposes territorial restrictions in its supply agreements with wholesalers and with some industrial customers in above countries. These restrictions include export bans and clauses requiring the purchased gas to be used in a specific territory (destination clauses). Gazprom has also used other measures that prevented the cross-border flow of gas, such as obliging wholesalers to obtain Gazprom's agreement to export gas and refusing under certain circumstances to change

²² Case T-360/09 E.ON Ruhrgas AG and E.ON AG v European Commission

²³ http://europa.eu/rapid/press-release_IP-09-1099_en.htm

²⁴ Case COMP/37.966 – Distrigaz

²⁵ Case COMP/39.727 – CEZ

the location to which the gas should be delivered. The Commission considers these measures prevent the free trade of gas within the European Economic Area (EEA).

Territorial restrictions have a negative impact on gas prices preventing cross-border flows of gas and leading to market partitioning. In particular, they hinder gas from flowing where it is most needed and where prices are commercially most attractive. Wholesale gas prices across the Central and Eastern European Member States can differ significantly. If gas prices in one country are higher than in another, then the wholesaler in the low price Member State should be able to sell surplus gas that it does not need to meet its domestic consumption to a market where prices are higher. Territorial restrictions prevent such price arbitrage. As a result of these restrictions, wholesalers cannot compete with Gazprom, in other words, Russian gas cannot compete with Russian gas. This leads to higher prices and gas markets that are segmented along national borders.

- **Unfair pricing policy**

These territorial restrictions may result in higher gas prices and allow Gazprom to pursue an unfair pricing policy in five Member States (Bulgaria, Estonia, Latvia, Lithuania and Poland), charging prices to wholesalers that are significantly higher compared to Gazprom's costs or to benchmark prices. These unfair prices result partly from Gazprom's price formulae that index gas prices in supply contracts to a basket of oil product prices and have unduly favoured Gazprom over its customers.

Generally, Gazprom pegs the price of the natural gas it sells to a number of oil products (so-called "oil indexation"). The Commission is investigating whether, and to what extent, the individual price levels in a country are unfair and how Gazprom's specific price formulae based on oil indexation have contributed to the unfairness. The Commission does not consider that indexing a product's price to oil products or any other product is in itself illegal. It also does not take issue with the fact that gas prices are different in different countries. Competitive conditions may vary in Member States, such as the importance of gas as an energy source in a country's "energy mix".

In order to assess whether individual price levels in a country are unfair, the different Member State prices were compared to a number of different benchmarks, such as Gazprom's costs, prices in different geographic markets or market prices. On the basis of this analysis, the Commission has come to the preliminary conclusion in its Statement of Objections that the specific price formulae, as applied in Gazprom's contracts with its customers, have contributed to the unfairness of Gazprom's prices: Gazprom's specific price formulae which link the price of gas to the price of oil products seem to have largely favoured Gazprom over its customers.

- **Gas transport infrastructure**

Gazprom may be leveraging its dominant market position by making gas supplies to Bulgaria and Poland conditional on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure. For example, gas supplies were made dependent on investments in a pipeline project promoted by Gazprom or accepting Gazprom reinforcing its control over a pipeline.

The Commission's provisional findings are that these practices constitute an abuse of Gazprom's dominant market position prohibited by Article 102 of the Treaty on the Functioning of the European Union (TFEU). Such behaviour, if confirmed, impedes the cross-border sale of gas within the Single Market thus lowering the liquidity and efficiency of gas markets. It raises artificial barriers to trade between Member States and results in higher gas prices.

EU Commissioner in charge of competition policy Margrethe Vestager said: *"Gas is an essential commodity in our daily life: it heats our homes, we use it for cooking and to produce electricity. Maintaining fair competition in European gas markets is therefore of utmost importance... All companies that operate in the European market – no matter if they are European or not – have to play by our EU rules."*²⁶

There is no legal deadline for the Commission to complete antitrust inquiries into anticompetitive conduct. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which the undertaking concerned cooperates with the Commission and the exercise of the rights of defence.

²⁶ http://europa.eu/rapid/press-release_IP-15-4828_en.htm

4 CONCLUSION

As a follow-up to its energy sector competition inquiry, the European Commission successfully concluded a series of antitrust investigations between 2007 and 2010 against a number of gas incumbents in Western Europe. The current antitrust investigations concern not only incumbents but also upstream suppliers. As we can see, the inspections took place at multiple sites in ten Member States, mainly in Central and Eastern Europe. In most countries, it was the European Commission's first competition inspection in the energy sector and in some, the European Commission's first ever competition inspection. This investigation process plays an important role in the policy making of the EU. It is mainly because the undertakings concerned are the biggest players on the market.

Recent investigation against Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets only confirms the European Commission's commitment to combat all anti-competitive practices in the European energy sector. It will be very interesting to follow this case and see the outcome, taking into account not only EU competition rules, (extraterritorial application of European competition law), but also the formation of the foreign policy of the European Union against Russia in respect of formation of the European Energy Union.

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SECURITY OF NATURAL GAS SUPPLY – DILEMMA OF FOREIGN POLICY OF THE SLOVAK REPUBLIC?

Vladimír Vázal

SPP - distribúcia, a.s.

Abstract: The topic of energy security, primarily in the area of security of natural gas supplies, became with a significant contribution of the gas crisis in 2009 one of the leading politics of the European Union and its member states. Taking into consideration the geopolitical aspects we can assume that it will not lose its importance also in the future, so that questions as diversification of sources and gas transmission routes and structure of energy mix of countries are up-to-date. However, security of gas supplies is not a pure foreign affairs problem but a cross-section one, which is strongly treated mainly by the economical politics of the Slovak Republic. A narrow co-operation between departments of foreign affairs and economy is therefore very important for a successful progress of SR in strengthening of gas supplies security.

Abstrakt: Téma energetickej bezpečnosti, predovšetkým v oblasti dodávok zemného plynu, sa s výrazným príchinením plynovej krízy z roku 2009, stala jednou z ťažiskových politík Európskej únie a jej členských štátov. Aj vzhľadom na geopolitické aspekty je predpoklad, že nestratí na význame ani do budúcnosti, a preto otázky ako diverzifikácia zdrojov a prepravných trás plynu či zloženie energetického mixu krajín sú vysoko aktuálne. V prípade bezpečnosti dodávok plynu však nejde o rýdzo zahraničnopolitický problém, ale o prierezovú problematiku, ktorou sa vo výraznej miere zaoberá najmä hospodárska politika Slovenskej republiky. Úzka spolupráca rezortov zahraničných vecí a hospodárstva je preto pre úspešné napredovanie SR v posilňovaní bezpečnosti dodávok plynu veľmi dôležitá.

Key words: security of supplies, gas crisis, energy policy, energy mix.

Kľúčové slová: bezpečnosť dodávok, plynová kríza, energetická politika, energetický mix.

1 ÚVOD

Energy security is a very important part of the policy not only of the Slovak Republic but also the whole European Union. Also a new ambitious project of the European Commission for establishing energy union states for one of its pillars on the first place the energy security. The contribution concentrates on one of the aspects of energy security of the Slovak Republic which is security of the natural gas supplies. I have come to the conclusion that it is a matter not only of foreign policy but also of economic policy. In my contribution I point out the importance of ensuring security of the natural gas supplies for the Slovak customers in regard to the extent of gas infrastructure of SR, as well as the historical connections of building the transmission gas pipelines which led to the dependence of our republic on the supplies of natural gas coming from the Russian Federation. The dependence on Russian gas is also related to other member states of the European Union. Efforts to search for alternative routes and sources of the natural gas were strengthened and accelerated by the problems with supplies of Russian gas through Ukraine which culminated in gas crisis at the beginning of 2009. Therefore, later in the contribution I engage in individual dilemmas concerning the security of gas supplies to Slovakia, namely to position of natural gas in energy of SR, diversification of gas sources and routes. I point out chosen contributions of the Slovak Republic to this diversification effort, i. e. gas interconnection Slovakia-Hungary and Slovakia-Poland, and the project of Easting gas pipeline which was introduced by Slovak transporter of gas eustream, a.s.

2 GASIFICATION OF THE SLOVAK REPUBLIC

The Slovak Republic is, right after the Netherlands, the second most gasified country in Europe. It is thanks to massive building of distribution pipelines in 60s and 70s of the previous century that nowadays has more than 94 % of Slovak population access to natural gas.

Gas is distributed to the customers through more than 33.000 km long distribution network to more than 1.5 million of consumer meter points. In 2014 the total consumption of natural gas in the Slovak Republic represented approximately 4.3 billion m³ while this number was considerably negatively influenced in consequence of exceptionally warm winter 2013/2014. Almost app. 98 % of the total distribution volume within Slovakia is the final purchaser transited to through the distribution network of SPP - distribúcia, a.s. which, based on immense reached gasification of Slovakia and ban for building parallel distribution networks, has in the area of gas distribution a monopolistic position. That is the reason why its activity is regulated by the Regulatory Office for Network Industries (URSO). Gas supply distributed by distribution network SPP - distribúcia, a.s. provides supplies for 26 users of the distribution network who are the holders of permission for gas supplies issued by URSO. The most important from them is Slovenský plynárenský priemysel, a.s., (SPP) which has almost 60 % market share.

Up to now, natural gas has dominant share in energy mix of the Slovak Republic as it contributes to gross domestic consumption of fuels by almost 28 %.

Consequently, it is clear from the previous data that ensuring secure and continuous supplies of natural gas in requested volume is vitally important for the population and economy of the Slovak Republic.

Based on the historical reasons and concluded long-term contracts for natural gas supplies is the Slovak Republic largely dependent on supplies of this commodity from the Russian Federation.

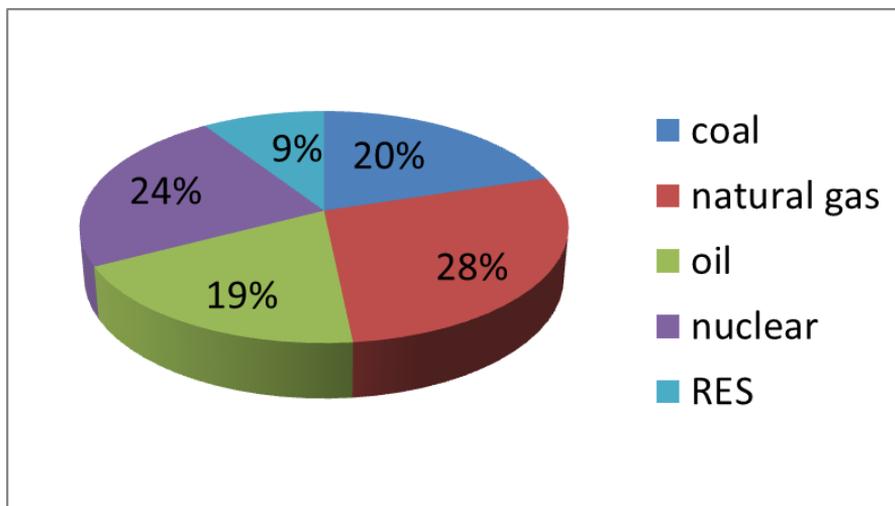


Chart 1: Energy mix SR 2013 (Source: MoE SR)

3 NEED OF THE SLOVAK REPUBLIC TO SOLVE ENERGETIC SECURITY IN THE AREA OF NATURAL GAS SUPPLIES

Natural gas supplies from Russia had run for a long time without any serious problems while prospective supply constraints were caused by technical problems arising for example from inappropriately used material of inter-state pipeline Brotherhood.

The situation changed after disintegration of the Soviet Union and establishment of independent Ukraine in 1991. As early as in February 1993 there was the first Russian-Ukrainian conflict in connection with belated Ukrainian payments for Russian gas. In 2000 and again in 2006, the Russian side publicly blamed Ukraine for thieving Russian gas.

Tensed relations between Russia and Ukraine culminated on 7th January, 2009, when there was a situation which was the most serious threat of energy security in the history of the Slovak Republic. Actually that day there was historically first total disruption in natural gas supply transited to Slovakia from the territory of the Russian Federation through the territory of Ukraine. Total

disruption of natural gas supply to the Slovak Republic lasted till 18th January, 2009 which is eleven days. In regard to unknown length of the total disruption in natural gas supply and inevitability of continual supply of households, hospitals and schools till the end of winter, SPP - distribúcia, a.s. launched for Slovak gas off-takers of technological character from 7th January 2009 restrictive measures, specifically limiting the off-take rate no. 8¹, based on which major customers were obliged to decrease their natural gas off-take to the level of so-called minimum of security, i.e. to the lowest level of daily off-take of gas necessarily needed for securing safety of producing mechanisms and service staff and for preventing the damages. This measure concerned approximately 1000 enterprises which had to dramatically limit, and in most cases even completely stop production. More companies were considering transfer of their production to countries which were not touched by the gas crisis in such extend as the Slovak Republic.

Following threat of natural gas supply was in winter 2014/2015 when there was reducing gas supply to Slovakia from the side of Gazpromexport to SPP as its customer – on the level of 40-50 % in the period from November 2014 to February 2015. This reduction of gas supply from Russia did not influence the operator of the distribution network, SPP - distribúcia, a.s. (and also neither final gas purchasers) and it was thanks to measures taken by this company.

Current relations of Russia and Ukraine in the area of gas transit through Ukrainian territory is well described by the statement of a general director of Gazprom, Alexei Miller: “The Ukrainian transit gas pipeline system is the weakest part in the relations of Gazprom and the European Union. It has a confrontation potential. Transit of gas to Europe was a gift from the USSR for Ukraine. However, when a gift is used as a tool for manipulation, it cannot last long.”²

These events and ongoing tension of Russian-Ukrainian relations accelerated and intensified efforts not only of the Slovak Republic but also of the European Union as a whole and its other member states to ensure continuous and reliable supply of natural gas to their territories. More and more were in the spotlight terms such as diversification of sources or diversification of gas transit routes. Moreover, the need for sovereignty of the states in defining their national energy mixes started to be emphasized.

4 SECURITY OF NATURAL GAS SUPPLY – DILEMMA OF FOREIGN POLICY AND ECONOMIC POLICY OF SR

4.1 Introduction

It is not possible to look at the gas supply security only from the point of view of foreign policy, but also from the point of view of economic policy. Economic policy and foreign policy make when ensuring the supply something like joined containers which complement each other. As foreign policy must in some areas (as I am going to state later in connection to energy mix in SR) respect the government approved priorities, goals and directions (again with parallel fulfilling of related goals stated by the European Union (for example in the area of renewable energy sources), so in other areas in is stated, mostly and naturally in the documents of the European Union, that „energy policy is often used as a foreign policy tool, in particular in major energy producing and transit countries.“³ This direction is supported by the tasks of foreign and European policy of SR approved by the government of SR which states: “In the area of energy security, it is for SR important to ensure the supply of energy material, to continue with support of diversification of routes and sources, to build international energy..“⁴

¹ Article 4, par. 4, clause d) of the Decree of the Ministry of Economy of the Slovak Republic No. 459/2008 Coll. stipulating the details on procedure regarding the announcement of the state of emergency, on announcement of limiting measures in the state of emergency and provisions aimed at removal of the state of emergency.

² Source: <http://energia.dennikn.sk/tema/zemny-plyn-a-teplo/miller-jednotna-cena-plynu-pre-eu-by-bola-ta-najvyssia/16186/>.

³ See *European Commission: Package for energy union. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank. A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*. Brussels, 25.2.2015. p. 6.

⁴ *Focus of foreign and European Policy of the Slovak Republic for 2015*, approved by resolution of SR Government Resolution no. 548/2014 dated on 5th November 2014. p. 4.

More of the recommendations, measures and tasks in the area of ensuring gas supply security were given or directed together to the Ministry of economy SR and to the Ministry of foreign and European affairs of the Slovak Republic, in that order⁵ and from which results the need for close cooperation between these resorts.

Energy security is also an important agenda of the European Union within its energy policy⁶ and currently within its ambitious project of establishing energy union where among its five fundamental dimensions has energy security, solidarity and trust the first-rank position.

4.2 Defining the security of gas supplies

Term “security of gas supplies” is legislatively set in Article 2, letter a), point 6 of Act No. 251/2012 Coll. on Energy and on amendment of certain laws as amended which is under the Ministry of economy SR. It represents the ability of the network to supply final gas purchasers, to ensure technical security of energy facilities and the balance of offer and demand in a specific area or its part.

Energy security could be, of course, defined also extra for the purposes of this work with a higher accent to its external political dimension. I suppose though that even in this legal definition of given term is the external dimension of security of gas supplies covered sufficiently. Not taking into consideration ensuring the technical security of energy facilities, which is more or less of internal matter, the ability of pipeline network to supply final gas purchasers, as well as ensuring the balance of offer and demand has its external aspects resulting from already stated dependence of the Slovak Republic on import of gas from abroad.⁷

4.3 Nature of dilemma of security of gas supply

What is the nature of dilemma of policy in connection to security of natural gas supply? Based on given facts, it is possible to conclude to three fundamental areas of problems which are:

1. Position respectively share of natural gas in energy mix in SR
2. Diversification of transit routes of natural gas
3. Diversification of natural gas sources

4.4 Position respectively share of natural gas in energy mix in SR

Above mentioned problems with supply of the Slovak Republic with natural gas through the territory of Ukraine are definitely one of the important factors which are considered when making the decision on share of natural gas in energy mix in SR. The European Union as the biggest world energy importer should be worth (when it annually reliable pays 400 billion euro for ensuring cross-border energy supply) having here the state when it gets equally reliable the ordered energy commodities in the amount and time periods as they were agreed in contracts.

Let us have a look who decides about the energy mix in SR. Firstly, is should be mentioned that stipulation of energy mix is a solely right of the Slovak Republic without any respect if it is a member state of the European Union. According to information publicized in the media, it is the concern of state that the further development of European energetics is not a burden for the principle of sovereignty when defining national energy mixes. After all, not even the latest ambitious project of the European Commission on establishing the Energy union does not say anything about interference into sovereign right of each member state of EU to define its own energy mix. The vice-president of the European Commission for the energy union, Maroš Šefčovič, for example at the event of Regional discussion forum on the topic of energy union, which took place on the ground of the Slovak technical university on 24th April 2015, stated that the European Commission is not to interfere into the right of the member states of EU for stipulating its own energy mix. However, he emphasised the importance to put it together with other goals of energy (and climate) policy for example in the area of renewable energy sources.

⁵ See for example *Common energy policy of EU and energy security of the Slovak Republic*. Slovak Foreign Policy Association and Government Office of the Slovak Republic. Bratislava 2011. p. 52.

⁶ See for example ČERNOCH, F., ZAPLETALOVÁ, V.: *Energy policy of the European Union. Updated edition*. University of Masaryk, Brno 2014. p. 14-36.

⁷ Own mining of natural gas in the territory of SR is in the total consumption involved only by approximately two per cent with decreasing tendency.

So, let us have a closer look at position and prognoses of development of natural gas share in energy mix in SR in a relevant political strategy document which is the Energy Policy of SR. Energy Policy defines the main goals and priorities of energy sector to 2035 with prognosis to 2050. Pursuant to Article 88, par. 2, clause a) of Act No. 251/2012 Coll. on Energy and on amendment of certain laws as amended by Act No. 391/2012 Coll. (hereinafter referred to as "Act on Energy"), the Ministry of Economy of the Slovak Republic (MoE SR) is responsible for working out the energy policy for the period minimum of 20 years and for its updating in minimum of 5 years cycles. Draft of energy policy worked out by MoE SR discuss and approves by its resolution the government of the Slovak Republic. Current Energy Policy of SR was approved by resolution of the government of SR No. 548/2014 on 5th November 2014.

As it has been already mentioned, natural gas in energy mix in SR in 2013 made up to 28 %. The main criterion, on which the energy mix in SR should be optimised, is the energy security. It clearly follows that based on current dependence of SR on supplies of Russian gas through Ukraine and risks connected to this, the share of natural gas in energy mix in SR should be reduced. This reduction, in accordance with approved and planned goals of climate area and transfer to carbon-free economy, should be mostly in favour of renewable energy sources. According to Energy Policy of SR, the support for renewable sources shall be directed in the first place to the area of heating plant industry. Broader use of natural gas can be expected in transportation where compressed natural gas (CNG) has an competition advantage against traditional fuels (petrol, diesel fuel) in the area of operational costs of vehicles with CNG drive, as well as in the area of emission reduction which is a very important factor as it is in compliance with goals of climate policy of the European union which is an integral part of the project of establishment of Energy union.

There shall be some space for further use of gas in connection with planned shutdown of some blocks of thermal plants to the end of 2015 due to not meeting stricter emission limits and within the reconstruction process the decrease of this capacity shall be filled with smaller modern facilities meeting the ecological parameters mostly on the basis of natural gas. As it comes in terms of launching of shutdown steam-gas power-plant in Malženice, or building and operation of new steam-gas sources, these shall be undoubtedly dependent on their economical eligibility. However, natural gas is the purest fuel among all hydrocarbons from the point of view of emissions of greenhouse gases and that is why it shall play an important role in the process of transfer to low-carbon or carbon-free economy. This task, though, can be time limited for the use of gas as "transfer fuel".⁸ The emphasis placed on energy efficiency, primarily to reducing energy consumption, is a factor which is also, in this sense, not in favour of increase of natural gas consumption.

⁸ When using natural gas for heating, there can be save of costs of up to 50 % of CO₂ emissions in comparison to coal and up to 60 % at combined production of electricity and heat. Usage of natural gas as a fuel, however, has also other ecological advantages like no produced mercury or saving of 97 % of produced fine dust compared to coal.

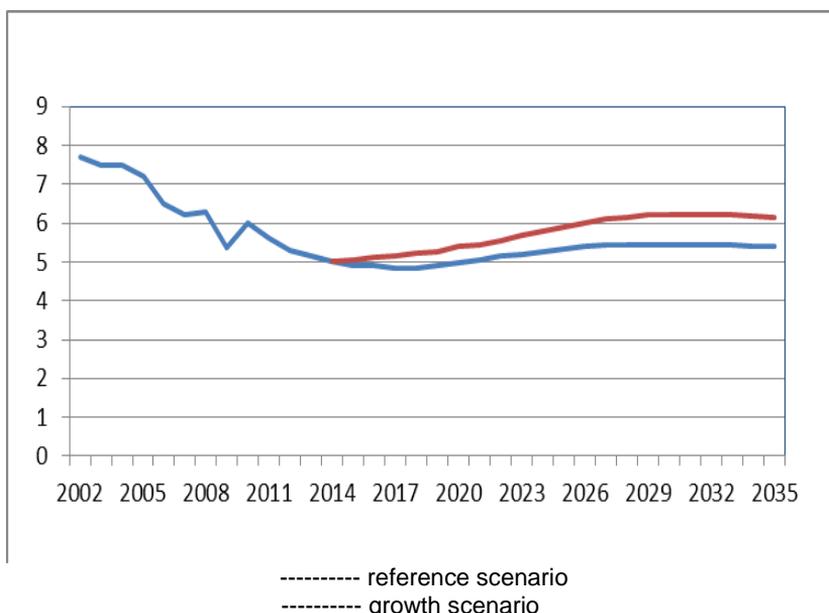


Chart 2: Expected development of natural gas consumption (Source: Energy Policy of SR)

4.5 Selected contribution of SR to diversification efforts of EU

The Slovak Republic actively contributes to effort of the European Union to increase of security of natural gas supply by diversification of gas sources and its transit routes. Great importance in this sense have interconnections of gas pipeline networks of individual European states – so-called **interconnectors**. Their meaning is not only from the point of view of ensuring the security of gas supply but also from the point of view of saving of costs. Their establishment is also one of the priorities of new European Commission.⁹ The Russian side, naturally, points out security risks of the model based on the diversification with regard to concluded long-term contracts for supply of Russian gas.¹⁰

Representatives of Slovakia, Austria, Bulgaria, the Czech Republic, Germany, Hungary, Poland, Romania, Slovenia and representatives of Croatia and European Commission signed in Brussels on 23rd November 2011, the Memorandum of Understanding on North-South Interconnections in Central-Eastern Europe a part of which was also Action plan in which were involved the project of the concern of SR. Namely they are projects of **interconnection of gas pipeline networks Slovakia-Poland and Slovakia-Hungary**. These projects were included in the list of so-called project of common interest (PCI) of EU based on the regulations on guidelines for trans-European energy infrastructure.¹¹ However, it is not possible to speak about real dilemma for foreign policy of SR with these cross-border international connections as there is no doubts about the need of their realisation from the point of view of security of supplies not only for SR but for all countries benefitting from so-called North-South interconnections. This is proved by integrating this project into PCI projects the main advantage of which is enabling shorter and easier administrative procedures needed for the realisation of the projects.¹² Slovak-Hungarian gas interconnection was

⁹ The vice-president of EC for Energy union, Maroš Šefčovič, before his appointing to this position, stated that he would put the accent on establishing united European energy market in the form of interconnecting national energy networks.

¹⁰ See: <http://energia.dennikn.sk/tema/zemny-plyn-a-teplo/miller-jednotna-cena-plynu-pre-eu-by-bola-ta-najvyssia/16186/>.

¹¹ Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No. 713/2009, (EC) No. 714/2009 and (EC) No. 715/2009.

¹² Average period for obtaining required permissions and certificates for similar energy projects in EU is 10 to 12 years.

launched on 1st July 2015 and the project of Slovak-Polish interconnection is currently in the state of assessment of impacts on the environment (EIA).

Another contribution of Slovakia to European diversification effort is the project of gas pipeline **Eastring** which was introduced by Slovak operator of transmission network, company eustream, a.s. in November 2014. Its competitive advantages to other projects are cost efficiency and bidirectional functioning (possible strengthening of security of gas supplies both for Western European countries and for South and South-Eastern Europe).

5 CONCLUSION

Security of gas supplies represents one of the major topics not only of the Slovak Republic but, in broader view, of European Union. The efforts for its ensuring were considerably accelerated and intensified by gas crisis at the beginning of 2009. The Slovak Republic was actively involved into relative efforts for diversification of routes of natural gas for example by the projects of interconnection with gas pipelines of Poland and Hungary which are part of so-called North-South Interconnections. Slovak gas transmitter introduced also the project of gas pipeline Eastring. Fundamental question in this topic is the share of natural gas itself in energy mix in SR which is closely connected to the stability of supply of this energy source. The question of security of gas supply is a sectional problematics and is a part of not only foreign policy of SR but mostly a part of economic policy while close cooperation of relevant resorts is very important for successful development in strengthening the security of SR.

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LAW OF ENERGY SECURITY

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Abstract: The Law of Energy Security seems to become a new emerging structural subdivision existing within the Public International Law system. Contemporary energy security concerns and co-related risks are influencing, in an increasing manner, the global international policy, which is aimed at preserving world peace and security. It is a global challenge in its substance and thus, any effective solution would be adopted with the aim to save world peace both in situation of Energy Deficiency and situation of Energy Over plus, requires joint efforts on international, regional and national levels. Codification and progressive development of international law opens room for reaching this goal via adopting new „soft law“ and „hard law“ legal norms. Both the risky short-term and long-term energy security issues bear sway over preserving world peace and security. Accordingly, any legal regulation must be adopted, interpreted and implemented in good faith as well as in strict conformity with the goals, purposes and principles of the Charter of the United Nations and other relevant international legal instruments. On the other hand, considerations *de lege ferenda* arise a theoretical as well as hypothetical questions, namely, whether 1) Energy and Energy (re)sources should be declared to be the common heritage of mankind, and 2) whether a Universal Right and Freedom of Access to Energy and Energy (re)sources (wherever they are located) should be generally recognized as constituent part of the Law of Energy Security rights. Accordingly, Law of Energy Security should offer a law regulation of a problem, to what extent the Energy Resources might be subject to national appropriation by claim of sovereignty, by means of use or occupation, or by other means in the future.

Key words: Law of energy security, Public international law, United Nations, European Union, International Energy Agency.

1 INTRODUCTION

Due to limited scope of the article, we prefer not to deal in our presentation with a detailed comparative analysis of the contemporary academic and expert discussion concerning the issue under consideration.¹ The author tends to elaborate such comparative study in the forthcoming scientific research.

Accordingly, we would rather focused on making some general introductory remarks, which could sow the seeds of the scientific research concerning the Law of the Energy Security in the future, than on detailed scientific research.

Definitely, the law of Energy Security copes not only with the legal regulation of current energy security issues. It shall cope also with various evolutionary elements. Thus, the scientific research in the field of Energy Security comprises the historical analysis, legal analysis, systematic analysis, logical analysis, semantic and grammatical analysis of the topic under consideration.

¹ See e.g. The Opening speech VP-designate for Energy Union Maroš Šefčovič, Hearing, Strassburg, 20 October 2014; UNDP: World Energy Assessment. Overview 2004 Update. New York: UNDP, 2004; "Emerging global energy security risks", The ECE Energy Series, No. 36. Geneva, UN, October 2007; EU Green Paper – Towards an European Strategy for the security of energy supply. European Commission-Directorate for Energy and Transport, 2001;

2 LAW OF ENERGY SECURITY AS A SUBDIVISION WITHIN THE PUBLIC INTERNATIONAL LAW AND THE LAW OF INTERNATIONAL PEACE AND THE SECURITY SYSTEMS

The Law of Energy Security seems to become a new emerging structural element (sub-division) of the Public International Law system. *In concreto*, it forms a constituent sub-section of the Law of International Peace and Security structure.²

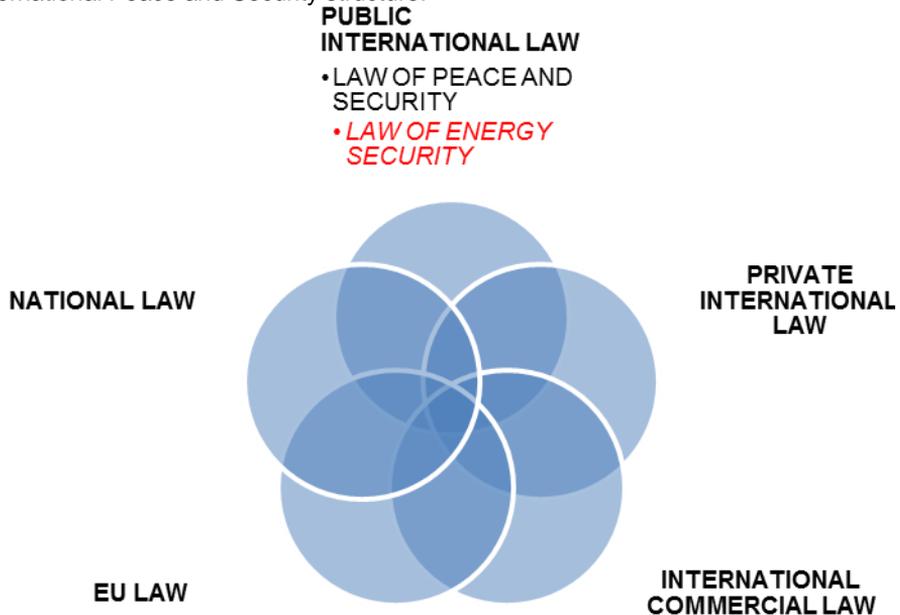


Chart 1

The Law of Energy security has been developing hand by hand with traditional subdivisions of the Public International Law system, e.g. the Diplomatic Law, the Consular Law, the Space Law, the Law of the Sea, the Law of International Organisations, the Law of War, the Humanitarian Law, the Law of Peaceful settlement of disputes, the Law of International Courts and Arbitration, the Law of Human Rights and Fundamental Freedoms and so on.

The Law of Energy Security is intensively interlinked to another international and regional legal systems, i.e. the Law of the European Union, the Private International Law and the International Commercial Law, The law of Energy Security has legal intersections also with various national law branches, e.g. the Constitutional Law, the Civil Law, the Administrative Law, the Economy Law, the Public Procurement Law, the Environmental Law.

Due to variety of law intersections existing within the framework of operation of the above legal systems, the Law of Energy Security cannot neither exist nor operate in a septic juridical and practical isolation.

From the theoretical point of view, the law intersections relate both to General part and Special part of the Law of Energy Security.

As far as the General Part of the Law of Energy Security is concerned, the law intersections refer to origin, definition, terminology, subjects, sources of law, rules and principles, peaceful settlement of disputes, State responsibility, liability matters and last but not least to coercion measures.

As far as the Special Part of the Law of Energy Security is concerned, the law intersections relate to bulk of particular rights and duties that are embedded in the relevant international treaties, in the rules of customary law, in general principles of law, which are recognized by civilized nations, as well as in the other relevant sources of the Public International Law. They regulate, by adopting

² See Chart 1 on page 2

particular legal rules and obligations, different factual political, security, military, economic, financial, social or cultural situations related to energy security issues.

In this respect, the Law of Energy Security is a complex, comprehensive and consistent legal system, which develops constantly corresponding to the past needs and/or future demands regarding the energy security matters.

In particular, many miscellaneous, contradictory as well as discrepant developments concerning the energy security sources that emerge in multiply relations among Sovereign States lead to necessity to codify and progressively develop the norms of the Law of Energy Security. This process has only started. In this respect, the law regulation seems to be behind the overwhelming developments that occur in the field of the material sources of law. Many contemporary energy security issues are not duly regulated by respective law norms. Even if they are regulated by the international law norms, the normative quality of the respective legal rules in force is very low. One can speak more of "soft law" quality than about "hard law" quality as far as the normative quality of the regulation is concerned.

Thus, it is predominantly important to adopt law regulation not only of the past or contemporary issues that have been tabled, but also to adopt law regulation of challenges, which refer to future needs and long term-purposes of the international community in the field of Energy Security. There are many reasons why to accelerate progressive development of the Law of Energy Security.

Primarily, the Law of Energy Security is closely linked to strategic efforts that are articulated by the International Community, individual States or groups of States with the preventive aim to protect and preserve the International Peace and Security for future generations.

In this respect, the Law of Energy security should create a legal basis for preventing eruption of World War III and global armed conflicts related to energy issues. The International Peace and Security are *conditio sine qua non* for implementing any legal regulations concerning the energy security issues. Notwithstanding the on-going process of disarmament, the 21st century still remains labelled by existence of nuclear weapons in arsenal of States. *Hélas*, despite of many legal attempts aimed at prohibition of proliferation of nuclear weapons, one cannot exclude the use of the latter in international conflicts emerging from energy security reasons in the future.

Secondly, the codification and progressive development of the Law of Energy Security is especially interlinked with the current developments occurring in the international economic relations, included the international trade and foreign trade matters related to energy issues.

Accordingly, the Law of Energy security should create a legal basis for preventing eruption of a new global World Economic Crisis. Doing so, it would contribute to preventing global, regional or local armed conflicts related to economic aspects of energy issues.

Generally speaking, on one hand, the International Community is confronted with increasing number of energy security challenges related to **Energy Deficiency or Energy sources Deficiency**. How to secure the right of free access for all sovereign states to limited traditional sources of energy, which will have been exhausted in the relatively near future? The contemporary international economic *milieu* is marked by persistent searching for new energy sources on Earth and Outer Space, for new consumption reducing technologies and so on.

On the other hand, notwithstanding this, the International Community is confronted with increasing number of energy security challenges related to **Energy over plus or Energy sources over plus**. The global, regional or local plethora in energy or energy sources, might hit, in a negative way, the global, regional or local economic development and jeopardize effective economic cooperation, e.g., among the energy producing States and energy consuming States. To this extent, the over-plus-in- energy factor also may become the reason for internationally wrongful conduct of States. Ultimately, such internationally wrongful conduct might result in threatening Peace, violating Peace or even to Acts of Aggression.

3 ORIGINS OF THE LAW OF ENERGY SECURITY

Taking into account the aforementioned remarks, we can say, that there exist two basic origins justifying the necessity to form the Law of Energy Security as a new structural element within the Public International Law system.

Firstly, the Law of Energy Security represents a direct causal juridical response by the international Community to previous challenges that surfaced in relation to urgent energy agenda issues from the past. Generally speaking, the Sovereign States and International Community as a

whole must duly react, by adopting pertinent and comprehensive legal norms, on demands arising from the past needs.

Such demands are linked to problems that occurred in the international political, security, military, economic, financial, social or cultural relations with respect to

a) **Energy Deficiency**, threat of exhaustion of traditional energy sources and persistent search for new untraditional energy sources on international, regional or national level,

b) **Energy over plus** that have menaced the global development in political, security, military, economic, financial, social and cultural relations among Sovereign States. They were namely affected by economic recession and another negative impacts, e.g., ineffective stockpiling of unexploitable supplies of energy, decrease in energy consumption caused by introducing new technologies or by inventing and applying new untraditional energy sources that provide economic or financial benefits and so on.

Secondly, the Law of Energy security represents a direct preventive juridical response by the International Community to future needs or demands that would have surfaced in relation to incoming and forthcoming energy agenda issues. In this respect, the Sovereign States and the International Community as a whole must duly react by adopting pertinent and comprehensive legal norms on demands arising from future needs to come. Such needs either do not exist at all or carry only marginal significance when speaking on their potential negative impacts in present time. Nevertheless, they might become a decisive source of a variety of international political, security, military, economic, financial, social or cultural conflicts once they will not have been regulated by law in advance.

In this respect, the Law of Energy security comprises not only the determination of International Community and Sovereign States to react on the past needs and demands, but also intention of the International Community and Sovereign States to precautionary regulate their future needs and demands regarding the energy security issues.

The origins of the Law of Energy Security might be compared to those of Space Law. The legal regulation of the Outer Space contains not only juridical norms that regulate the needs that originated in the past, but also juridical norms aimed at prevention, exclusion, restriction and sanctioning risky or dangerous activities, included military activities, in the Outer Space, on the Moon and other celestial bodies.³

The legal argument *a completudine* invites States and the International Community to enhance their efforts aimed at achieving conditions, in which any relevant conduct in the field of Energy Security issues, once it was not legally indifferent, was prohibited, permitted or made facultative by norms of international law. Accordingly, the international law regulation would become complex and comprehensive one.

The legal argument *a coherentia* invites States and the International Community to enhance their efforts at achieving conditions, in which the international law regulation of Energy Security issues was not intrinsically contradictory. Such law regulation should not regulate the identical matters in a contradictory way, e.g., by adopting legal provisions that simultaneously prohibit as well as concede a special conduct with respect to Energy Security issues. In this respect, the relevant law regulation of identical matters should be concurring and not dissenting one as far as the content of the respective legal norms is concerned.

The *apagogic argument* invites States and the International Community to enhance their efforts at achieving conditions, in which the international law regulation of Energy Security issues should be interpreted in Good Faith and in conformity with principle of Universal Justice.

Last but not least, the *naturalistic argument* invites States and the International Community to enhance their efforts at achieving conditions, in which the international law regulation of Energy Security issues created sufficient legal *milieu* for regulating any relevant problems that might occur in the present time or in the future. In this respect, the Law of Energy Security should prevent situations in which Sovereign States or other relevant subjects were obliged to admit that the international law norms are inapplicable with regard a particular factual situation, even if regulated by those norms in juridical terms.

³ e.g., the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967) in Article V stipulates that „States Parties to the Treaty shall regard astronauts as envoys of mankind (...)“.

Taking into account the above comments, we may conclude that the Law of Energy Security is a developing system that has resulted from both, the traditional process of codification and progressive development of Public International Law in the field of energy security.

4 THE LAW OF ENERGY SECURITY SYSTEM

The Law of Energy security forms a constituent part of the Law of International Security.

The Law of Energy Security system comprises two parts, i.e. the General Part and the Special Part.

The General Part of the Law of Energy Security is devoted to different general theoretical issues concerning:

1. Origin of the Law of Energy Security,
2. Definition of the term „Energy Security“,
3. Object of the Law of Energy Security,
4. Position of the Law of Energy Security within the Public International Law System,
5. Relation of the Law of Energy Security to another legal systems
6. Subjects of the Law of Energy Security,
7. Principles and rules of the Law of Energy Security
8. Sources of the Law of Energy Security
9. Settlement of disputes concerning the Energy Security issues
10. Responsibility and Liability in the Law of Energy Security
11. Sanctions in the Law of Energy Security
12. Coercive measures in the Law of Energy Security

The Special Part of the Law of Energy Security is dealing with the particular legal norms regulating the Energy Security issues. These legal norms, rights and obligations regulate the conduct of Sovereign States and other subjects of the Law of Energy Security in political, security, military, economic, social and other relations that emerge, change or disappear in the process of co-operation, rivalry or hostility among Sovereign States and other subjects with respect to Energy Security matters, both in the Energy Deficiency and Energy Over plus situation, i.e.:

1. Energy Security Rights and Obligations in the field of political relations (namely with regard to Sovereignty issues, State Territory issues, Population of State issues, Human Rights and Fundamental freedoms protection etc.)
2. Energy Security Rights and Obligations in the field security relations
3. Energy Security Rights and Obligations in the field of military relations
4. Energy Security Rights and Obligations in the field of economic and financial relations
5. Energy Security Rights and Obligations in the field of social and cultural relations.

The legal norms, rights and obligations related to Energy Deficiency regulate not only direct consequences regarding the lack of energy. They regulate also challenges that are linked to exhaustion of energy resources, to corresponding social or economic impacts of unavailability of energy supplies, energy supply disruption, but also to promoting alternative energy resources, diversification of energy supplies and/or energy types. The purpose of such long-term and short-term law regulation is to promote sustainable Energy Policy and Energy Security in the changing external conditions that put at risk the international peace and security as well as global development in political, security, military, economic, social and other relations among Sovereign States.

The legal norms, rights and obligations related to Energy Over plus regulate a variety of legal aspects connected with short-term, long-term or continual unexploitable Energy Over plus in the changing external conditions that put at risk the international peace and security as well as global development in political, security, military, economic, financial, social and other relations among Sovereign States.

5 CONTENT AND SCOPE OF THE TERM „LAW OF ENERGY SECURITY“

The Content of the term „Law of Energy Security“ comprises main topical features, which are namely the following attributes: „law“, „energy“, „security“. In the Slovak language, the term „energy“ used in the term „Law of Energy Security“ means „energetic“ (právo energetickej bezpečnosti).

In the Slovak language, the term „energetický“ in its objective sense expresses an adjective connected with the term „Energy“ (e.g., energetický priemysel, (energy industry), energy sources

(energetické zdroje), energy consumption (energetická spotreba), energy facility (energetické zariadenie), energetická bezpečnosť (energy security).

The Slovak term „energetická bezpečnosť“ is translated into English as „Energy security“.

The English terms „Energy“ as well as „energetic“ may be translated into Slovak in different meanings (e.g. „Energy“ - energia, sila, schopnosť, činnosť, pribojnosť, ráznosť, energetický; „Energetic“ - energický, rázny, pevný, účinný, vitálny, aktívny, energetický).

The Slovak term „bezpečnosť“ expresses in its objective sense different meanings (e.g. istota, ochrana, zabezpečenie, osobná bezpečnosť, bezpečnosť štátu, ale aj polícia, či policajné orgány).

The English word „Security“ translated into Slovak has also different meanings (e.g., bezpečnosť, istota, záruka, bezpečnostný, cenný papier, kaucia, stav bezpečia, záštita, utajenie a pod.).

For purposes of this article, the term „Security“ is to be interpreted extensively, i.e. not only in its economic dimension but in its complex and consistent sense comprising political, security, military, economic, social, and cultural meaning of the term.

Notwithstanding, the term „Energy Security“ has not yet been precisely defined in the Public International Law through codification or progressive development of Public International Law.

The author of the article shares the opinion that such definition should encompass all relevant main attributes of terms „energy“, „energetic“, and „security“, not only some particular features related to special situations, e.g., energy security with regard to energy deficiency, energy security with regard to energy supplies, energy security with regard to protection of climate, energy security with regard to protection of environment.

In seeking for traditional meaning of the term „Energy Security“, it is very important not to forget about the generally recognized general rule of interpretation, the supplementary means of interpretation, as well as the rules regulating interpretation of treaties authenticated in two or more languages as set in the Vienna Convention on Law of Treaties.

In terms of article 31 para 1 of the Convention „A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.“

In terms of Article 31 para 4 of the Convention „A special meaning shall be given to a term if it is established that the parties so intended“.⁴

In terms of Article 33 para 1 of the Convention „When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or parties agree that, in case of divergence, a particular text shall prevail“. In terms of Article 33 para 3 of the Convention „the terms of the treaty are presumed to have the same meaning in each authentic text.“ In terms of Article 33 para 4 of the Convention „Except where a particular text prevails (...), when a comparison of the authentic texts discloses a difference of meaning (...), the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted“.⁵

In terms of Article 32 of the Convention „Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning (...) or to determine the meaning (...) when the interpretation (...) (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable“.⁶

The above mentioned provisions of the Vienna Convention on Law of Treaties are fully applicable also with regard to adopting a definition of the term „Energy security“.

The scope of the term „Law of Energy Security“ consists of all legal norms, regulating the energy security matters in a manner that will have been defined in an officially accepted definition of the term „Energy Security“ enlisting the main topical features of the term. Such definition should be adopted on the international level in the form of a legally binding international instrument.

The legal term „Law of Energy Security“, which carries an objective dimension, rather differs from the legal term „Right to Energy Security“, which carries a subjective dimension. The latter term

⁴ See Article 31 of the Vienna Convention on Law of Treaties

⁵ See Article 33 of the Vienna Convention on Law of Treaties

⁶ See Article 32 of the Vienna Convention on Law of Treaties

comprises a subjective right to Energy Security of a sovereign State or another subject of the Law of Energy Security embedded in a relevant international law instrument.

Taking, that there does not exist a complex, comprehensive and consistent definition regarding the content and scope of the term „Law of Energy Security“, the author offers his own definition, which might be as follows:

The Law of Energy Security is a collection of legal norms, adopted in a special form, which was recognized by the Sovereign States, regulating their cooperation, rivalry or hostility with regard to energetic security matters in the field of the political, security, military, economic, social and other relations among Sovereign States aimed at securing their survival in capacity of Sovereign States.

The above definition is to be interpreted in good faith and *per analogiam* with the provision of Article 31 of the Vienna Convention on Law of Treaties, namely the provision referring to „ordinary meaning“ of terms.⁷

Adoption of the „ordinary meaning“ of the term „Energetic Security“ is the *conditio sine qua non for bona fide* interpretation and application of the term „Energy Security“ in practice.

This would be the best way how to prevent eventual disputes concerning the interpretation or implementation of rights and obligations set forth in the Law of Energy Security.

It is obvious that the disputes of such kin would arise in any time, once a sovereign State would have attempted to give a „particular meaning“ to the term „Energetic Security“, without taking due account to intentions stressed by other participating Sovereign States or other relevant subjects of the Law of Energy Security that accepted the „ordinary meaning“ of the term used in the respective international treaty.

It may happen that finding an „ordinary meaning“ of the term may be as difficult as agreeing upon to which „special meaning“ should be given priority among several concurring or dissenting „special meanings“ of the term.

The author shares the opinion that the broadest background for defining the content and scope of the term „Energy Security“ should be based on strategic interests of Sovereign States „to survive“ in international relations.

Such survival is viable only e.g., if the International Community, Sovereign States or other subjects of Law of Energy Security enjoy their

a) inalienable right of reasonable access to energy and energy resources existing within the International Community, other Sovereign States and subjects of Law of Energy Security, and

b) Inalienable obligation to provide for reasonable access to energy and energy resources existing within their own territory to the International Community, other Sovereign States and subjects of Law of Energy Security.

The above right and obligation must be operable and enjoyable not only in conditions of Energy Deficiency situations but as well as in conditions of Energy Over plus situations.

The contemporary law regulations contain some particular attempts to define the term „Energy Security“.

The IEA defines energy security as **“the uninterrupted availability of energy sources at an affordable price”**. Energy security has many dimensions: long-term energy security mainly deals with timely investments to supply energy in line with economic developments and sustainable environmental needs. Short-term energy security focuses on the ability of the energy system to react promptly to sudden changes within the supply-demand balance. Lack of energy security is thus linked to the negative economic and social impacts of either physical unavailability of energy, or prices that are not competitive or are overly volatile.⁸

In terms of the UNDP World Energy Assessment, 2004, Update **„the Energy security is a term that applies to the availability of energy at all times in various forms, in sufficient quantities, and at affordable prices, without unacceptable or irreversible impact on the environment.** These conditions must prevail over the long term if energy is to contribute to sustainable development. Energy security has both a producer and a consumer side to it. In terms of energy resources world-wide to meet energy demand for the foreseeable future there is no energy security problem. However, whether these resources will be available in the marketplace at

⁷ See Article 31 para 1) of the Vienna Convention on Law of Treaties

⁸ Zdroj: International Energy Agency <http://www.iea.org>

affordable prices depends on how markets perform, on government taxation and regulation, and on the role of policies such as electrification or subsidies.”⁹

The UN Economic and Social Council copes with energy security within the framework of a global initiative named „Sustainable Energy for ALL (SE4ALL)“ which was launched by the Secretary General of the United Nations in 2012. The initiative is based on 3 main elements, namely achieving universal energy Access, improving energy efficiency as well as increasing the use of renewable energy.

It is also well known, that in 2010 the UN General Assembly adopted resolutions in which the year 2012 was designated the International Year of Sustainable Energy for All.¹⁰ By and large, the 2014 – 2024 Decade was declared the United Nations Decade of Sustainable energy for all“. The UN Secretary-General annually reports to the UN General Assembly on achieving goals of the Decade.“¹¹

On regional level, as far as the European Union is concerned, it seem to be important to refer e.g. to act 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects. The Energy Charter Treaty „establishes a framework for international cooperation between European countries and other industrialised counties with the aim of developing the energy potential of central and Eastern European countries and of ensuring security of energy supply for the European Union. The Protocol on energy efficiency and related environmental aspects aims to promote energy efficiency policies that are compatible with sustainable development, to encourage more efficient and sound use of energy and to promote cooperation in the field of energy efficiency.“¹²

Maroš Šefčovič, the Vice-President designate for Energy Union formulated in his Opening speech at Hearing in Strasburg on 20 October 2014 five pillars of a new European Energy Union, which are as follows:

- a) Security, solidarity and trust,
- b) A competitive and completed internal market
- c) Moderation of demand
- d) Decarbonisation of the EU energy mix, and
- e) Research and innovation

The Vice-president Maroš Šefčovič also indicated that there exist two urgent challenges for Europe, *i.e.* Securing the energy security in context of the Russia - Ukraine crisis and struggling with the climate change.¹³

The author shares the opinion that the above mentioned and other partial attempts to define the content and scope of the term „Energy security“, made on the UN or the EU level are restrictive to the extent that they are dealing only with particular energy security situation related to deficiency in energy and/or energy resources. They use terms as „availability of energy“ „affordable prices“, „unacceptable or irreversible impact on the environment“ and so on. In general, they draw attention to the content and scope of terms „Availability“, „Reliability“, „Affordability“,“ and „Sustainability“.¹⁴

The above mentioned terms are especially inherent to terminology of the market economy, to terminology of commercial and economic relations existing between energy producing and energy consuming subjects, as well as to terminology of sustainable environmental protection.

⁹ the UNDP World Energy Assessment, 2004, Update p. 42

¹⁰ A/RES/65/151

¹¹ See e.g. A/RES/67/215 Resolution adopted by the General Assembly on 21 December 2012; 67/215. Promotion of new and renewable sources of energy; A/RES/65/151 Resolution adopted by the General Assembly, 65/151. International Year of Sustainable Energy for All; A/67/314 Sustainable development, International Year of Sustainable Energy for All, 2012, Report of the Secretary-General; A/68/309, Sustainable development, United Nations Decade of Sustainable Energy for All, 2013, Report of the Secretary-General, A/69/395 Sustainable development, United Nations Decade of Sustainable Energy for All, 2014, Report of the Secretary-General

¹² Official Journal L 069 , 09/03/1998 P. 0001 - 0116

¹³ <http://ec.europa.eu/archives/>

¹⁴ Within the United Nations organization system, the energy security problems are predominantly pertracted by the UN Economic and Social Council and its auxiliari organs and specialized agencies..

The definition drafted by the author comprises not only the economic dimension of the problem but also political, security, military, economic, financial, social and cultural dimensions of the energy security issues.

6 THE OBJECT AND SUBJECT MATTER OF THE LAW OF ENERGY SECURITY

The object of the Law of Energy Security is a complex of energetic security relations, which emerge, transform or cease to exist in the political, security, military, economic, financial, social and cultural sphere among Sovereign States and other subjects either in situation of Energy deficiency or in situation of Energy Over plus.

The subject matter of the Law of Energy Security is energy and energy resources and related objects.

7 SUBJECTS OF THE LAW OF ENERGY SECURITY

There are many international governmental and non-governmental organs and institutions, which are dealing with different aspects of the Energy Security issues, included the principal and subsidiary organs and other subjects working within the United Nations system, the European Union system and so on.¹⁵

The Decision of the OECD Council establishing an International Energy Agency of the Organisation, stipulates that „An International Energy Agency (hereinafter called the "Agency") is hereby established as an **autonomous body within the framework of the Organisation**“. The decision uses terms „**Participating Countries**“, „**European Communities**“, „**oil producing countries**“, „**oil consuming countries**“, „**not Participating Countries**“, „**international organisations, whether Governmental or non-Governmental**“, „**other entities and individuals**“.¹⁶

Another relevant international instrument, namely the Agreement on an International Energy program (as amended 9 May 2014) uses terms „**oil producing countries**“, „**oil consuming countries**“, „**consumer and producer countries**“, „**the oil industry**“, „**oil companies**“, „**Member countries of the Organisation for Economic Co-operation and Development**“ (preamble), „**Participating Countries as a group**“ (Article 1).¹⁷

With regard to analysis concerning the subjects of the Law of Energy Security, it is useful to mention that in terms of Article 104 of the UN Charter „The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.“¹⁸ In practise, this means that the UN enjoys corresponding legal capacity also with regard to various activities in the field of energy security.

¹⁵ See e.g. the list of participating organisations in Twenty-third session of the Economic Commission for Europe, Committee on Sustainable Energy, Geneva, 19-21 November 2014. The Draft Report distributed on 30 January 2015 refers namely to: ECOWAS Bank for Investment and Development (EBID), European Climate Foundation (ECF), Global Carbon Capture and Storage Institute, International Sustainable Energy Organisation (ISEO), International Centre for Trade and Sustainable Development (ICTSD), International Chamber of Commerce Environment and Energy Commission, International Energy Agency (IEA), IEA Renewable Energy Technology Deployment (RETD), International Gas Union (IGU), International Renewable Energy Agency (IRENA), International Organization for Standardization (ISO) Central Secretariat, Moscow International Petroleum Club (MIPC), Organization for Security and Co-operation in Europe (OSCE), Organization for Security and Co-operation in Europe (OSCE) Office in Tajikistan, Parliamentary Assembly of the Council of Europe, Renewable Energy Policy Network for the 21st Century (REN21), The European Azerbaijan Society (TEAS), United Nations Foundation, United States Energy Association (USEA), World Energy Council (WEC) and World Petroleum Council. Independent experts and representatives of academia and the private sector also attended (ECE/ENERGY/2015/L.1). Zdroj: https://ec.europa.eu/inea/sites/inea/files/2015-2-call-for-proposals_0.pdf

¹⁶ See e.g. Articles 1, 2, 3, 6, 12

¹⁷ <http://www.iea.org>

¹⁸ UN Charter, Article 104

8 SOURCES OF THE LAW OF ENERGY SECURITY

The basic sources of the Law of Energy Security are coherent with the Public International Law sources. In terms of the Article 38 of the Statute of the International Court of Justice which stipulates that:

„1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. (...) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto“.¹⁹

As far as the international treaties regulating the Energy Security issues are concerned, it is important to state that in terms of Article 102 para 1) of the UN Charter, „Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.“ In terms of para 2 of the article „No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.“²⁰ In practice, no UN Member may invoke any international agreement regulating the energy security issues before any organ of the United Nations once such agreement was not duly registered with the UN Secretariat.

Another important and relevant provision of the UN Charter (Article 103) sets forth that „In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.“²¹ This provision is applicable also with respect to conflicts between the energy security obligations under the UN Charter and obligations under international agreements regulating the energy security issues.

As far as the regional law regulation is concerned, it is important to draw attention to Article 3 para 5 of the Treaty on European Union (TEU) which stipulates that „5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.“²²

In this respect, there exists an universal primacy of the Public International Law commitments, included the Law of Energy Security obligations, over the commitments issuing from the EU law once a conflict between undertakings under the EU law and undertakings under the UN Charter or other relevant International Law Instruments would emerge.

9 PRINCIPLES AND RULES OF THE LAW OF ENERGY SECURITY

The legal principles of the Law of Energy Security must be coherent with the „general principles of law recognized by civilized nations“ as set in the UN Charter, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations²³, as well as in conformity with other relevant

¹⁹ <http://www.icj-cij.org>

²⁰ UN Charter, Article 102

²¹ UN Charter, Article 103

²² <http://eur-lex.europa.eu>

²³ A/RES/25/2625 - 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, www.un-documents.net/a25r2625.htm

international Instruments, included the 1975 Helsinki Final Act²⁴. With regard to the UN Charter, the main principles are as follows: 1. The Organization is based on the principle of the sovereign equality of all its Members. 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter. 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. 5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. 6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security. 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.²⁵

The principles of the Law of Energy Security that yet exist and that would emerge in the process of codification and progressive development of the Law of Energy Security should build up on the above generally recognized principles of the Public International Law. They should lay down strategic purposes and goals of the conduct of Sovereign States both in situations of Energy Deficiency and Energy Over plus in the future.

The rules of the Law of Energy Security may be divided into different categories.

From the normative quality point of view, the Law of Energy Security legal norms (*ius cogens* and *ius dispositivum*) may be divided into two principal groups – the „soft law“ Energy Security norms and the „hard law“ Energy Security norms.

The „soft law“ Energy Security legal norms are embedded

- a) In different political resolutions or recommendations, which have no normative quality as far as their rules are concerned, e.g. a variety of the UN resolutions adopted by principal or subsidiary organs (except resolutions adopted by the Security Council in conformity with Chapter VII or Chapter XVII)
- b) In different international legal and semi-legal instruments, which have only marginal normative quality, as far as their rules are concerned?²⁶

The „hard law“ Energy Security legal norms preserve their high normative quality in a way that each particular obligation of the subject A is in directly interlinked with corresponding particular right of the subject B. By and large, such norms should preserve their traditional normative structure, i.e. They should contain traditional structural elements of a complete legal norm, which are represented by the *disposition, hypothesis and sanction*.

The rules of the Law of Energy security contain particular rights and obligations of Sovereign States and other subjects. The list of these rights and obligation may be extracted from detailed analysis of the text of the relevant international Instruments, namely international legally binding treaties.²⁷

The rules of the Law of Energy Security shall regulate not only economic, but also relevant political, security, military, financial, social and cultural and other legal aspects of the energy security issues.

²⁴ Conference on security and co-operation in Europe Final Act, Helsinki 1975, <https://www.osce.org/>

²⁵ See the UN Charter, Article 2 www.un.org/en/documents/charter/

²⁶ Some experts and writers use terms „embryonic law“ or „droit de naissance“ in this respect.

²⁷ See e.g. the text of the Decision of the OECD Council establishing an International Energy Agency in which are embeded different commitments of States related to short-term and long-term energy security challenges. <http://www.iea.org>

10 CODIFICATION AND PROGRESSIVE DEVELOPMENT OF THE LAW OF ENERGY SECURITY

The topic „Law of Energy Security“ has not yet been included into the program of the International Law Commission (ILC). This means that there does not exist a general consensus on the necessity to study the legal aspects of the issue on expert level at the time being. Nevertheless, the Law of Energy Security is an emerging subdivision of the Public International Law. It is not excluded that the topic would draw attention of the international community in the next future. There exist at least some indications that the ILC extends its interests towards codification and progressive development of new topics in international law. For example, the identification of international customary law was included into the program of the ILC in 2012.²⁸ It is known, that the norms of customary law regulate also different aspects of the Energy Security issues. Thus, it is not excluded that the Law of Energy Security will be officially included into the future program of work of the ILC in shorter or longer perspective.

Considerations de lege ferenda

Should the Law of Energy Security comprise a Universal Right of Mankind to Access to Energy and Energy Resources despite of the fact where the resources are located?

Should the Law of Energy security consider the Energy Resources to be common heritage of mankind? Accordingly, the Energy Resources should not become “subject to national appropriation by claim of sovereignty, by means of use or occupation, or by other means”?²⁹

11 RESPONSIBILITY AND SANCTIONS

Responsibility, liability and sanctions related to the Law of Energy security will be regulated *firstly*, by relevant generally accepted principles and rules of International Law and *secondly*, by particular principles and rules, which will be adopted in the process of codification, interpretation, application and progressive development of the Law of Energy Security. In this respect, due importance should be given to promoting erga *omnes* obligations of Sovereign States, to the principle of *Universal jurisdiction*.

12 CONCLUSIONS

The Law of Energy Security seems to become a new emerging structural subdivision existing within the Public International Law system. Contemporary energy security concerns and co-related risks are influencing, in an increasing manner, the global international policy, which is aimed at preserving world peace and security. It is a global challenge in its substance and thus, any effective solution, which would be adopted with the aim to save world peace both in situation of Energy Deficiency and situation of Energy Over plus, requires joint efforts on international, regional and national levels. Codification and progressive development of international law opens room for reaching this goal via adopting new „soft law“ and „hard law“ legal norms. Both the risky short-term and long-term energy security issues bear sway over preserving world peace and security. Accordingly, any legal regulation must be adopted, interpreted and implemented in good faith as well as in strict conformity with the goals, purposes and principles of the Charter of the United Nations and other relevant international legal instruments.

On the other hand, considerations de lege ferenda arise a theoretical as well as hypothetical questions, namely, whether 1) Energy and Energy (re)sources should be declared to be the common heritage of mankind, and 2) whether a Universal Right and Freedom of Access to Energy and Energy (re)sources (wherever they are located) should be generally recognized as constituent part of the Law of Energy Security rights. Accordingly, Law of Energy Security should offer a law regulation of a problem, to what extent the Energy Resources might be subject to national appropriation by claim of sovereignty, by means of use or occupation, or by other means in the future.

²⁸ The topic „Identification of international customary law“ has been included into the program of work of The International Law Commission since 2012.

²⁹ See Article II of the Outer Space Treaty (1966)

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