



INTER – UNIVERSITY PARTNERSHIP

“The Energy Challenges in the Light of International Law at the Beginning of the 21st Century”

Report of the meeting on 5-7 mars 2009, Warsaw

We would like to thank our guest, Professor Kenig – Witowska as well as all the team of polish researchers working on this project for having made this meeting possible, despite the tragic decease of their master and friend, Professor Eugeniusz Piontek.

- **Welcome** in the presence of the scientific adviser of the French Embassy in Poland, Mr. Jean-Jack Cegarra.

- **Welcome word of Mr. Cegarra**

During his short speech Mr. Cegarra stressed the importance of the questions related to energy and, currently, particularly in Poland. He admitted the role of a legal research on the topic which allows recalling that beyond the technical sides related to the energy questions there are also legal aspects, not less important.

Mr. Cegarra reaffirmed the interest carried by the French Embassy in Poland to the project and expressed the will of the latter to continue to support our work. The embassy proposes in particular its assistance for the diffusion of the work, in electronic or paper form. This diffusion could touch the diplomatic circle in France and Poland, but also in the countries of the other partner Universities.

Thereafter, Mr. Cegarra pointed out the current context in Poland. Indeed, this state develops a reflexion on clean energies (clean coal for example), but also on the question of civil nuclear energy. Thus we are in the presence of important issues: stakes of research (in very different

fields such as the nuclear physics or law), stakes of training, economic issues. In addition, France, which positions as a possible supplier of Poland, wishes to play a leading role in all the fields mentioned above.

▪ **Discussion on the impact of the project**

During the discussions on the project the following points were underlined:

- The research teams reaffirmed their will to carry out a scientific work which would allow developing a legal approach for the questions related to the current and future energy challenges;
- The importance to carry out this work before the technological progress;
- The importance of a concrete continuation of the research work of the team, which should lead to an awareness of law issues in the energy field, in particular in the sector of the companies, such as for example Aréva;
- The will to widen the sources of founding of the project. The various tracks considered are: the Polonium program in the framework of the Partnerships Hubert Curien (Egide), the Embassy of France in Poland within the framework of a global project related to a “scientific package” concerning the nuclear power, the Rhone-Alps region, private partners.

- **Introduction of the participating teams**

The research teams have two new members:

- Mr. Piotr Bogdanowicz: a PhD at the Institute of international law, working in the field of European law of energy and continuing at the same time his career of lawyer and legal adviser.
- Miss Caroline Migazzi: PhD at the Centre of international law, recruited especially in the framework of the project.

- **Adoption of the program of the meeting**

▪ **Objectives of the meeting (I): Assessment of the work of the partner teams.**

- **Chapter 4:** *“Energy Challenges and International Organizations: the European Union Example”*
 - ✓ Detailed presentation of the project (Cf. appendix n°1)

Two questions will be treated within this chapter. The first, of general nature, relates to the division of competences between the EC and the EU. The second is of specific nature and issues with the energy law of the EU and of the Energy Community.

✓ Discussion on the work

The discussions on this chapter highlighted several important points:

- Determination of the way law treats energy question within the EU (e.g. the process of decision making as regards energy);

- Determine of measures taken in the field of energy in the perspective of climate change.

The approach of the international law and of the European law on the matter is not the same.

- **Chapter 2:** *“Energy Challenges and Investments”*.

This study will be focused on the question of energy security. This question being very vast, it will be found, under various aspects, through all the chapters of the work.

✓ Detailed presentation of the project (Cf. appendix n°2)

✓ Proposals of amendments of the contents:

Chapter 2: International investments and the diversification of the sources of energy as a pillar of the energy security in the relations between the EU and the NIS

I. International investments within the framework of the treaty of the Energy Charter II

II. Diversification of energy sources

✓ Discussion on the work

During the discussions it was stressed that the two aspects suggested by the team are really paramount. Other important matters were put forward for this chapter:

- The question of the respect of national sovereignty on natural resources;

- The problem of financing the diversification of energy sources;

- Kazakhstan has a central role as regards energy security, but it needs investments. A link can be found between international investments law and energy investments. It would be interesting for this reason to determine the role of certain institutions on the matter, in particular the World Bank, the Multilateral Agreement on Investments (MAI), the OECD;

- An approach enabling us to find links between the various subjects will be necessary: links between international investments, energy, development and environment.

- **Chapter 1** *“Energy Challenges and International Environmental Law”*

✓ Detailed presentation of the project (Cf. appendix n°3)

✓ Discussions on the work:

- There is a possibility of introducing a subject on the interactions between universalism and regionalism in the field of energy. Thus could be considered a study on protection at international and regional levels. The European Union or even some sub-regional system (like NAFTA) could be taken as example.
- In the same way the question of a “right to energy”, a right to access to energy could allow to take into account the human rights in the energy issue.
- Another important point will be related to the question of the partnerships (PNUE, alliances) for the progress of environmental protection, the role of these partnerships.

- **Chapter 3: “Energy Challenges and Sovereignty”**

An interesting question was raised during the meeting and it will be included in this chapter. There is a new problem with pipelines because there are some projects of constructing pipelines under the sea. A specific example is the Baltic pipelines which will pass by 5 economic zones (Polish, Norwegian, Swedish, German and Danish). The Polish operator has jurisdiction on the continental part of the pipeline but there is no legislation concerning the part under the sea. The state’s sovereignty over the economic zone is limited. There are private law agreements but the parties can not establish a regulator that would have jurisdiction on the sea part. Which national regulator would have the jurisdiction to rule the TPA (third parties access)? What rules apply to the operator of the transmission systems? We need to look to EU law and international law. But nothing exists because the problem was never encountered before.

There are similar problems with electricity cables and gas lines (ex. Holland, German, Italy).

- Another point to be included in this chapter is the question of the applicability of the principle 21 of Stockholm Declaration.
- The question of the state of necessity is a central one. A third point to be included is the question of the energetic supply and concurrence.

- **Additional questions**

In the field of relations between the EU and the NIS the aspects of transposition of the European directives are important. This issue could be integrated within the framework of Chapter 4. The table of contents remains opened to new proposals. A consensus is needed to

be found as regards the plan, but it obviously could undergo some modifications when passing to the drafting phase.

▪ **Objectives of the meeting (II): Decisions regarding the symposium**

- Organisational aspects

The symposium will normally take place in Chisinau in Moldova. The idea is to have members of the team (senior and junior members) and guests. After discussion it was established that in a first time will be published the proceedings of the symposium at the Lyon 3 editorial service and in a second time will be published the symposium work at another editor. The methodology of a reporter making a resume can be used for the symposium. There will be a discussion and a conclusion. The symposium will take place in April 2010.

The deadline for the establishment of the table of contents for the symposium is September 2009.

- Financial aspects:

- The French Embassy in Moldova made proposals to help to find funding for the symposium;
- AUF supports scientific events;
- The French Minister of Foreign Affairs: ECONET program (waiting for the answer)
- Region Rhône-Alpes : CIBLE program (waiting for the answer)

▪ **About the new project : Polonium (Hubert Curien partnership)**

Poland decided to engage in the nuclear way. It would be interesting to define the guarantees offered by international law that could be implemented in national law. If such guarantees exist, how can they be adapted? What can be done if nothing exists?

Proposals: the problem of safety and of security (technical and environmental) concerns access, transport, people etc. There is also a problem of major technological risk.

The deadline for drafting the project is June. The project will be submitted to a group of Polish and French experts. The French Embassy in Poland has the possibility to allow some extra founding for this project.

Appendixes:

Appendix n°1: Project on “*Energy Challenges and International Organizations: the European Union Example*”

Division of Competences Between the European Community/ European Union and the Member States in the Area of Energy Law.

I. Introductory remarks

1. The EU Energy Law
 - a) The notion of energy, energy sector and energy law
 - b) The EU Energy Law versus energy law of European Communities
 - c) The EU Energy Law versus domestic energy law
2. Division of competences in the law of European Communities
 - a) Division of competences in the Treaty establishing European Coal and Steel Community - overview
 - b) Division of competences in the treaty establishing Energy Community - overview
3. Division of competences in the EU law.
 - a) Principle of vested powers - general remarks;
 - b) Division of competences regulation in the Treaty establishing the European Community and the amendments thereto introduced by the Treaty of Lisbon.
4. Division of competences between the European Community / European Union and the Member States concerning the energy law - the main assumptions.

II. Energy sector in the Treaty establishing the European Community

1. Direct references to energy sector within the context of the Treaty

- a) Accepting "measures in the sphere of energy" as one of the Treaty's goals (Art. 3 Clause 1 letter u of the Treaty)
 - b) "Services of general economic interest" (Art. 16 and 86 Cl. 2 of the Treaty) within the area of the EU Energy Law
 - c) Establishment of energy networks (Art. 154 Cl. 1 of the Treaty)
 - d) Adopting "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply (Art. 175 Cl. 2 letter c of the Treaty).
2. The principle of powers vested and its application by adopting acts of secondary law in the area of energy sector
- a) Art. 95 of the Treaty as the basis for establishing the law in order to create and operate a common market and an internal market.

III. Power Engineering in the Treaty establishing the European Union and in the Treaty on the Functioning of the European Union - amendments entered by the Treaty of Lisbon

1. Direct references to power engineering within the context of the Treaty of Lisbon
- a) "Energy" as one of the main spheres of the European Union and an area of shared competence
 - b) „Energy sector” as a new Policy of the European Union and spirit of solidarity in establishing aims of policy on energy (Title XX and Article 176a of the Treaty on the Functioning of the European Union).
2. Principles of exercising shared competence in the power engineering sector.
3. Regulation of activities in the horizontal sphere as a new basis for powers in the energy sector.

IV. Factors determining the division of powers in the energy law

1. The process of harmonising the energy law in the European Union.
2. The process of liberalisation of energy in the European Union.
3. Applying competitive rules in energy sector
 - a) Judgments of the European Court of Justice relating to state aid issue
 - b) Case-by-case analysis carried out by the European Commission.
4. Development of renewable energy as a high Community priority.
 - a) Main goals of the new Energy Directive proposed in January 2008.
5. The notion of EU Member States' energy safety
 - a) The Green Book on *European Strategy for balanced, competitive and safe energy* and the new *European Energy Policy*.
 - b) Energy safety of the European Union's member states versus internal energy market.
6. The treaty on establishing the Energy Community.
 - a) The nature of the agreement in a view of the Community law
 - b) The notion of *energy acquis communautaire*

V. Conclusion

1. The idea of common energy market as a paradigm of the division of competencies in energy law.

Appendix n°2: Project on “*Energy Challenges and Investments*”

First of all, I would like to express my gratitude to the University of Warsaw for this warm welcome and to present the regrets on behalf of Mrs. Sylkina for not being present at this meeting.

Regarding the progress of work, I would like to transmit the desire of Kazakh part to deal with the question of the energy security, taking into account certain aspects of the international investment issue in the field of energy.

It is true that the energy security issue is very multidimensional and extensive, embracing a wide range of questions. Thus, the global energy security can be defined as a set of measures designed to ensure a good balance of demand and supply in the global market, based on a due regard for the interests of consumers and producers of energy, as well as of transit countries. The main measures to enhance energy security should include: 1) increasing the transparency, predictability and stability of global energy markets, 2) improving the investment climate in the energy sector, 3) increasing energy efficiency and energy conservation, 4) the diversification of the energy sources 5) ensuring the physical security of the infrastructure of the energy sector 5) reduction of the extent of energy poverty 6) solution of the problems of climate change and sustainable development.

Taking into account that the Polish party is interested in the environmental aspects of the energy issue, the Kazakh party could deal with the international investment law aspects within the framework of the Energy Charter Treaty and certain aspects of the energy security in the relationships between the European Union and the Post-Soviet States in particular the energy producers like Russia, Kazakhstan, Azerbaijan, Turkmenistan. Thus, the questions of diversification of the energy sources like a necessary element of the energy security could be examined.

Paper title proposed for the final conference (Draft version)

“International investment and diversification of energy sources as pillars of energy security in relationships between EU and NIS”

A special place in the development of energy security is devoted to the European Energy Charter political declaration (1991) and the Energy Charter Treaty (1994) which became the first international legal instrument enabling the international community to a certain extent to solve three interrelated objectives - economic growth of energy, energy security and environmental protection. Overview of the Energy Charter Treaty shows that it is the only multilateral treaty that seeks to directly address the political, economic and legal problems in the energy sector. The Energy Charter has been signed by almost 60 states and the Treaty - by 51 countries and the European Communities.

All of them undertook to comply with the following fundamental principles:

- respect for national sovereignty over energy resources, respect for contract and property;
- stable and open frameworks for flows of energy, capital, technology and investment;
- focus on market-oriented solutions;
- non-discrimination;
- transparency; and

- energy efficiency and sustainable development.

The Energy Charter Treaty (ECT) is the international community's most significant multilateral instrument for the promotion of cooperation in the energy sector and provides the legal basis for an open and non-discriminatory energy market. It is also, together with the North American Free Trade Agreement (NAFTA), one of the most important multilateral treaties providing for the promotion and protection of investments.

The ECT was signed on December 17, 1994 and entered into force on April 16, 1998. It now binds forty-eight States as well as the European Communities. The ECT was adopted with a view to pursuing, on a legally binding basis, the objectives and principles of the European Energy Charter of December 17, 1991. In the context of a global energy market, the creation of a single investment area has appeared as one of the means of achieving a unique playing field in the energy sector? One of the chief features of the ECT is indeed the promotion and protection of investments in the energy sector. Part IV of the Treaty, entitled "Investment promotion and protection", offers protection that is similar to that accorded by most bilateral investment treaties, including such rights as the fair and equitable treatment, the most constant protection and security of investments, the prohibition of discriminatory measures, the most-favored-nation treatment, and the payment of prompt, adequate and effective compensation for any nationalization, expropriation or measures having an effect equivalent to nationalization or expropriation. The Treaty further provides for binding international dispute settlement, in particular with respect to investment disputes. Under Article 26 of the Treaty, disputes relating to the investment of an investor can be referred to international arbitration if they have not been settled amicably between the disputing parties. The investors are then given the option to choose between ICSID (International Centre for Settlement of Investment Disputes) arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Investment

There is a huge need for new investment in order to meet growing global demand for energy. A significant risk to energy security is that policy frameworks can prevent investment capital from being mobilized and directed to the most efficient energy supply or energy-saving projects. The challenge is to reduce, as far as possible, these policy risks by creating a favorable investment climate based on openness, consistency and non-discrimination.

The Energy Charter Treaty takes a balanced approach to investors' access to resources. On the one hand, the Treaty is explicit in confirming national sovereignty over energy resources: each member country is free to decide how, and to what extent, its national and sovereign energy resources will be developed, and also the extent to which its energy sector will be opened to foreign investments. On the other hand, there is a requirement that rules on the exploration, development and acquisition of resources are publicly available, non-discriminatory and transparent.

Once a foreign investment is made in line with a country's national legislation, the Treaty is designed to provide a reliable and stable interface between this investment and the host government. The Treaty protects foreign investors against non-commercial risks such as discriminatory treatment, direct or indirect expropriation, or the breach of individual investment contracts. The need for stability in the relationship between investors and host governments is particularly acute in the energy sector, where projects tend to be long-term and highly capital-intensive.

The binding rules contained in the Energy Charter Treaty can play a significant and positive role in mitigating risks. This is because they provide investors with the possibility to protect their rights by taking the host government to international arbitration. Since the Treaty came into force in 1998, several investor-state disputes have already been addressed under the Treaty and successfully resolved, either by amicable settlement or by an arbitral award.

The existence of a functioning mechanism for the resolution of disputes provides persuasive encouragement for states to observe their obligations under the Energy Charter Treaty. As the Charter's Industry Advisory Panel has observed, "although dispute settlement provisions should normally be perceived as instruments of 'last resort', they are of significant value in providing a constructive framework for the resolution of investment related disputes and may thereby make a significant contribution to investor confidence and to a more reliable investment environment".

The Charter's Investment Group

Under the supervision of the Charter Conference, the Charter's Investment Group is the institutional body for the discussion of all investment-related issues covered by the Treaty. Its main tasks are:

- To provide a policy forum for all investment-related matters under the Treaty;
- To undertake horizontal and country reports concerning the investment climate and the issue of market restructuring/privatization;
- To exercise peer pressure with regard to the reduction of remaining restrictions for investment in the energy sector;
- To give general recommendations or individual advice to specific members concerning their investment-related energy policies;
- To provide information on recent developments in the investment-related energy policies of member countries.

Definition of "Investment" and "Investor"

- **Investment:** Every kind of asset (e.g. shares, claims to money, intellectual property, licences, concessions) owned or controlled directly or indirectly by an Investor
- **Investor:** natural persons of a CP (including permanent residents), and companies/organizations organised in accordance with the laws of a CP

Investment promotion and protection (Part III)

- General obligations (Art. 10): fair, equitable and nondiscriminatory treatment, constant protection and security, more favourable of MFN and national treatment, umbrella clause
- No expropriation (Art. 13) except where in public interest, not discriminatory, under due process and with payment of prompt, adequate and effective compensation
- Rights in respect of key personnel (Art. 11), transfers (Art. 14) and more favourable international agreements (Art. 16)
- Denial of Part III advantages permitted in certain circumstances (Art. 17)

The investor-state dispute settlement mechanism (Article 26)

- Available for disputes relating to an Investment in a Contracting Party of an Investor of another Contracting Party
- Three-month cooling-off period for amicable settlement, failing which
- Investor may choose local courts, contractual dispute settlement mechanisms or ECT arbitration
- ECT arbitration available under ICSID, Stockholm Chamber of Commerce or UNCITRAL Rules

- Tribunal shall decide dispute in accordance with ECT and applicable rules and principles of international law

Actually - 18 international arbitrations and 4 awards

- First arbitration commenced in 2001
 - 5 arbitrations by end 2004, 6 in 2005, 3 in 2006, 4 in 2007 (to August)
 - Respondents include EU and non-EU states
 - Final awards in Nykomb v. Latvia (2003) and Petrobart v. Kyrgyzstan (2005)
 - Decisions on jurisdiction in Plama v. Bulgaria (2005) and Kardassopoulos v. Georgia (2007)
1. AES Summit Generation Ltd. (UK subsidiary of US-based AES Corporation) v. Hungary
 2. Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia
 3. Plama Consortium Ltd. (Cyprus) v. Bulgaria
 4. Petrobart Ltd. (Gibraltar) v. Kyrgyzstan
 5. Alstom Power Italia SpA, Alstom SpA (Italy) v. Mongolia
 6. Yukos Universal Ltd. (UK – Isle of Man) v. Russian Federation
 7. Hulley Enterprises Ltd. (Cyprus) v. Russian Federation
 8. Veteran Petroleum Trust (Cyprus) v. Russian Federation
 9. Ioannis Kardassopoulos (Greece) v. Georgia
 10. Amto (Latvia) v. Ukraine
 11. Hrvatska Elektroprivreda d.d. (HEP) (Croatia) v. Republic of Slovenia
 12. Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey
 13. Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. (the Netherlands) v. Azerbaijan
 14. Cementownia "Nowa Huta" S.A. (Poland) v. Republic of Turkey
 15. Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey
 16. Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands) v. Republic of Kazakhstan
 17. Electrabel S.A. v. Republic of Hungary
 18. AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary
 19. Mercuria Energy Group Ltd. v. Republic of Poland
 20. Alapli Elektrik B.V. v. Republic of Turkey

The current model of energy security, which appeared during the crisis of 1973, based on how to cope with any disruptions of oil supplies from producing countries. But today the concept of energy security should be expanded in so far as to include the international legal norms ensuring the protection of the entire energy infrastructure, and all the links in the chain of supply. Currently, we are in presence of the new trends of energy reality. The Actual state of world energy is defined by such states and regions of the world as the United States, Middle East, Russia, China and the EU member States.

The serious international energy challenges today include the declining level of the global provision for oil and gas. There is a temporary shortage of oil-refining and transportation capacities, and limited additional capacity for oil production. In addition to the global energy situation is characterized by the exacerbation of contradictions. The root of geopolitical tension is the conflict potential in the distribution of oil resources on the planet.

Most of the hydrocarbon resources of the planet are controlled by the national state-owned companies. The processing facilities, logistics and transport schemes, the distribution of hydrocarbons are in the hands of transnational corporations. Hence, the difference appears in the strategy and conduct of States in the global energy market. The big transnational corporations are seeking to expand their resource base. The national state-owned companies, having major energy resources, are doing everything to retain ownership of the development of the oil processing, and trying to get a share in the capital of the transportation and marketing structures. The deepening of this contradiction transforms it into a sustainable trend.

At the same time, today we can say that energy interdependence and the increasing rate of energy trade require a continued international legal cooperation of producers and consumers to ensure the safety of the entire chain of supply. Cross-border pipelines long become an increasingly important element in the global energy sector.

A key challenge in the field of energy security should be a favorable investment climate. The developing of new resources requires a constant flow of investment and technology. According to recent estimates by the International Energy Agency, in the next 25 years 17 trillion dollars would be required for the introduction of new developments in the field of energy. These cash flows cannot materialize without the creation of rational and stable legal investment mechanisms, without timely decision-making at the governmental level and without open markets. Legal ways facilitating investment in the energy sector should be the norms, creating the competitive, open, fair and transparent markets. For this purpose it is necessary to develop an international legal mechanism that would facilitate the establishment in the producing, consuming and transit countries a stable, market-based legislation in the field of investment, establishing effective legal measures to enforce contractual obligations and access to effective procedures for disputes resolution.

On 14 November 2008, the EU and Russia held their 22nd Summit in Nice. Among the topics covered in the course of discussions were energy security and climate change concerns, especially in the context of the looming financial and economic crisis.

With the current global financial crisis and volatile energy prices, massive investment is becoming increasingly risky. However, before energy security can be achieved, it is vital that systematic and regular investments be made in energy projects. Therefore, reliable and clear assurances that contracts and property will be respected are assuming great importance. The Energy Charter Treaty's original binding mechanisms for investor protection, including the tested option of investor-state arbitration, are designed precisely to provide this legal security.

Security of transit is a key component of the Energy Charter's work. The Charter has evolved as a leading inter-governmental forum for exchanging information on topics such as access to transit pipelines, tariff-setting, congestion management and investment in new transit infrastructure. All this is complemented by the work on Model Cross-border Pipeline Agreements developed by the Charter Secretariat. The Charter's work on energy efficiency is based on an Energy Efficiency Protocol. The Protocol requires its signatories to formulate the aims of national strategies and policies in this field, establish appropriate legal frameworks, and develop specific programmes for the promotion of efficient energy use and the reduction of harmful environmental practices.

In addition, the Charter's activities bring an important element of transparency to Eurasian energy markets. The Charter provides an open multilateral policy forum helping to keep a regular dialogue on matters that affect energy flows across Eurasia.

The emergence of the Energy Charter reflected the desire of Europe and Eurasia to formalise a new dimension of European and global cooperation based on mutual respect and trust. The contracting parties reflected in the 1991 Charter their resolve to "promote a new model for energy cooperation in the long term in Europe and globally within the framework of a market economy and based on mutual assistance and the principle of non-discrimination" (quoted from the Charter).

The Charter and the Treaty have been very instrumental in narrowing the gap between Russian and European positions and developing equitable, non-discriminatory cooperation. Not all participants are 100% pleased with these documents' provisions. At the same time, it would be wrong to understate their importance for the development of Russia-EU relations up until now and in the future.

The signing and application of the Energy Charter Treaty on a provisional basis (unlike, for example, in the case of some other producing countries which have not ratified the Treaty either) makes Russia one of the key Charter players. The Russian delegation participates actively and with a keen interest in the meetings of the Energy Charter Conference and the Charter's Groups. In our view, this is extremely important, as this enables a constructive, open dialogue and, consequently, enhances transparency within the Eurasian energy space.

Incidentally, with a view to foster such a dialogue, the Russian Gas Society recently suggested establishing a Eurasian Centre for Energy Planning and Projecting. It is assumed that the Centre will be tasked with long-term energy balance projections in the Russian-European region, rating of exporting, transit and consuming countries, etc. We believe that given the geographic scope of the organisation, the Energy Charter could serve as a basis for such a Centre.

No doubt, the EU-Russia energy dialogue and the forthcoming negotiations on a new Partnership and Cooperation Agreement have great political importance. At the same time, as we see it, the Energy Charter Treaty and numerous references to it provide both parties with a comprehensive legal and regulatory framework for energy cooperation, including crucial areas such as advance information on market and political changes, confidence-building dialogue, dispute resolution mechanisms, etc.

The Energy Charter allows Russia and the EU to apply a holistic approach to European energy security matters. This is facilitated by the membership of other Eurasian countries in the Treaty, enabling them to air their views on an equal footing on all critical matters of energy cooperation in an open discussion as part of the Charter process.

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It is encouraging to see a constructive atmosphere at the Ad Hoc Strategy Group meetings and the willingness of Russian and EU representatives to discuss and consider each other's concerns. Overall, in order to enhance European energy security, it is important to have a stable foundation for harmonising the interests of EU countries as energy consumers and those of Russia as energy producer and supplier. Security may be assured reliably through equal cooperation and sound regulation of Russian and European interdependence. The Energy Charter Treaty is a reliable instrument to secure a mutually beneficial tandem between Russia and Europe in the energy sector. We believe that the Treaty has the potential to be used more actively in the interest of integrated partnership-building throughout larger Europe.

Appendix n°3 : Projet on “Energy Challenges and International Environmental Law”

La problématique des défis énergétiques est au cœur des préoccupations de la société internationale actuelle. Elle interpelle donc son droit. Dans le triptyque « Mondialisation - Energie – Environnement »¹, l'énergie occupe une place centrale. L'environnement et énergie sont de plus en plus interdépendants dans les négociations internationales. La relation fondamentale existante entre la politique énergétique et le réchauffement climatique est un parfait exemple de cette interdépendance.

Un des principes clés du droit international de l'environnement, à savoir celui du développement durable, est de « concilier les exigences du développement et celles de la protection de l'environnement »². En effet, la Déclaration de Rio énonce que pour parvenir à un développement durable, la protection de l'environnement doit constituer une partie intégrante du processus de développement et ne peut être considérée isolément³. Il s'agit donc de permettre « l'utilisation optimale »⁴ des ressources énergétiques mondiales. Dès lors, l'étude juridique des questions énergétiques, est indissociable du droit international de l'environnement.

Le Principe 21 de la Déclaration Finale des Nations Unies sur l'environnement adoptée à Stockholm en 1972 impose à chaque Etat le devoir de faire en sorte que les activités exercées sur leur territoire ou sous leur contrôle, ne causent pas de dommage à l'environnement dans d'autres Etats. Selon ce principe, qui s'impose au domaine énergétique, la politique environnementale relève donc de la souveraineté étatique. Toutefois, si les législations nationales sont de plus en plus attentives à la protection de l'environnement, elles ne s'avèrent pas suffisantes pour faire face à des défis environnementaux majeurs et directement liés à l'énergie tels que les changements climatiques ou la pollution atmosphérique. Ces défis s'inscrivent dans une perspective de globalisation. Par conséquent, si dans un premier temps, il était admis que la protection de l'environnement relevait uniquement de la souveraineté de l'Etat⁵, ce principe s'est révélé insuffisant face à la mondialisation et à la globalisation. Les défis liés à l'énergie sont des défis globaux puisqu'ils dépassent largement le cadre des frontières. Ainsi, soulevant des questions relatives à l'accès aux ressources énergétiques et à la sécurité environnementale et humaine, la problématique de l'énergie est donc intimement liée à l'environnement.

Tout d'abord, les défis énergétiques du XXIème vont poser la problématique de l'accès aux ressources. Alors que la demande en énergie est de plus en plus importante, les ressources énergétiques se raréfient. Selon le Conseil Mondial de l'Energie, afin de satisfaire la demande de tous les habitants de la planète, l'offre en énergie devrait doubler d'ici 2050⁶. Seule la rationalisation des ressources existantes et le développement de nouvelles sources d'énergie préservant les ressources énergétiques et l'environnement permettront d'atteindre cet objectif. Par conséquent, pour faire face à l'augmentation de la demande en énergie, l'accès aux ressources devra être amélioré.

Dans l'étude du droit à l'accès aux ressources, la problématique de la souveraineté étatique aura un rôle central. Les tensions géopolitiques en Irak et en Géorgie en sont un parfait exemple. Ainsi, se pose la question cruciale de la détermination des droits de l'Etat sur son

¹ « Les choix énergétiques mondiaux : entre confiance technologique et préoccupation environnementales », *Liaison Energie-Francophonie*, n°80, p.3.

² CIJ, 25 septembre 1997, *Projet Gabcikovo-Nagymaros*

³ Principe 4, Déclaration de Rio, 14 juin 1992.

⁴ Préambule de l'Accord instituant l'OMC.

⁵ Principe 21 de la Déclaration Finale des Nations Unies sur l'environnement adoptée à Stockholm en 1972.

⁶ « Les choix énergétiques mondiaux : entre confiance technologique et préoccupation environnementales », *Op.Cit.*, p.6.

territoire et des modalités d'exercice de sa souveraineté. Or, tels que témoignent les divers différends territoriaux, cette question n'est pas dépourvue de difficultés⁷. Au regard de l'accès à la ressource énergétique, il s'agira d'étudier, d'une part, les droits et les obligations de l'Etat exploitant, et d'autre part ceux de l'Etat utilisateur de l'énergie.

De ces droits et obligations découlera la possibilité de mettre en œuvre la responsabilité internationale de l'Etat. Or, les dommages liés à l'exploitation énergétique étant souvent des dommages causés à l'environnement, l'engagement de cette responsabilité pourra s'avérer problématique. Les particularités de la responsabilité internationale de l'Etat en matière environnementale et la complexification subséquente de la technique se retrouveront donc en matière énergétique.

Par ailleurs, le risque caractérisant la matière énergétique, les aspects de sécurité ne peuvent être éludés dans l'analyse des interactions entre le droit international de l'environnement et l'énergie. La sécurité est entendue ici dans un sens relativement large puisqu'elle englobe la sécurité du transport de l'énergie, la sécurité environnementale et par conséquent, comme l'environnement c'est également l'Homme, la sécurité humaine. Toutes ces déclinaisons de la sécurité sont indissociables.

La sécurité humaine est liée à la problématique de l'énergie en ce que, d'une part, l'énergie se trouve au cœur de nombreux conflits internationaux et, d'autre part, l'exploitation et le transport de l'énergie sont le fait de l'homme.

D'autre part, la problématique de l'accès aux ressources découle celle de la sécurité du transport de l'énergie et de la sécurité des équipements. En effet, si le Conseil Mondial de l'énergie ne semble pas douter sur le fait que l'humanité dispose de ressources énergétiques suffisantes pour satisfaire la demande, il admet toutefois que se posera indéniablement la question du transport de ces ressources des lieux de production vers les endroits où ils sont les plus nécessaires. Cette opération de transport est susceptible, par sa nature, d'engendrer des problèmes de pollution et de nuisances. Ces pollutions et nuisances vont avoir des impacts sur l'environnement. Par conséquent, le droit international de l'environnement aura vocation à servir de fondement pour régler ces questions. Ainsi, la sécurité du transport de l'énergie et la sécurité des équipements est indéniablement liée à la sécurité environnementale et à la sécurité humaine.

Au regard de cette problématique générale posée par l'énergie au regard du droit international de l'environnement, il est possible d'isoler plusieurs problématiques plus précises telles que celle de la lutte contre les changements climatiques, de la protection des milieux naturels ou encore celle de l'énergie en tant que dynamique de ressources naturelles.

La problématique de la protection des milieux naturels est liée tant à l'accès à la ressource énergétique qu'à son transport. L'accès à la ressource peut avoir pour conséquence la dégradation du milieu naturel. De même pour le transport de l'énergie qui, par des nuisances et des pollutions, s'avèrera difficilement compatible, par nature, avec la préservation du milieu naturel. La lutte contre les changements climatiques, quant à elle, illustre également la nécessité de concilier énergie et environnement, pour des questions de sécurité environnementale mais également de sécurité humaine. Enfin, considérant les énergies comme dynamique des ressources naturelles, la notion « d'utilisation rationnelle des ressources » prend tout son sens. Elle englobe non seulement la régulation des ressources existantes, mais également le recours aux énergies renouvelables ou alternatives. La régulation de ces différentes formes d'énergies aura nécessairement un impact sur l'environnement.

La problématique du recours aux énergies renouvelables se pose en termes d'autant plus important qu'il faudra élaborer un ensemble de normes juridiques propres. En droit

⁷ Voir la problématique de la détermination du statut du passage du Nord-Ouest.

international de l'environnement les enjeux de la production d'instruments internationaux sont considérables. Il existe de nombreux textes internationaux dans le domaine de l'environnement et de l'énergie. Toutefois, leur force contraignante est parfois très limitée. Dans ces domaines, l'enjeu des déclarations de principe des Etats prend tout son sens. Se pose alors la question de savoir comment le droit international de l'environnement, en termes d'instruments juridiques, appréhende les défis énergétiques.

Au regard de tous ces enjeux internationaux existants entre l'environnement et l'énergie, l'apport du droit communautaire est considérable. En effet, le droit communautaire en tant que potentiel modèle, mais également du fait de l'importance croissante de l'Union Européenne sur la scène internationale en matière d'énergie et d'environnement, trouve également une place dans cette étude.

Le droit communautaire est un droit qui a pu être considéré par certains auteurs comme une « locomotive » pour le développement du droit international. Ces deux ordres juridiques sont imbriqués. De plus, le droit communautaire entretient des rapports privilégiés avec les droits des Etats membres. Ces deux ordres juridiques peuvent effectivement servir de modèles et inspirer dans une certaine mesure le droit international de l'environnement. Dans le domaine de l'énergie, et notamment au regard des défis environnementaux, l'Union européenne ambitionne d'apparaître comme « chef de file » des développements futurs.

L'adoption du « Paquet énergie climat de l'UE » le 2 décembre 2008 montre bien à quel point les enjeux climatiques et énergétiques sont liés. Pour l'UE la lutte contre le réchauffement climatique passe nécessairement par l'amélioration de l'efficacité énergétique.

L'UE entend jouer un rôle moteur dans la lutte contre le réchauffement climatique et avoir une position de force lors des négociations de la conférence de Copenhague de 2009.

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Appendix n°5: Questions to be treated in the project

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- Caspian Sea and international environmental law
- Energy safety and international environmental law
- The role of the universal international organisations in “the approach of proximity” adopted by the EU and the CIS in order to respond to environmental requirements in the energy field
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- Legal relations as regards energy between the European Union and the countries of the CIS
- Legal relations between France and the member States of the CIS in the energy sector.

Chapter 2: Energy issues and international investments law

- International investments law and state control on the production of energy resources
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- Legal aspects of the energy product pricing;
- Legal aspects of the transport of hydrocarbons, embracing the questions of the right of use and the property right on gas and oil pipelines;
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- Analytical study of rules envisaged in delivery agreements
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- Would transit States of oil and gas be in right to provision on the conduits crossing their territory, in the event of a state of necessity?
- Does Russia have the right to completely cut the gas and oil delivery to a state on the basis of existing agreements? (Study of the case of Moldova; comparative study with other agreements within the CIS)
- Does an importing Russian gas State have the right to resell it in another State, whose deliveries were cut by Russia?
- The GUAM as an alternative to energy dependence with respect to Russia: stakes and prospects
- The problem of Transnistria in the middle of the energy dependence of Moldova
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