

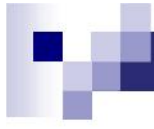


ELECTRICITY COOPERATION IN CENTRAL ASIA

*A comparative and international law
perspective*

**Electricity transit workshop
14 October 2014**

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Secretariat (Fellow)

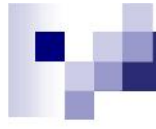


CONTEXT:

- Energy, carbon and water saving benefits of electricity cooperation in Central Asia

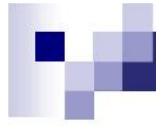
BUT

- Increasing energy independence, lack of trust, transit and trade disputes, insufficient enforcement of existing arrangements



RESEARCH QUESTION

- *What are the cooperation obligations of Central Asian states under international law?*



METHODOLOGY

- Comparative analysis of power sector regulation
- Analysis of regional energy cooperation agreements, in the light of general principles of international law
- The role of external actors in regional trade
- Taking into account Russian and EU experience



BROADER STUDY ON SECURITY OF ELECTRICITY SUPPLY IN CENTRAL ASIA



- The challenge of modernisation: the role of FDI
- Energy security: national v. regional approach
- Electricity production: tariff increase and payment
- Renewable energy trade: stability of support
- District heating: the electricity-heating issue
- Energy efficiency: the right to saved energy
- Regulatory authority: the challenge of independence



ENERGY SECURITY:

NATIONAL V. REGIONAL APPROACH

- Cooperation benefits recognised in regional agreements + independent studies

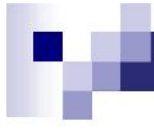
Agreement of 17 March 1998 between Kazakhstan, Kyrgyzstan and Uzbekistan on the Use of Water/Energy of the Syr Darya Basin:
“benefits derived from the joint operation of the reservoirs of the Naryn-Syr Darya Cascade, including the use of water for irrigation and power generation.”

Agreement of 17 June 1999 between Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan on the Parallel Operation of the Energy Systems of CA: *“cooperation and mutual support meet the traditional interests of the CA nations”; importance of “creating an integrated electricity market”.*



- But, national strategies mainly focus on “self-sufficiency”/ export – not energy savings/import

- 2012-2017 Strategy for the Development of Kyrgyz Electricity :
*“обеспечение **энергетической независимости** Республики, повышение **экспортного потенциала** Кыргызской Республики.”*
- 2030 Concept for the Development of Kazakh Energy:
*“**самодостаточность** обеспечения ресурсами и продукции ТЭК”;*
*“**снижение зависимости** от покупки регулирующей мощности из сопредельных энергосистем”;*
*“усиление геополитического влияния в регионе, путем **удовлетворения роста энергопотребления экономиками региона**”*
- 2003-2015 Concept of Development of the Fuel-Energy Complex of Tajikistan:
“Достижение максимальной энергетической независимости ТЭК Тадж.”

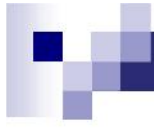


- Linked to the notion of national unified Power system, instead of regional Central Asian Power System, in national electricity laws

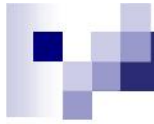
Edinaia Elektroenergeticheskaia Sistema Uzbekistan

Edinaia Elektroenergeticheskaia Sistema Respubliki Kazakhstan

National'naia Energosistema Tadjikistan



- The EU approach to energy security as alternative
 - rejects “self-sufficiency” because of economic, social and environmental inefficiency
 - recognises interdependence: solidarity regarding energy security, energy efficiency and renewable energy
 - cooperation within the EU internal electricity market, with public security and fuel mix exceptions (no loss of sovereignty)



Article 194 TFEU:

In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;*
- (b) ensure security of energy supply in the Union;*
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and*
- (d) promote the interconnection of energy networks.*

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.

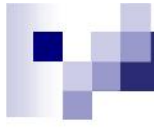


■ Legal basis for “EU style” electricity cooperation approach in Central Asia

- Legal basis for international energy efficiency cooperation under national law

Основными направлениями международного сотрудничества в области энергосбережения являются (...) участие в международных проектах в области энергосбережения.

- Partnership and cooperation agreement provides for approximation to “EU model”
- 2005 Concept on the Formation of a Common Electricity market in the CIS refers to EU electricity directive



COOPERATION UNDER THE ECT

■ General cooperation objective of the ECT

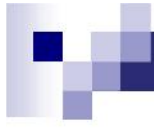
“Parties undertook implement and broaden their co-operation”

■ Freedom of transit, and new infrastructure:

*The Parties shall take the necessary measures to facilitate the Transit of Energy consistent with the principle of **freedom of transit** and **without distinction as to the origin, destination or ownership** of such Energy.*

*Contracting Parties shall encourage relevant entities **to co-operate** in:*

- (a) modernising Energy Transport Facilities necessary to Transit;*
- (b) the development and operation of Energy Transport Facilities serving the Areas of more than one Contracting Party;*
- (c) measures to mitigate the effects of interruptions in Energy supply;*
- (d) facilitating the interconnection of Energy Transport Facilities.*



■ Energy efficiency and environ. protection:

“Contracting Parties shall encourage co-operation in the attainment of the environmental objectives of the Charter” (Article 19);

“Contracting Parties shall encourage co-operation in energy efficient services and practices” (Protocol)

■ Investment protection:

enforce the right to free electricity transit in investment agreements



COOPERATION UNDER INTERNATIONAL CLIMATE LAW



■ The UNFCCC and Kyoto Protocol

*“The global nature of climate change calls for the widest possible **cooperation by all countries** and their participation in an effective and appropriate international response” (preamble)*

*“All Parties shall (...) promote and **cooperate** in the development, application and diffusion of practices and processes that reduce or prevent anthropogenic emissions of GHG” (Article 4 UNFCCC)*

“All Parties shall cooperate in the promotion and transfer of processes pertinent to climate change” (Article 10, c Kyoto)

International financing for NAMAs



COOPERATION UNDER INTERNATIONAL WATER LAW



- **Relevance of international water law for electricity cooperation in Central Asia**

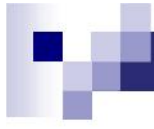
Insufficient access to thermal energy leads to increased hydro use in the winter and reduced reservoir levels in the summer
+ spills

- **“Community of interests”**

States cannot avoid their membership in community of riparian states (Leb)

- **Cooperation**

even in case of breakdown of diplomatic relations (Art. 30 UN Watercourses Convention)



- No veto of planned measures, but obligation to consult/negotiate and respect interests

Emergency requires cooperation, mutual engagement, planning, joint management (e.g. to avoid increased hydro use in winter)

- Principle of equitable/reasonable utilisation

Cooperation to minimise use of hydropower in the winter

- Joint management institutions

Opportunity for electricity cooperation (hydropower aspects of)
Independence (science-based)



GENERAL PRINCIPLES OF INTERNATIONAL LAW

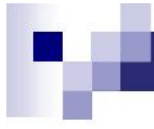


■ Good faith

states have mutual obligation to negotiate in good faith in order to arrive at a reasonable and equitable solution (mutual benefits) (*Lax Lanoux + Fisheries Jurisdiction*)

Negotiations without intention to attempt a mutual agreement is meaningless and against intern'l practice

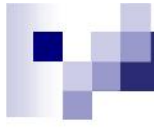
Good faith negotiation is not reiterating own positions, but being ready to consider modification so that compromise and agreement become possible (*North Sea Continental Shelf*)



■ Duty to avoid harm on other states

“Under international law no state has the right to use its territory in such a manner as to cause injury in or to the territory of another state” (Trail Smelter arbitration)

Relevance for transit interruption, implementation of fossil fuels agreement



■ Obligation to cooperate

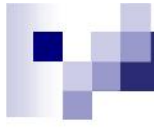
customary principle of international law, with special application for environmental matters

Law of coexistence *versus* cooperative existence of states with positive obligations of assistance (Leb)

Sovereignty and interdependence (cooperative sover.)

■ Obligation to inform and notify

Impact on third states (e.g. transit/supply interruption)



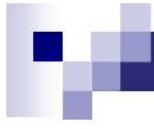
THE ROLE OF EXTERNAL ACTORS

■ Freedom of transit under bilateral investment agreements

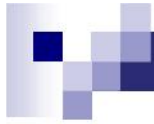
Eg. Kyrgyz-Russian agreements: commitment of free access to Kyrgyz network infrastructure, freedom of transit, guaranteed export to third countries, and free market pricing of the electricity produced from the Kambaratin and Upper Naryn hydropower plants for export purposes

■ The role of the ECT

□ Fair and equitable treatment (legitimate expectations) and umbrella clause



- Role of FDI, taking into account importance of export for business case of electricity investments:
 - enforce commercial arrangements before independent investor-state arbitration (access to the grid, tariff, deviation and balancing)
 - create trust by de-politicising cooperation



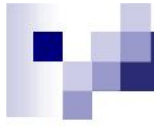
Role of the ECT:

- *FET*: protection of expectations + “economic equilibrium” of power plants (recovery of CAPEX) + payment collection schemes

(see Sempra, CMS, National Grid, Total v Argentina; Duke v Ecuador; TECO v Guatemala)

- *Umbrella clause*: include sovereign guarantee of cost-reflective tariffs and payment collection in investment (loan) agreement

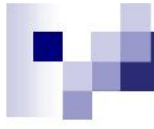
(WB financing of N/S Kazakh line; ADB financing of Talimarjan pp in Uzbekistan)



- Enforce independence of national – and possibly regional – regulatory authorities

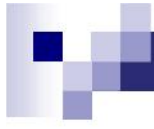
Biwater v Tanzania:

“In the Arbitral Tribunal’s view, as a matter of principle, the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from BGT’s legitimate expectation that an impartial regulator would be established to oversee relations between City Water and DAWASA “

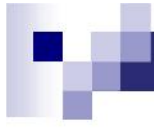


CONCLUSIONS

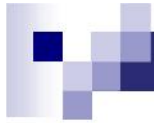
- Duty to cooperate and negotiate in view of finding a mutually beneficial agreement: relevance for electricity trade and transit
- Water-energy nexus integrates water law disciplines into regional electricity cooperation (reasonable utilisation, cooperation, notification, negotiation)



- CO₂ reduction benefits of regional cooperation opens door to cooperation requirements under climate law, and financial support under international climate regime
- Good faith: cooperate and negotiation with the real intention to find an agreement, readiness to compromise



- Role of the trade, transit and investment disciplines of the ECT



Thank you for attention!

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Common rules for global energy security