EU Energy Policy after the Treaty of Lisbon: Breakthroughs, Interfaces and Opportunity

Author: Zhu Feng
Supervisor: Prof. Paulo Canelas de Castro
Date of submission: July 2011
Acknowledgements

This thesis is the fruit attained in my two years study in the University of Macau. First of all, I would like to express my deepest gratitude to my supervisor, Professor Paulo Jorge Tavares Canelas de Castro, for his support and guidance throughout the study and research. He taught me the essential characteristics of EU law and how to be a researcher for a theoretical topic. In addition, I chose the vital and area, EU energy policy, as the topic of my thesis under his suggestion. His continued guidance and support led me to the right way in my research and thesis writing.

I would also like to extend my appreciation to Professor Joseph W. Dellapena and PHD candidate Zhang Jiao for their advices to my research and thesis writing.

My sincere appreciation is extended to the Jean Monnet Seminars held by the University of Macau in 2010-2011. These seminars gave me inspirations about the interfaces between energy and environment, the idea on the competence delimitation and so on, which were great helpful to my research.

Special thanks to my classmates for their assistance in my research and thesis writing.

I would also like to extend my deepest gratitude to my parents. Without their encouragement, I could not successfully accomplish this thesis.
Abstract

Although two of the three original treaties of European Union (EU) were related to energy resources (coal and nuclear resources), yet a detailed legal basis for EU energy policy was absent in the most important EC Treaty (TEC) for a longtime. Currently, this situation is eventually altered by the Treaty of Lisbon which formally established a new legal basis of energy policy. However, relatively little research attention so far seems to have been devoted to a comprehensive study about this new legal basis and its relation with other parts of the Treaty. Therefore, this thesis aims to explore the energy-related content of Lisbon Treaty. It proposes at three levels as follows.

First, the new legal basis clause and the competence delimitation of energy policy are most conspicuous breakthroughs presented by the Treaty. At the first time, EU energy policy has a detailed legal basis as well as a transparent competence division between the Union and Member States. They provide a comprehensive set of rules about the objectives, legal framework, decision-making procedure and competence allocation in this area. Therefore, these two provisions are breakthroughs brought by the Treaty.

Second, apart from the new legal basis, numerous legal bases of other areas stress energy-related matters as well, such as the legal basis of environmental policy. This phenomenon clearly illustrates there are certain interfaces between energy policy and other relevant policy areas. In fact, entire objectives which stipulated in the new legal basis of energy policy have certain interfaces with other four provisions in the TFEU. Therefore, this thesis also examines these interfaces.

Third, in the practical level and in order to safeguard the security of energy supply, EU needs to strengthen its relations with energy partners. In this regard, the Treaty of Lisbon also introduces institutional innovations in the Common Foreign and Security Policy. These innovations could be viewed as an opportunity for the EU to tackle the energy challenge of Europe in a better way. The thesis evaluates possible impacts of new actors in the external energy field and provides a preliminary observation on daily practices of them in the post-Lisbon period.

As a conclusion, the major finding of thesis argues that the contribution of Treaty to energy policy is between fundamental breakthrough and challenge ahead. Therefore, it
still depend upon the actors of this policy area to better make use of breakthroughs, organize the interfaces and seize the opportunity provided by the Treaty and further develop this vital policy area in the future.

**Table of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACER</td>
<td>Agency for the Cooperation of Energy Regulators</td>
</tr>
<tr>
<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
</tr>
<tr>
<td>COR</td>
<td>Committee of Regions</td>
</tr>
<tr>
<td>DG ENER</td>
<td>Directorate-General of Energy</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>ECSC</td>
<td>European Coal and Steel Community</td>
</tr>
<tr>
<td>ECT</td>
<td>Energy Charter Treaty</td>
</tr>
<tr>
<td>EEAS</td>
<td>European External Action Service</td>
</tr>
<tr>
<td>EEPR</td>
<td>European Energy Program for Recovery</td>
</tr>
<tr>
<td>EESC</td>
<td>European Economic and Social Committee</td>
</tr>
<tr>
<td>ENTSO</td>
<td>European Network of Transmission System Operators</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>EPC</td>
<td>European Political Cooperation</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EURATOM</td>
<td>European Atomic Energy Community</td>
</tr>
<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
</tr>
<tr>
<td>GCC</td>
<td>Gulf Cooperation Council</td>
</tr>
<tr>
<td>GHG</td>
<td>Green House Gas</td>
</tr>
<tr>
<td>LTEU</td>
<td>Lisbon version Treaty on the European Union</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>OPEC</td>
<td>Organization of Petroleum Exporting Countries</td>
</tr>
<tr>
<td>QMV</td>
<td>Qualified Majority Voting</td>
</tr>
<tr>
<td>SEA</td>
<td>Single European Act</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the function of European Union</td>
</tr>
<tr>
<td>TEC</td>
<td>Treaty establishing the European Community</td>
</tr>
<tr>
<td>TEN</td>
<td>Trans-European Networks</td>
</tr>
<tr>
<td>TEN-E</td>
<td>Trans-European Networks in Energy infrastructures</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
</tr>
<tr>
<td>TPA</td>
<td>Third Party Access</td>
</tr>
</tbody>
</table>
Table of Charts

Chart 1 Three main parts of analytical structure................................................................. 6
Chart 2 Major energy-related measures from 1986 to 2006 ............................................ 23
Chart 3 Multiple legal bases for energy-related matters before the Treaty of Lisbon ........... 24
Chart 4 The direct and indirect contributions to the energy policy by SEA TEU and the Constitution ..... 31
Chart 5 Full text of the energy title of Treaty of Lisbon and new elements in previous treaty revisions .... 36
Chart 6 The structure of the new legal basis............................................................................ 38
Chart 7 Three limits to the EU competence in energy policy.................................................. 51
Chart 8 Interfaces between objectives of energy policy and other non-energy-specific provisions ....... 57
Chart 9 The meanings of different “20%” within the 20-20-20 target ....................................... 65
Chart 10 The energy route from traditional and emerging strategic suppliers around Europe ........... 89
Chart 11 The HR’s relationship with other institutions in the CFSP field................................. 99
Chart 12 Institutional relations under different model of EEAS ............................................ 103

Table of Treaties

Treaty on the Functioning of European Union (consolidated version, 2008)

Art.2................................................................................................................................................... 43
Art.4........................................................................................................................................................ 6
Art.66...................................................................................................................................................... 75
Art.114.................................................................................................................................................. 51, 64, 76
Art.122.................................................................................................................................................. 31, 51, 80, 70, 72, 73, 76, 79
Art.170.................................................................................................................................................. 51, 53, 66
Art.172.................................................................................................................................................. 76
Art.191.................................................................................................................................................. 53, 56, 58, 60
Art.192.................................................................................................................................................. 46, 51
Art.194.................................................................................................................................................. 41, 28, 30, 44, 49, 56, 58, 60, 64, 65, 66, 69, 75, 74, 76, 77, 78, 80
Art.222.................................................................................................................................................. 41
Art.294.................................................................................................................................................. 75
Art.337.................................................................................................................................................. 74, 77, 78

Lisbon version Treaty on the European Union (consolidated version, 2008)

Art.2.................................................................................................................................................. 31
Art.5.................................................................................................................................................... 4
Art.13.................................................................................................................................................. 102
Art.15.................................................................................................................................................. 95, 102, 103
Art.18.................................................................................................................................................. 94, 96, 100, 106
Table of Cases

Case C-300/89  Commission v Council (titanium dioxide)[1991] ECR I-2901 ................................................................. 62
Case T-87/05  EDP-Energias de Protugal SA v. Commission [2005] ECR II-03745 ................................................................. 62
Case C-490/10  European Parliament v the Council O.J. L 180 2010 ........................................................................... 77
Case C-338/01  Commission v Council (indirect taxes) [2004] ECR I-2901 ................................................................. 78
Case C-269/97  Commission v Council [2000] ECR I-2257 ......................................................................................... 78
# Table of Contents

Acknowledgements .................................................................................................................. ii

Abstract ..................................................................................................................................... iii

Table of Abbreviations .............................................................................................................. v

Table of Charts .......................................................................................................................... vii

Table of Treaties ......................................................................................................................... vii

Table of Cases ............................................................................................................................ ix

Introduction ................................................................................................................................... 1

Basic Concepts ............................................................................................................................ 2

Analytical Structure and Chapter Layout .................................................................................. 5

Literature Review ....................................................................................................................... 9

Chapter One Research Background: the Historical Paradox and Treaty Revisions .. 15

1.1 The Historical Paradox ......................................................................................................... 15

1.2 The Continuous Treaty Revisions (1986-2003) ................................................................. 17

1.2.1 Creating an Energy Policy Legal Basis; Unsuccessful Attempts ................................. 17

1.2.2 The “Indirect Contributions”: Dynamics from Other Policy Areas ......................... 19

1.2.3 The Pros and Cons of the Indirect Contribution ......................................................... 22

1.3 The 2004 Constitutional Treaty: Debates and Compromise .............................................. 26

1.4 Concluding Remark .............................................................................................................. 30

Chapter Two Breakthroughs ...................................................................................................... 32

2.1 The Negotiation Period: Common Challenges and Common Views ............................... 32

2.2 The New Legal Basis: an Assessment ................................................................................ 34

2.2.1 The Changing Landscape ............................................................................................... 35

2.2.2 The Innovations of the Lisbon Version Legal Basis of Energy Policy .... 38
2.2.3 The Legal Framework of EU Energy Policy ............................................ 44

2.2.4 Special Issues: The Declaration on Art. 194 and the Status of EURATOM ................................................................. 47

2.3 The Energy Policy as a Shared Competence .............................................. 49

2.3.1 The Competence Delimitation of Energy Policy: General and Specific Rules .......................................................................................................................... 49

2.3.2 The Evaluation on the Shared Competence Rules.................................. 53

2.4 Concluding Remark ...................................................................................... 55

Chapter Three Interfaces ..................................................................................... 57

3.1 General Remarks ............................................................................................ 57

3.2 The Interface between Energy Policy and Environmental Policy .......... 60

3.2.1 Introduction ............................................................................................. 60

3.2.2 Common Objectives ................................................................................. 61

3.3 The Interface between Energy Policy and Internal Market ...................... 66

3.4 The Interface between Energy Policy and TEN-E .................................... 71

3.5 The Interface between Energy Policy and Internal Energy Security Clause ... 75

3.6 The Future Possibility about the Legal Basis Litigation ......................... 79

3.7 Concluding Remarks ...................................................................................... 85

Chapter Four Opportunity ................................................................................... 87

4.1 CFSP: A Missing Part of European External Energy Policy? ................... 89

4.1.1 The Energy Challenge of Europe ............................................................. 89

4.1.2 The Need to Promote External Energy Relations under the CFSP ......... 92

4.2 The Institutional Innovation of CFSP: An Opportunity ............................. 95

4.2.1 The New CFSP of the Treaty of Lisbon: Business as Usual? ............... 95

4.2.2 Institutional Innovations: the HR .............................................................. 98

4.2.3 Institutional Innovations: the President of European Council .......... 106

11