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Nord Stream Pipeline: the European *"hard case"*

The issue of the Nord Stream Pipeline is a subject of a political discussion based on a few legal expert opinions concerning that joint undertaking of Russian and German concerns[1]. The Nord Stream Pipeline is to run through third-country exclusive economic zones. Already in 2005 Sweden granted its consent to preliminary studies of the pipeline run through its territory. However, allowing studies is not tantamount to granting consent to the pipeline construction. The pipeline is expected to run through the Swedish economic zone, and partly even through its territorial waters near the island of Gotska Sandoen, which is a protected national park. Thus it will circumvent the Polish economic zone.

The fact that the Polish Senate has decided to discuss the problem at a conference level testifies to it still being a "hot topic". Relatively little attention in the discussion of the Nord Stream is given to the possibility of submitting disputes and controversies associated with the project to consideration by objective judges[2]. Another look at the issue through the prism of the "judges' Europe" is worthy of presentation among people who have impact on decision-making, especially since judges (particularly those of the European Court of Justice – hereinafter to referred as ECJ) know how to use law for the purposes of integration[3] and, at times, can cause by issuing courageous decisions not only a ripple on the surface but a real wave[4]. The issue of the Nord Stream Pipeline puts emphasis on the ability to exploit the "legal dimension of integration" and on the appreciation of "judicial strategies" in achieving one's objectives, especially in a situation where political possibilities of reaching a compromise have been exhausted and the attempt to look at the problem from the "jurisdictional" perspective has been completely neglected.

1. The notion of *"hard case"*

The issue of the Nord Stream Pipeline is nothing else than a classic example of a difficult case, the solution of which necessitates an analysis exceeding the canons of thinking in the categories of legal positivism.

R. Dworkin has divided cases examined by courts into *"clear"* and *"hard"*[5]. In his view, we deal with a hard case when lawyers differ in their opinions as to the accuracy or falsity of the view of a law[6]. J. Raz in his works calls them regulated and non-regulated cases

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[1] One was an opinion commissioned by the Economy Ministry drawn up by the author with Dorota Pyć.

[2] That aspect was emphasized in an article written jointly with T.T. Koncewicz - *"Gazociąg północny i Polska oraz traktat ustanawiający Wspólnotę Europejską. Sztuka korzystania z prawnego wymiaru integracji"*, *Rzeczpospolita* of 5th June 2006. For more, see Point 3 below.

[3] It is the phenomenon known as "integration through law". See Z. Brodecki – *"Prawo integracji w Europie*, LexisNexis, 2006, and T.T. Koncewicz – *"Sędzia i prawodawca we wspólnotowym systemie prawnym", Palestra*, 9–10.2005.

[4] See in this vein Professor Sir D. Edward, whose opinion must be taken under particular consideration as he is a former ECJ judge with many years of experience – *"Luxemburg in retrospect: a new Europe in prospect"*, (2004) European Business Journal, p. 121.

[5] R. Dworkin – *"Law's Empire"*, Harvard University Press, 1986, pp. 353 – 354.

[6] Ibid., pp. 177, 226, 229, 243, 255-256, 265–266 and the Polish edition – *"Imperium prawa"*, translated by J. Winczorek with a foreword by M. Zirk-Sadowski, Oficyna Wolters Kluwers Business,

(disputes)[7]. Regulated cases "are those which fall under customary law or a statutory rule in the sense that the court is not required to issue a judgement that defines them [...]". A dispute is regulated when binding law provides a solution to it - shows how the conflict must be resolved. On the other hand, it is non-regulated "when there are no correct legal answers in binding law to some questions the case may be posing, i.e. when there is a loophole in law applicable to the given case"[8]. In non-regulated cases, law does not dictate any solution although it may exclude certain solutions as inappropriate and provide general guidelines as to making a selection among some or all other possible solutions. Dworkin cautions against automatism in classifying disputes as regulated or non-regulated. Indeed, regulated disputes may be more difficult to solve than non-regulated ones. The *criterium divisionis* lies in that only in non-regulated disputes we require an opinion from the court. In a regulated case, the solution is provided by law and the court cannot create a new law, unless it modifies law that already exists. In a non-regulated case containing a loophole, the court creates new law without changing existing law. Law is created precisely by the act of filling out loopholes[9]. While Dworkin considers that difficult cases can be solved within the framework of law, in which he includes not only rules but also principles and policies[10], in Hart's opinion difficult cases should be resolved on the basis of "supratextual interpretation"[11]. The views of an adherent to the British tradition - Hart – and of a representative of American jurisprudence - Dworkin – are quoted today in legal philosophy textbooks all over the world. Many arguments speak in favour of assessing the legality of the joint Russian – German undertaking in the spirit of Dworkin and Hart.

Entering the world of ideas, principles and policies[12] is indispensable because the convention's norms of the law of the sea govern the freedom of laying cables and pipelines in a general manner and do not determine precisely how that activity relates to provisions concerning protection of the marine environment.

> The legal status of maritime areas and the rights and obligations of coastal states are governed by the Law of the Sea Convention 1982[13], hereinafter "Convention". In the case of the Nord Stream Pipeline project, most important are provisions dealing with the freedom of laying cables and pipelines in exclusive economic zones.[14] The type and extent of that freedom is the same as in the high seas but with certain restrictions imposed by sovereign rights of the costal states in matters such as protection of the marine environment. It is a given that coastal states have the obligation to protect the environment in their exclusive zones. They are required to care for pollution prevention by, among other things, developing environmental impact assessments, protecting biodiversity of the seas, or creation of protected maritime areas[15]. According to art. 122 of the Convention, the Baltic is a semi-enclosed sea requiring particular protection. Bearing this in mind, the 1992 Helsinki

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Krakow, 2006. For more on Dworkin's philosophy of law, see also M. Zirk-Sadowski – *"Wprowadzenie do filozofii prawa"*, Zakamycze 2000, p. 197 and subsequent.

[7] The Polish translation of the terms "regulated" and "non-regulated" comes from the Polish edition of *The Authority of Law*, Dom Wydawniczy ABC, 2000.

[8] Ibid, pp. 180-181.

[9] For difficult cases in Community law and ECJ methods of solving them see in particular J. Bengoetxea - *"The Legal Reasoning of the European Court of Justice. Towards a European Jurisprudence"*, Clarendon Press, 1993; and in Polish literature - Z. Brodecki (ed.) – *"Europa sędziów"*, LexisNexis, 2007, in print; and T.T. Koncewicz - *Równowaga instytucjonalna i Parlament Europejski. Wspólnotowy hard case w Trybunale Sprawiedliwości"*, Palestra 3–4/2007.

[10] R. Dworkin – *"Taking rights seriously"*, Harvard University Press, Cambridge 1977.

[11] H. L. A. Hart – *"Eseje z filozofii prawa" (Essays in Jurisprudence and Philosophy)*, translated by J. Woleński, Dom Wydawniczy ABC, 2001, pp. 21–120.

[12] The relation of ideas, i.e. universal values such as humanitarism, effectiveness and justice, to principles has been presented in the book *Europa sędziów* (Judges' Europe), LexisNexis, 2007, in print.

[13] Journal of Laws 2002, no. 59, pos. 543.

[14] Art. 58 and 87 of the Law of the Sea are worthy of special attention.

[15] Art. 211 of the Law of the Sea Convention clearly specifies these obligations.

Convention on the Protection of the Marine Environment of the Baltic Sea[16] imposes the obligation to prevent and eliminate pollution of the Baltic Sea based on the use of Best Environmental Practice, Best Available Technology and environmental impact assessment required in case of a proposed project that is likely to have an adverse impact on the environment. The Baltic Sea is subject to higher environmental protection standards by virtue of its recognition by the MARPOL Convention[17] as a special area and of establishment of Baltic Sea Protected Areas by the Helsinki Commission. According to current law, integrated management plans must be established for these areas[18].

International jurisprudence is giving increasing importance to the so-called soft law, whereas Community law – to the politics of law (which is a part of *acquis communautaire*)[19]. Legal acts deprived of the binding force, just like those that are binding, are passed by the appropriate authorities within the boundaries of their jurisdiction and in accordance to specified procedures. Consequently, they must not be treated as second-class norms. They often relate to a subject-matter that is of key significance to international relations or to the process of European integration. The energy policy is one such example. Both secondary law and the energy policy of the European Union[20] rely on principles of the internal electric-power market and the so-called "green" energy. As implementation of new technologies is associated with high investment costs, the current policy is not effective. The European Union lacks a common energy strategy which would determine both internal and external relations in this area, particularly between the EU and Russia[21]. All aspects of these legal circumstances are determined by the general principles of universal international law and Community law, which are inspired by national laws or joint constitutional traditions of the member states. These principles are considered "superior" to the norms of written law and are thus placed at the top of the hierarchy of legal sources[22].

Art. 2 of the Polish Constitution of 1997 states that "the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice". This constitutional provision is so inclusive that it "devours" all general principles – written or established by courts, particularly by the Constitutional Tribunal[23]. For this reason, the thesis of the superiority of general principles over written law is incomprehensible in Poland. In other constitutions, for example in the French Constitution of 1958, general legal principles (*principes généraux du droit*) are listed in the schedule of legal sources as an important element of the sphere of public and private life[24].

The most important role in solving contentious matters is played by judicial precedence. Law of the judges is universally recognized today not only in the common-law culture (which is evident), but also in the culture of statutory law. Suffice it to mention French administrative law (which to a large degree is regulatory law shaped by the State Council)[25] and the Napoleonic Code, which would not have lasted 200 years without its continuous reconstruction via court decisions[26]. As for Community law, there is no question

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[16] See Z. Brodecki - *"New Convention on the Protection of the Marine Environment of the Baltic Sea"*, 19 Polish Yearbook of International Law, 1991-1992, p. 25 and subsequent.

[17] Journal of Laws 1987, no. 17, pos. 101.

[18] Assuming the rationality of that legislation, maritime administration of many countries (included Poland) does not avail itself of its entrusted tasks.

[19] This notion brings to mind *ius gentium*. See Z. Brodecki – *"For stronger and wider Union. Acquis communautaire and Poland"*, Sopot 1998, text published as a manuscript, and *"Acquis communautaire: La notion inconnue pour la Constitution Polonaise"*, Sopot 1999, text published as a manuscript.

[20] That policy promotes systems that use biofuels and heat, geothermal and solar energy.

[21] In this respect, the efforts of Polish diplomacy must be recognized as correct.

[22] Z. Brodecki, *Wyższość*, [in:] *Europa sędziów*, LexisNexis, 2007, in print.

[23] See also L. Garlicki, *Polskie Prawo Konstytucyjne. Zarys wykładu,* Liber, 2005, p. 61 and subsequent.

[24] See A. Mackowska, K. Wojtyczek, *Prawo francuskie*, vol. I, Kantor Wydawniczy Zakamycze, 2004, p. 44.

[25] A. Mackowska, K. Wojtyczek, *op. cit.*, p. 44.

[26] K. Sójka – Zielińska, *Kodeks Napoleona. Historia i współczesność*, LexisNexis, 2002, pp. 161–194.

as to the role played by judges in maintaining the pace of integration. Suffice it to say that many areas of Community law would simply not exist without jurisprudence and principles worked out therein[27]. In fact, Community law is the judges' law.[28].

> The absence of respect for judicial precedence is another barrier in the legal awareness of the Polish society[29]. While the awareness of the role played by the decisions of the International Tribunal of Justice in the Hague, the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg increases from day to day[30], Polish courts still refuse to recognize their own judgements as precedent-setting (even judgements issued by the Supreme Court, the Supreme Administrative Court and the Constitutional Tribunal). Unfortunately, it also happens at times that there are problems with recognizing the authority of a judgement issued by an international court[31]. Consequently, it will be difficult to overcome the obstacle on the path to acknowledging and applying foreign precedents, although they are slowly being recognized in cases for indemnity sought as a result of having been infected with HIV or for violations of intellectual property rights.

2. Violation of principles

To evaluate the joint venture by Russian and German concerns, most important are the principles promoted by ECJ judges Koen Lenaerts[32] and David Edward[33]. These outstanding judges present the principles of environmental protection against the background of the general principles of Community law[34]. When reflecting on the Nord Stream Pipeline case, it is sensible to focus on the *precautionary principle*, which is one of the aspects of sustainable development in the meaning of Community and international law.

> In 2002, the International Law Association adopted a declaration on the principles of international law related to sustainable development. It combines development with the "principle of diversified responsibility" and the idea of equality in international law – both universal and regional.
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> In Community law, there is the well-known integration clause[35] which imposes the need to care for the environment in all sectorial strategies[36] by acting upon the

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[27] For more on this subject see in H.G. Schermers, D.F. Waelbroeck – *"Judicial Protection in the European Union"*, Kluwer Law International, 2001, in which the authors specify those spheres which maintain operability only thanks to precedents.

[28] This is best confirmed by the title and content of the book quoted earlier, *Judges' Europe*, which is based on the fundamental assumption that a true reconstruction of Community law requires an ECJ judge and a First Instance Court judge to look at it.

[29] For the significance of precedents in European law, see Z. Brodecki – *"Prawo integracji w Europie"*, LexisNexis, 2006, pp. 94–96.

[30] Recognition must be given to the increasingly active attitude of non-governmental organizations, which advocate a look at the Polish legal system and its aches and pains from the perspective of international judges and courts. Activities of the Helsinki Foundation of Human Rights and its Strategic Litigation Program (www.hfhr.org.pl) show that ending a case in Polish courts can be only the beginning of a new supranational case examination process. Also see the discussion in Point 4 below.

[31] See in particular the valuable considerations in E. Łętowska – *"Korzystny dla skarżącego wyrok ETPCZ jako podstawa skargi o wznowienie postępowania"*, EPS 1/2006, p. 45 and subsequent.

[32] *"In the Union We Trust : Trust – Enhancing Principles of Community Law"*, 2004, 41 Common Market Law Review 317.

[33] *"Judging Environmental Law"*, [in:] Colneric, Puissochet, Ruiz-Jarabo Colomer (ed.) – *"Une Communauté de Droit. Festschrift für Gil Carlos Rodriguez Iglesias"*, Berliner Wissenschafts – Verlag, 2003, p. 487 and subsequent.

[34] Judge Lenaerts presents "*precautionary principle*" and "*risk assessment*" in juxtaposition to principles such as "*transparency*" and "*proportionality*", *op. cit.*, pp. 317–335.

[35] M.M. Kenig–Witkowska - *"Ius contrahendi w sprawach dotyczących środowiska w prawie Unii Europejskiej"*, [in:] *"Szkice z prawa Unii Europejskiej", vol. I, Prawo instytucjonalne"*, Zakamycze 2003), p. 107 and subsequent, also D. Pyć, *op. cit.*, p. 96.

obligation to cooperate in the spirit of global partnership. It focuses on the requirement to share information, conduct consultations and carry out environmental impact assessments, as well as the responsibility to cooperate with member states in ensuring implementation and compliance with Community environmental regulations.[37].

It is paradoxical that the precautionary principle has its source in German environmental protection law, where it appears under the name of "*Vorsorgeprinzip*"[38]. That principle made itself known in the context of acid rain, global warming and pollution of the North Sea. However, German diplomacy did not take it into account when it made the strategic decision to enter into the joint venture with Russian concerns.

The precautionary principle has grown to the rank of a general principle of Community law as a result to judgements issued by ECJ and the First Instance Court. It has been repeatedly invoked in cases associated with environment and health protection. Among these case, the following ones deserve particular attention: 174/82 - *Sandoz*[39], 247/84 - *Motta*[40], C–180/96 - *United Kingdon vs. European Commission* (known as BSE)[41] , T–147/00 - *Les Laboratoires Servier vs. European Commission*[42] and T–392/02 - *Solvay Pharmaceuticals*[43]. These judgements link the precautionary principle with the proportionality principle. That link has been expressed most convincingly by ECJ in the case C–178/84 – *European Commission vs. Germany* (known as *"Reinheitsgebot"*)[44]. In that case, the court stressed that the proof of the existence of a threat does not have to be *conclusive*, as all that is required is presentation of *sufficient scientific indications*. It is a reference to the theory of probability, which is universally accepted in matters of preventive and compensatory liability for damages of catastrophic proportions. Such distribution of the evidential burden is characteristic to jurisprudence and constitutes an integral element of a regulation that is subject to interpretation[45].

The discussion of the Nord Stream Pipeline project must not overlook the *principle of good/sound administration*[46]. Its foundations are set forth in art. 41.1 of the Charter of Fundamental Rights of the European Union[47]. Thanks to judicial decisions, it has grown to the rank of a general principle of Community law[48]. *Administrative care / due diligence* refers to actions/inactions of the European Commission or member state administrative authorities. This notion was subject to a thorough analysis in the case T–178/98 - *Fresh Marine vs. European Commission*[49], in which ECJ established the absence of *ordinary care and diligence* on the part of the European Commission. In turn, in the case C–269/90 -

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[36] They are enumerated in the Sixth Environment Action Programme of the European Community, COM (2001) 31 final, pp. 3–91.

[37] This purpose is served by the IMPEL network that operates pursuant to the European Parliament and Council Resolution No 1600/2000 on the Sixth Environment Action Programme (Official Journal 2000, L 242).

[38] See Jordan – *"The precautionary principle in the European Union"*, [in:] *"Reinterpreting the precautionary principle"*, London 2001, pp. 143–161.

[39] European Court Reports 1983, p. 2445.

[40] European Court Reports 1985, p. 3887.

[41] European Court Reports 1998, p. I - 2265.

[42] European Court Reports 2003, p. II - 85.

[43] European Court Reports 2003, p. II - 4555.

[44] European Court Reports 1987, p. 1227.

[45] Also see the discussion of the weight of the distribution of evidential burden in Community law against the background of the Rospuda case in T.T. Koncewicz – *"Przypadek Rospudy: ciężar dowodowy obciąża tego kto ingeruje w przyrodę", Rzeczpospolita* 61/2007, p. C4.

[46] That principle is discussed in K. Lenaerts, *op. cit.*, pp. 336–342, and in D. Edward, *op. cit.*

[47] A. Skóra – *"Pojęcie i podstawowe zasady europejskiego postępowania administracyjnego"*, [in:] Z. Brodecki (ed.) – *"Regiony. Seria Acquis Communautaire"*, LexisNexis, 2005, pp. 330–337.

[48] S. Majkowska – *"Uwagi do art. 225, 226, 230 i 232 TWE"* [in:] Z. Brodecki (ed.) – *"Traktat o Unii Europejskiej. Traktat ustanawiający Wspólnotę Europejską. Komentarz"*, LexisNexis, 2006, 2nd edition, pp. 676–681, 682–685, 689–702, 703–709.

[49] European Court Reports 2000, p. II - 3331.

Technische Universität München[50], attention was directed to the issue of *administrative fairness* in situations when the deciding authority had *large power of appraisal* at its disposal. In such situations, the Commission is burdened with the obligation to analyze the factual status at the appropriate time and, if necessary, ask for an expert opinion[51] so as to prevent issuance of an arbitrary decision[52]. Entities set on using their right to sound administration can induce the Commission into taking up appropriate action[53]. The motives behind its action or inaction must be always accompanied by a proper and exhaustive justification (*sufficient reasoning*)[54].

The right to sound administration can be invoked by entities on which the relevant norm has *direct effect* and to which it can be *directly applied*[55]. As a rule, environmental protection norms meet these requirements[56]. This is confirmed by judgements delivered in cases C–321/95 - *Greenpeace vs. European Commission*[57], C–431/92 – European Commission vs. Germany[58] (known as *Grosskrotzenburg*) and C–129/96 - *Inter-Environmental Wallonie*[59]. In these cases, judges had no doubt whatsoever that, for example, Directive 85/337 on environmental impact assessments established the obligation to precede investment projects with appropriate procedures.

3. Nord Stream Pipeline: judicial strategies and lines of argument. A hypothetical scenario.

Variant I: *European Commission vs. Germany*

Art. 226 of the Treaty deals with European Commission complaints against member states which violate Community law. For the purpose of this article, Community law is meant in its broad sense; it covers not only written sources but also structural principles fundamental to the successful achievement of the Community's tasks. A particularly important role is played in this respect by art. 10 of the Treaty, which imposes on member states the obligation of loyalty to the Community. ECJ judicature stresses that in certain circumstances that obligation can induce member states to consult the Commission for the purpose of preventing a conflict with Community law and objectives, or obstruction of the execution of its policies. A member state that acts unilaterally disregards its Community responsibilities and violates the fundamental premise of integration as a community of interests and goals. An important message which can be read as a confirmation of Polish misgivings addressed to Germany in connection with the construction of the Nord Stream Pipeline is found in the case C–459/03 which is analysed in depth below. The member state obligation to keep the Commission informed takes on a special significance in a sphere that may impact competences handed over to the

[50] European Court Reports 1991, p. I - 5469.
[51] That direction was also taken in the case C–212/91 - *Angelopharm vs. Hamburg*, European Court Reports 1994, p. I – 173, and in the case 151/98, *Pharos vs. European Commission*, European Court Reports 1998, p. II–3407.
[52] See also the case T–95/96, *Gestevision Telekino vs. European Commission*, European Court Reports 1998, p. II–3407.
[53] This is confirmed by the judgement issued in the case T–231/97, *New Europe Consulting and Brown vs. European Commission*, European Court Reports 1999, p. II–2403. A detailed account of that judicature is provided by H.G. Schermers, D.F. Waelbroeck, *op. cit.*, and H. P. Nehl – *"Principles of Administrative Procedure in EC Law"*, Hart Publishing, 1999.
[54] As in art. 41.2 of the Charter of Fundamental Rights of the European Union.
[55] S. Majkowska, M. Nyka in *"Europa sędziów"*, LexisNexis, 2007, in print.
[56] D. Edward, *op. cit.*, p. 488 and subsequent.
[57] European Court Reports 1998, p. I–1651.
[58] European Court Reports 1995, p. I–2189.
[59] European Court Reports 1997, p. I–7411.

Community. As a result, the Commission finds itself in a position to clarify (particularly in borderline and doubtful situations) whether the case relates to Community law and to what extent, and decide whether there are grounds to initiate proceedings under art. 226 of the Treaty.

Even if one accepts that Germany has kept its competence to act unilaterally in the sphere covering the agreement with Russia (which, as explained below, is doubtful in our view), that competence does not give it the right to act freely. Indeed, there exist judicial decisions which stress that member states must not use their reserved competences in a manner threatening Community objectives. Two examples illustrate that peculiar "competence reflex": organization of the armed forces and penal law. In both cases, ECJ did not challenge state competence but stressed that choices made within its framework had to conform to Community law. This is why, despite its evident competence in the given sphere, the state could not completely exclude women from serving in the army (case *Tania Kreil* – violation of the Community principle of non-discrimination[60]) and, when determining penal sanctions for possession of narcotics, it could not interfere excessively with the freedom to provide services (case *Donatella Calfa*[61]). These circumstances contain strong grounds for the Commission to become interested in the gas pipeline case and the argument that the matter is subject to Germany's exclusive competence does not have to be viewed as decisive.

Variant II: *Poland vs. Germany*

However, the problem with challenging Germany under art. 226 of the Treaty is that Poland cannot force the European Commission to take the case to ECJ. Such decision belongs solely and exclusively to the Commission and its potential refusal is not subject to court appeal. This said, the Community dispute-resolution system does not leave states at the mercy of the Commission. Art. 227 of the Treaty provides for one member state bringing a matter against another member state before ECJ. This procedure plays the role of a safety valve for member states in situations where, under art. 226 of the Treaty, the Commission fails to recognize the grounds for bringing a case before ECJ. When that happens, the state which disagrees with the Commission decision and considers the matter important from the perspective of its interests can take legal action against another state individually.

Of course, court litigation between states should be the last resort[62]. Still, a potential confrontation in court in the matter of the pipeline is unlikely to exacerbate the current diplomatic conflict as the positions of both parties are well known and forcefully articulated. It would provide an opportunity for an unbiased and binding resolution based on a thorough consideration of all arguments and reasons. The advantage of art. 227 of the Treaty also lies in the possibility of taking over and expanding upon arguments presented (unsuccessfully) by the state before the Commission under art. 226 of the Treaty. This applies, before or else, to the argument based on art. 10 of the Treaty, which is interpreted in judicature as the source of numerous extremely important and broad obligations of member states toward the Community and, as such, constitutes an invaluable "argumentation" reservoir in a lawsuit. Further, the feature of the Community "as one based on law" has an equally impressive legal potential: that law determines the conduct of states not allowed to shun the responsibilities of membership in the Community. In addition, consideration could be given to charging Germany with a violation of the Law of the Sea Convention (LSC). LSC requires states bordering on semi-

[60] Case C–285/98, European Court Reports 2000, p. I–69.
[61] Case C–348/96, European Court Reports 1999, p. I–11.
[62] See T.T. Koncewicz – *"Artykuł 227 Traktatu rzymskiego - państwa członkowskie przed Trybunałem Sprawiedliwości", Rzeczpospolita* no. 128/2003.

enclosed seas (such as the Baltic Sea) to cooperate with one another in the exercise of their rights and in the performance of their duties. This is significant as LSC is an international agreement that constitutes an integral part of Community law and the requirement to cooperate set forth therein can be interpreted as an extension of the Community loyalty principle. Both principles give rise to the ban on actions that damage the legally protected rights of other states. Consequently, does Germany's conduct satisfy the requirement of notifying and consulting the Commission before taking action? Why did Germany act unilaterally and place Poland before a *fait accompli*? Can such unilateral state outlook and policy implementation be questioned in the light of the Community loyalty principle? Finally, considering LSC provisions, EU energy policy, precautionary principle that is a general principle of Community law and marine environment protection, did Germany stay within the boundaries marked out by the framework of Community law? All these questions refer to issues that are strictly legal rather than political. Once we dress them in an appropriate justification, encase them in judicial precedents, prop everything up with a systemic interpretation, we end up with a classic "Community *hard case*" perfectly suited for a binding ECJ resolution. Knowing the ECJ preferred way of reasoning based on accentuation of the true nature of Community objectives, weight given to the principles on which the system is built (loyalty, unity, binding character of member state obligations), endeavour to ensure the effectiveness of Community legal norms, the charge of Germany having acted "outside the Treaty" and the rigors of its membership in the Community could be indeed proven before the court.

Variant III: *Poland vs. Commission*

Art. 232 of the Treaty deals with bringing action against a Community institution for having failed to act. According to the content of that article, such action can be brought in situations where an institution remains inactive even though Community law obligates it to act. An institution called upon to act has two months to assume a position on the issue. The purpose of art. 232 is to implement the duty to act in a situation where the institution has not taken any action at all. It is important to note that neither the political nature of the issue at hand nor the delicate character of its subject-matter can be used as justified reasons for an institution to delay looking at the issue[63]. An institution that expressly refuses to act cannot be subject to the inaction complaint. Such situation allows for moving for invalidation of the pertinent legal decision. In the gas pipeline matter, Poland benefits from the broad judiciary delineation of the boundaries of the inaction complaint, which allows to challenge inaction consisting in not accepting a strictly specified legal decision, but also to challenge inaction defined more broadly. In the past, ECJ admitted a complaint against general inaction in the area of the common transportation policy. However, if this route is taken, the complainant must specify the absence of which legal acts he questions within the framework of the general inaction complaint.

From the viewpoint of the gas pipeline construction case, it is important to know that ECJ admits the possibility of a member state coming forth with an inaction complaint directed against an institution that desisted from launching proceedings leading not only to issuance of a binding legal decision but also of legal decisions without a binding force (suggestions, opinions, reports), to which it is obligated under Community law. Also in the context of art. 232, the entire reasoning would be based on and circulate around art. 10 of the Treaty and its interpretation by ECJ. The obligation to exercise Community loyalty applies not only to member states (as spelled out in art. 10 of the Treaty) but equally to all Community institutions (as ECJ courageously decided in the *IMM Zwartveld* case[64]). The

[63] K. Lenaerts, D. Arts, I. Maselis – *"Procedural Law of the European Union"*, Sweet and Maxwell, 2006, p. 329 and subsequent.
[64] Case C-2/88, European Court Reports 1990, p. I-3365

fundamental issue would be to prove that the Commission is obligated to act bearing in mind the Community energy policy, fisheries policy and potential violation of competition terms. However, more decisive than anything else would be environmental protection considerations and potentially harmful effect of gas pipeline construction on the marine environment, since the Commission itself has repeatedly confirmed in proceedings before ECJ that environmental protection is a key Community goal and ECJ has recognized the existence of Community competence in the area of marine environment protection and preservation. Consequently, in the light of the ecological threat presented by the gas pipeline, the premise that laying any gas pipeline on the seabed should always be the act of last resort and the fact that the alternative land route has not been fully explored, there would be a need to evaluate the project from the perspective of its detrimental impact on marine environment.

4. Unappreciated judicial "community of interests"

When analysing and anticipating possible jurisdictional strategies in the Nord Stream Pipeline case, we must count in one more factor – proliferation of international courts. New international courts, each with a different jurisdiction, keep popping up[65]. More interaction between courts means more interaction between their judges. Nowadays judges pay attention to decisions issued by other courts, study their judgements, follow their course of reasoning, become familiar with new ways of looking at the same problem. In this respect, proliferation of international courts is a good thing. On the other hand, the growing number of courts increases the probability of getting different answers to the same question. Courts may interpret the same question differently because they will each time consider the context of the interpreted question. Every international court must in good will pay attention to judgements issued by other courts. It must become clear to judges that a judicial supranational round-table, which decides on issues vital to states and citizens, is in the process of being created. It is judges' duty as main actors in that process to maintain an open attitude that promotes goodwill cooperation and respects the competence and the judgement line of other courts that belong to this "judicial community". All this in the name of harmony, dependability and predictability of law[66]. The existing threat of discrepancy is built into such pluralistic and multi-level system[67].

These reflections are particularly relevant in the context of the Nord Stream Pipeline case. In a world dominated by courts, the key issue is to aptly apply the existing

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[65] Literature related to this topic is extremely rich. In particular, see A.M. Slaughter – *"A Global Community of Courts"*, 2003, Harvard International Law Journal 191; R. Higgins R. *"A Babel of Judicial Voices? Ruminations from the Bench"*, 55 (2006) International Comparative Law Quarterly 791; N. Lavranos – *"Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals. Part I"*, 2005, European Environmental Law Review 213; N. Lavranos, *"Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals. Part II"*, 2005, European Environmental Law Review 240; N. Lavranos – *"The MOX Plant Judgment of the ECJ: How exclusive is the jurisdiction of the ECJ?"*, 2006, European Environmental Law Review 291; N. Lavranos – *"Protecting Its Exclusive Jurisdiction: The Mox Plant-judgment of the ECJ"*, 2006, Law and Practice of International Tribunals 479; R. Lawson, (2000) 37 Common Market Law Review; R. Lawson – *"Current Trends in the Relationship between Strasbourg and Luxembourg"*, ERA Trier, 2–3 June, 2005); T.T. Koncewicz – *"Wspólnotowe prawa fundamentalne i jurysdykcyjne dialogi w ramach europejskiej „wspólnoty sędziów""*, Radca Prawny 2/2006; Z. Brodecki, T.T. Koncewicz – *"Trybunał Sprawiedliwości i delimitacja prawa wspólnotowego: Glosa do postanowienia Trybunału Sprawiedliwości w sprawie Attila Vajnai"*, Europejski Przegląd Sądowy 9/2006.

[66] Rao - *"Multiple Judicial forums: A Reflection of the Growing Strength of International Law or its Fragmentation, Diversity or Cacophony?, New Judicial Sources of Norms in International Law - Symposium"*, 2004, Michigan Journal of International Law 929.

[67] More in T.T. Koncewicz – *"Europejskie i krajowe sądy tworzą coraz ściślejszą wspólnotę"*, Rzeczpospolita 26/2007, p. C4. The author points out that the judicial community now also includes the Constitutional Tribunal and national courts.

mechanisms of legal protection, select an appropriate forum to present "one's case" and, finally, chose the right argumentation.

A particular attention should be paid to the judgement rendered by ECJ in the case C-459/03 – *Commission vs. Ireland*[68]. This case is interesting not only because of the judgement itself (emphasis on ECJ's jurisdictional monopoly in matters of Community law and expansive interpretation of the scope of ECJ's jurisdiction), but also because of the circumstances that preceded and accompanied the Commission infringement action. The issue regarded compliance of art. 10 and art. 292 of the Treaty with Ireland's decision to submit for examination by arbitration courts a dispute concerning radioactive waste produced by MOX Plant in Sellafield and dumped into the Irish Sea. In the Commission's opinion, the issue had to do with interpretation of Community law and, as such, was under exclusive ECJ jurisdiction. In first instance, the arbitration court acknowledged its jurisdiction under the Convention for Protection of the Marine Environment in North-East Atlantic, adjudged that the Convention constituted a sufficient basis for judging the case and, therefore, there was no need to take other circumstances into account (such as the potential existence or inexistence of ECJ jurisdiction over the matter). In second instance, conducted under the provisions of the Law of the Sea Convention, proceedings were suspended after the arbitrators pointed out to the parties in the dispute the grounds for establishing whether ECJ did not have jurisdiction over the matter. The parties' response was forestalled by the Commission, which submitted a complaint to ECJ under art. 226 of the Treaty. In its judgement, ECJ stated that Ireland had violated Community law and jurisdictional monopoly of ECJ, which had exclusivity on resolving disputes based on the interpretation of Community law, EU member state and institution obligations, and the nature and extent of Community competences.

In respect of the Nord Stream Pipeline, the message conveyed in the judgement on the *Commission vs. Ireland* case is a precedent. It can be presented thus[69]:

Firstly, the Law of the Sea Convention constitutes an integral part of the Community legal order. In ECJ's opinion, the circumstances invoked by Ireland as justifying the actions pursued "outside" the Community court system concerned the interpretation of Community law *par excellence* and, therefore, ECJ had exclusive jurisdiction over the issue.

Secondly, the judgement confirms that international agreements must not have a detrimental effect on the jurisdictional system set forth in the Treaty and on ECJ jurisdictional exclusivity within its framework. This is extremely important in the Nord Stream Pipeline case as it gives grounds to argue that states must not undermine the integrity of the system by acting in a different manner than by signing international agreements. Art. 10 of the Treaty ("solidarity") orders member states to respect the competence system and Community jurisdiction[70].

Thirdly, the judgement stresses the importance of the autonomy of Community law and of the need to ensure the uniformity of interpretations of the competences transferred by member states to the Community. This, in turn, opens wide possibilities for arguing in the gas pipeline case that Germany has violated that legal system and its autonomy.

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[68] Judgement of 30th May 2006 accessible on www.curia.europa.eu

[69] For a detailed discussion of the judgement see N. Lavranos – *"The MOX Plant Judgment of the ECJ: How exclusive is the jurisdiction of the ECJ?"*, 2006, European Environmental Law Review 291; N. Lavranos – *"Protecting Its Exclusive Jurisdiction: The Mox Plant Judgment of the ECJ*, 2006, Law and Practice of International Tribunals 479, and the literature cited therein.

[70] ECJ decisions concerning the 3rd pillar also reinforce that conclusion and underline the fact of member states being bound by the adopted *acquis communautaire*. See T.T. Koncewicz, P. Rybiński – *"Prawo wspólnotowe: nadciągająca fala, czy niszczący bałwan morski? Uwagi na marginesie wyroku Trybunału Sprawiedliwości Wspólnot Europejskich w sprawie C-176/03 - Commission vs. Council"*, Palestra 5-6/2007.

Fourthly, the judgement reinforces the postulate of the duty of member states to consult the Commission prior to taking action and to supply it with appropriate and exhaustive information which will enable it to evaluate the action's legality[71]. Art. 10 of the Treaty fulfils the function of a reservoir of these duties and ECJ ensures their execution. All that is left is a proper selection of the jurisdictional variant, as discussed earlier.

Fifthly, the direction of the judgement expresses ECJ's apprehension of the fragmentation of Community law and of its own jurisdiction.

Sixthly, the judgement stresses the obligatory nature of the jurisdiction of the Community court. States are not allowed to "run away" from the Community judicial forum and select at their will another court to hear their case.

Bearing all this in mind, here are some summarizing conclusions:

Conclusions

Appreciating the judicial dimension of integration

The present article shows that the Treaty contains jurisdictional grounds for launching proceedings, suggests selected elements that in case of a dispute would play a role in supporting the Polish position and outlines the substratum which could serve as a basis of arguments challenging the legality of the gas pipeline construction.

It is an error to think that the political level is the only one at which the admissibility of laying a gas pipeline on the Baltic seabed can be examined. It appears that we are not taking full advantage of the possibilities presented by Community law. Even more: by focusing on the political and media aspect of the dispute (the Polish government fighting hard in defence of Polish interests), we neglect what we can achieve by relying to a greater degree on formalised judicial procedures and mechanisms - less spectacular but, at times, more effective. Community law contains a dispute resolution system that is compulsory to and binds all member states, and that contains diverse means of court protection of member state interests[72]. In the Community, the legal world functions parallel to the political world and according to its own dynamics, allowing the execution of certain objectives via a properly selected "court strategy" and, whenever possible, reforging politics into legal arguments. The concept of a "Community based on law" means that integration must always keep a legal dimension, which in consequence underlines the applicability of the saying *"iura vigilantibus scripta sunt"*. The phenomenon of the Community rests in that its law has its own dynamic and can be used as an instrument to achieve assumed goals[73].

To date, there have been too few legal arguments and too little use made of judicial principles and precedents in the dispute over the Nord Stream Pipeline.

The final conclusion is the following: in a situation where it is too late to reverse political decisions, Poland simply cannot afford to stay passive, particularly since the European

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[71] This aspect is expounded in the opinion of Advocate General Poiares Maduro; in particular, see Point 58 of the opinion and the case law cited therein.

[72] This is discussed at length in T.T. Koncewicz – *"Zasada jurysdykcji powierzonej Trybunału Sprawiedliwości Wspólnot Europejskich. Dynamiczna koncepcja wspólnotowego wymiaru sprawiedliwości"*, Prawo i Praktyka Gospodarcza Publishers, 2006; *"Jurysdykcja Trybunału Sprawiedliwości: nietypowa międzynarodowa, czy szczególna wspólnotowa"*, Palestra 9-10/2006; and recently – *"Do czego zobowiązuje członkostwo w Unii Europejskiej"*, Rzeczpospolita of 5th April 2007.

[73] More in Z. Brodecki – *"Prawo integracji w Europie"*, LexisNexis, 2006, particularly p. 94 and subsequent, where precedence is given to art. 220 of the Treaty, which obligates ECJ to ensure legal compliance in the process of interpretation and application of the Treaties.

Court of Justice is known for its unwavering and uncompromising defence of the common interest and enforcement of obligations voluntarily contracted by member states. Let us then try to take advantage of Community methods in pursuing our rights before ECJ which, after all, has been described as “the mightiest of all international tribunals”.