

MAKING SENSE OF SOLIDARITY IN INTERNATIONAL LAW: INPUT FROM THE INTEGRATION OF THE EUROPEAN GAS MARKET

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Solidarity is cited in the international law doctrine but often denied a self-standing legal meaning and normative force in international relations. Its mainstream understanding in the international law doctrine is often limited to a socio-political notion, which in my view neglects the evidence that one can gather from the practice of international law regimes. This happens to be particularly true for the international law of Ukraine-EU gas market integration, which operates the term quite widely. The present article seeks to repair the said omission by explaining how solidarity is pinpointed in this international law framework. This analysis allows picturing solidarity in three different legally relevant dimensions (constitutional principle, general legal maxim and the duty of cross-border assistance). The latter two dimensions present solidarity in terms of specific rights and obligations, which can be helpful in cementing solidarity as a legal notion in international law.

Keywords: solidarity, Ukraine-EU relations, EU external energy policy, Energy Community

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I. INTRODUCTION

Despite being extensively discussed in the academic literature,¹ solidarity is often viewed with scepticism by international law scholars who consider it undefinable or incapable of affecting international relations.

These conclusions are rarely based on the analysis of European Union law or of the international law of European energy cooperation. In fact, in the EU Treaties² solidarity is mentioned by name and is considered one of the principles of EU law. It takes specific legal forms in sectoral regulations, in particular on energy where it features both as a guiding principle³ and as a practical tool to ensure security of natural gas (gas) supply.⁴

¹ For an international law account of the concept, see Ronald St. John MacDonald, 'Solidarity in the Practice and Discourse of Public International Law' (1996) 8(2) *Pace International Law Review* 259; Rüdiger Wolfrum, 'Solidarity amongst States: An Emerging Structural Principle of International Law' in Pierre Marie Dupuy and others, *Common Values in International Law: Essays in Honour of Christian Tomuschat* (N.P. Engel Verlag 2006) 1087; Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer 2010); Holger Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill 2012); Markus Tobias Kotzur and Kirsten Schmalenbach, 'Solidarity Among Nations' (2014) 52(1) *Archiv des Völkerrechts* 68.

² Treaty on European Union (TEU); Treaty on the Functioning of the European Union (TFEU).

³ TFEU, art 194.

⁴ 'New rules to secure gas supplies in Europe bring more solidarity' (European Commission, 12 September 2017) <http://europa.eu/rapid/press-release_IP-17-3203_en.htm> accessed 02 December 2018.

Relatively more successful than the internal market for electricity,⁵ the EU's internal gas market has been instrumental in spreading the Union's regulatory approaches beyond its borders. This process is forged through international law arrangements, including association agreements as well as the Treaty Establishing the Energy Community (EnC).⁶

In the Energy Community, Ukraine is the second biggest member (after the EU), based on gas market parameters.⁷ It is a critical route for transporting gas of a single Russian exporter, Gazprom, to the EU and wider Europe, including the Balkans.⁸ Adding that to Europe's general dependence on Russian gas,⁹ Ukraine is the crucial security factor for the whole of the Energy Community.

Since 2014 when Ukraine made a strategic turn from Russia in its gas policy,¹⁰ legal instruments of Ukraine-EU integration in this sector have absorbed numerous references and instruments of solidarity from the European Union legal order.

⁵ 'Continued gas wholesale market integration, but electricity market integration at risk' (ACER, 06 October 2017) <<http://www.acer.europa.eu/Media/News/Pages/Continued-gas-wholesale-market-integration,-but-electricity-market-integration-at-risk.aspx>> accessed 02 December 2018.

⁶ Treaty Establishing the Energy Community (signed 27 June 2014; entered into force 01 July 2006) OJ L198/18 (EnC). For the most recent text of the treaty, see <<https://www.energy-community.org/legal/treaty.html>>.

⁷ Energy Community Secretariat, 'Annual Implementation Report' (2017) <<https://www.energy-community.org/implementation/IR2017.html>> accessed 02 December 2018.

⁸ DG Energy, 'Quarterly Report on European Gas Markets, Market Observatory for Energy: Volume 11 (issue 2; second quarter of 2018)' 11 (figure 9). See also Regulation 2017/1938 (n 105) Annex I where the risk group 'Ukraine' involves: Bulgaria, Czech Republic, Germany, Greece, Croatia, Italy, Luxembourg, Hungary, Austria, Poland, Romania, Slovenia, Slovakia.

⁹ DG Energy (n 8) 9. See also Energy Community Secretariat, 'Knocking on the EU's Door through the Energy Community: Integration of Western Balkans into the Pan-European Energy Market' (2018) 8 <<https://www.energy-community.org>> accessed 02 December 2018 ('Russia continues to dominate the gas market [in the Western Balkans] in such a way that would be unacceptable in the EU').

¹⁰ Katarzyna Wolczuk, 'Managing the flows of gas and rules: Ukraine between the EU and Russia' (2016) 57(1) *Eurasian Geography and Economics* 113.

This article seeks to shed light on solidarity in international law by using the example of a field that is not commonly explored by international lawyers. In my view, the non-recognition of solidarity as a legal notion is partially caused by the lack of its exact description. By establishing a useful interface between international and EU law on the subject, our analysis concentrates on the identification of clear-cut forms of solidarity, especially its transcription into specific, positive (to do) and negative (not to do) obligations. In Section II, since we are primarily concerned with the role of solidarity in international law, we offer a working definition of solidarity, along with its basic normative content, derived from the international law doctrine. In Section III, this definition is validated in the EU legal order, which helps to delineate different legally relevant dimensions of solidarity, thus signalling that its reading as a socio-political, 'meta-legal' notion is incomplete. These dimensions are then identified in the international law framework of Ukraine-EU gas market integration (Section IV), where the EU law constructs operate in a truly international law setting. Section V summarises the conclusions from this exercise.

II. SOLIDARITY IN INTERNATIONAL LAW

1. How can Solidarity be Defined for International Law Purposes?

What do we mean by solidarity in an international law context? An authoritative commentator remarks that 'the expression "solidarity" (a) scarcely appears in any international treaty of note; and (b) is missing from landmark statements articulating the general practice of States accepted as law, namely, custom'.¹¹ More drastically, another acknowledged lawyer notes that solidarity 'is too abstract and too indefinite in contours and contents to become a normative concept that produces steering effects on States' behaviour in international relations'.¹²

It is indeed true that solidarity is not expressly mentioned in the Charter of the United Nations. Neither is it listed among fundamental principles of

¹¹ 'Discussion Following the Presentation by Philipp Dann' (intervention by Yoram Dinstein) in Wolfrum/Kojima (n 1) 78.

¹² Ibid 42.

international law under the Friendly Relations Declaration.¹³ The UN Desertification Convention¹⁴ is one of the few universal international treaties referring to solidarity but not clarifying its meaning. No reputable international law interpreter (e.g. International Court of Justice, International Law Commission) have had the right occasion to express itself on the universal definition of solidarity. The history has known attempts to denote solidarity in political acts, namely as part of the legal toolkit of the New International Economic Order¹⁵ and in relation to the UN Millennium Development Goals.¹⁶ However, they arguably failed to gain universal recognition, proposing an asymmetrical treatment of developing countries.¹⁷

It is thus the legal scholarship (in academia, governmental and inter-governmental public service) who have shaped the concept of solidarity in international law for purposes of domestic and international decision-making.

¹³ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (24 October 1970).

¹⁴ United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (adopted 17 June 1994; entered into force 26 December 1996) 1954 UNTS 3, art 3(b).

¹⁵ Report of the Secretary-General, 'Progressive Development of the Principles and Norms of International Law relating to the New International Economic Order' (1984) UN Doc A/39/504/Add.1, 91. See also UNGA Res 55/107 (14 Mar 2001) UN Doc A/RES/55/107, UNGA Res 59/193 (20 Dec 2004) UN Doc A/RES/59/193 ('(f) Solidarity, as a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly in accordance with basic principles of equity and social justice and ensures that those who suffer or who benefit the least receive help from those who benefit the most'). Kotzur/Schmalenbach (n 1) 74.

¹⁶ United Nations Millennium Declaration, UNGA Res 55/2 (18 Sep 2000) ('Solidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.'). See Philip Dann 'Solidarity and the Law of Development Cooperation' in Wolfrum/Kojima (n 1) 64.

¹⁷ MacDonald (n 1) 279-280; Bruno Simma, 'From bilateralism to community interest in international law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 237.

According to Wolfrum (referring to Scheuner), 'the idea that the principle of solidarity should guide states in their relations was discussed between the sixteenth and nineteenth centuries'.¹⁸ Yet, it is hard to trace the evolution of solidarity as a separate international law notion before the time when the term itself was formulated and became part of the mainstream linguistic practice.¹⁹ Derived from Roman law (*obligatio in solidum*),²⁰ solidarity appears in the 1804 French Civil Code in a narrow legal context of shared responsibility, but '[t]he transformation of the legal concept of solidarity into a political concept seems to have begun in the latter half of the eighteenth century'.²¹ Leroux (1797-1871) is credited as the 'first theorist of solidarity' in print thanks to his 1840 publication.²² This must be the time when the term migrated to England and Germany.²³ Both the Oxford English Dictionary²⁴ and the Digital Dictionary of the German Language²⁵ indicate the French origin of the word and give the earliest reference thereto to the 1840s.

It is in the mid-19th century that the 'solidarity theory of law' was developed by Duguit (1859-1928) and extended to the field of international law by Scelle

¹⁸ Rüdiger Wolfrum, 'Solidarity' in Dinah Shelton (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press 2015) 402; Ulrich Scheuner, 'Solidarität unter den Nationen als Grundsatz in der gegenwertigen internationalen Gemeinschaft' in Jost Delbruck, Knut Ipsen, Dietrich Rauschning (eds), *Recht im Dienst des Friedens: Festschrift für Eberhard Menzel* (Duncker & Humboldt 1975).

¹⁹ Steinar Stjerno, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2004) 25 ('The idea existed before the term became widespread, and the term was in general use before its modern meaning had developed.').

²⁰ Hauke Brunkhorst, *Solidarity: From Civil Friendship to a Global Legal Community* (The MIT Press 2005) 2.

²¹ Stjerno (n 19) 27.

²² Laurence Wilde, *Global Solidarity* (Edinburgh University Press 2013) 20-21. See Pierre Leroux, *De l'humanité* (Perrotin 1840).

²³ Stjerno (n 19) 30.

²⁴ OED Online, <<http://www.oed.com>> accessed 02 December 2018. See Malcolm Ross, 'Solidarity: A New Constitutional Paradigm for the EU?' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010) 23 ('[t]he first mention of solidarity in the Oxford English Dictionary only appears in the mid-nineteenth century').

²⁵ Das Wortauskunftssystem zur deutschen Sprache in Geschichte und Gegenwart, <<https://www.dwds.de>> accessed 02 December 2018.

(1878-1961),²⁶ becoming one of the mainstream doctrines describing the origin of international law.²⁷ Duguit explains solidarity in the context of individual freedom:

once a man becomes part of the society and because he is a social being, there are born for him a series of obligations, namely to exercise his own physical, intellectual and moral activity and to abstain from doing whatever can hinder the development of others, so that in the end it is not correct to say that a man has the right to exercise his activity; rather he has the duty not to hinder the activity of others, the duty to facilitate and assist within his powers²⁸

and admits that '[this] duty can be founded only on the principle superior to the man, on the ideal to be pursued, on the goal to be achieved'.²⁹ Interestingly, he recognizes that the word 'solidarity' is quite often used indiscriminately.³⁰

For Scelle, solidarity can be driven by either innate similarities or forces unleashed by the division of labour,³¹ but in any event it is a product of social reality reaching out to the international plane; this metalegal (*métajuridique*)³² phenomenon pre-determines the existence of socially necessary international legal orders.³³ His contemporary colleagues in theory and practice of international law likewise appealed to the socially cohesive quality of solidarity.³⁴ They all thus viewed solidarity as a socio-political notion rather than as a legal concept formalised in positive law.³⁵

²⁶ Armin von Bogdandy 'Opening Address' in Wolfrum/Kojima (n 1) 2.

²⁷ Oriol Casanovas y La Rosa, *Unity and Pluralism in Public International Law* (Martinus Nijhoff Publishers 2001) 6-10.

²⁸ Léon Duguit, *Souveraineté et liberté: leçons faites à l'Université Colombia (New-York), 1920-1921* (Librairie Felix Alcan 1922) 142 (author's translation).

²⁹ Ibid 144.

³⁰ Duguit (n 28) 147.

³¹ Georges Scelle 'Règles générales du droit de la paix' (1933) 46 *Recueil des Cours de l'Académie de Droit International* 327, 339-340.

³² Ibid 334-335.

³³ Ibid 350.

³⁴ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2009) 287-352.

³⁵ Although it cannot be excluded that this image of solidarity was influenced by the Code Civil. See Koskenniemi (n 34) 289.

Modern scholars locate solidarity in individual treaty provisions, principles and branches of international law such as: Article 22 of the Covenant of the League of Nations,³⁶ Articles 41-42, 49-50 of the UN Charter,³⁷ Article 1 of the 1949 Geneva Conventions,³⁸ Article I of the General Agreement on Trade and Tariffs 1994,³⁹ Article 5 of the North Atlantic Treaty;⁴⁰ *erga omnes* obligations,⁴¹ collective security,⁴² the responsibility to protect,⁴³ sustainable development and common but differentiated responsibilities;⁴⁴ international development law,⁴⁵ international human rights law,⁴⁶ and international refugee and disaster relief law.⁴⁷ In doing so, they mostly rely on some ordinary, often dictionary meaning of solidarity, usually skipping a complicated exercise when they would need to determine the full content of the term for international law purposes. Some even consider this exercise doomed to failure.⁴⁸

However, the many doctrinal applications of solidarity have similarities which can be summarised to form a non-contentious definition. Taking

³⁶ MacDonald (n 1) 261.

³⁷ Karel Wellens, 'Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections' in Wolfrum/Kojima (n 1) 28-30.

³⁸ Ibid 20.

³⁹ Ibid 22. See also Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1096-1098.

⁴⁰ Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1091-1092.

⁴¹ Wellens (n 37) 22-28.

⁴² Abdul G Koroma, 'Solidarity: Evidence of an Emerging International Legal Principle' in Hestermeyer (n 1) 104-105; Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1092-1093.

⁴³ Wellens (n 37) 12; Koroma (n 42) 119-123; Laurence Boisson de Chazournes 'Responsibility to Protect: Reflecting Solidarity?' in Wolfrum/Kojima (n 1) 94-95.

⁴⁴ Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1094-1096; Koroma (n 42) 111-113.

⁴⁵ Kotzur/Schmalenbach (n 1) 84-85.

⁴⁶ Theo van Boven 'The Right to Peace as an Emerging Solidarity Right' in Eva Rieter and Henri Waele, *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (Brill 2011).

⁴⁷ Nele Matz-Lück, 'Solidarität, Souveränität und Völkerrecht: Grundzüge einer internationalen Solidargemeinschaft zur Hilfe bei Naturkatastrophen' in Hestermeyer (n 1).

⁴⁸ Kotzur/Schmalenbach (n 1) 72.

inspiration from Dann's presentation at the 2008 convention,⁴⁹ I propose to define solidarity as a relationship generated by the interplay of three key elements: common values and objectives; mutuality; and equality.

For solidarity to exist, there must be a 'sense of community or commonality'⁵⁰ and a recognition that common values and objectives can be secured only if everybody in the community participates in the joint efforts (mutuality).⁵¹ This requires that the values and objectives must themselves be such as to depend on everyone's input. They must be susceptible of securing a community. Short-term or one-off objectives are unlikely to solidify mutual obligations. Mutuality also pre-determines that solidarity is a relationship among formal equals. When everyone contributes to the common cause which is otherwise non-achievable, 'solidarity changes the rules from the zero-sum game – "In order to win, someone else must lose" - to "No one wins unless everyone wins"'.⁵² Then even the least powerful has a say and simultaneously bears the burden of common efforts. Equality has formed 'the revolutionary core of the concept of solidarity',⁵³ providing a historical alternative to philanthropy and mercy. We can thus visualise solidarity as a wheel where the hub represents common objectives, the rim signifies equality (i.e. equal distance from the hub) and spokes stand for mutuality holding together the whole structure:

⁴⁹ Dann (n 16) 61.

⁵⁰ Simma (n 17) 238 (referring to MacDonald).

⁵¹ Dann (n 16) 61, fn 20 (referring to MacDonald).

⁵² MacDonald (n 1) 281.

⁵³ Dann (n 16) 57.

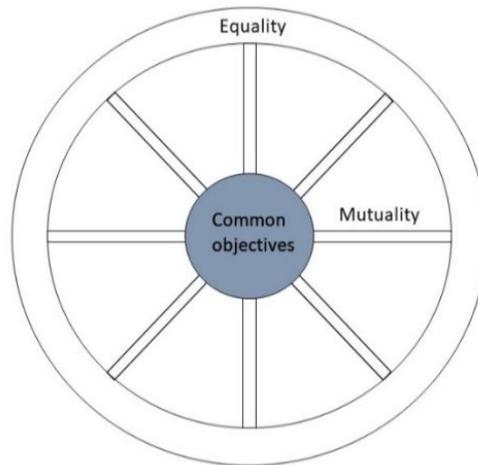


Figure 1: Visualisation of solidarity as a socio-political notion

This understanding of solidarity seems the most basic and the least controversial. Taken in its ideal form, solidarity can thus be distinguished from adjacent socio-political concepts such as cooperation (where mutuality is not as paramount to the achievement of the set goal) and loyalty⁵⁴ (where common goals are pursued in such a way that equality is undermined). It fits well into the consensual paradigm of international law, provides a healthy alternative to previously discarded attempts to define solidarity but does not fully cut away from those.⁵⁵ All this makes it suitable for test in real-life legal regimes.

2. *How can Solidarity Affect International Relations?*

To affect international relations, solidarity must be expressed in terms of legal rights and obligations of solidarity bearers, i.e. members of a community

⁵⁴ Kotzur/Schmalenbach (n 1) 74.

⁵⁵ Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (1 May 1974) 3 ('International co-operation for development is the shared goal and common duty of all countries. Thus the political, economic and social well-being of present and future generations depends more than ever on co-operation between all the members of the international community on the basis of sovereign equality and the removal of the disequilibrium that exists between them.').

bound by 'mutual concern'.⁵⁶ The definition suggested above does not however specify the personality of such solidarity-bearers. Their identity depends on the character of common values that are subject to convergence. Where such values are of interest to each and every individual ('solidarity with respect to humankind'⁵⁷), then the required level of mutuality becomes hard to achieve. This showcases the basic paradox of solidarity which 'turns on its simultaneous appeal to unity and universality and its dependence in practice on antagonisms between particular groups'.⁵⁸

A community can consist of individuals as e.g. advocated by Scelle.⁵⁹ However, even his vision pre-supposed that individuals would exercise solidarity through professional associations acting across borders,⁶⁰ i.e. through an appropriate medium. Since in this article we inspect specific international law instruments (see Section IV), we are best positioned to analyse the normative impact of solidarity at the level of states and other subjects of international law whose legal personality emanates from the state.

In this connection, several prominent international law scholars opine:

[solidarity] is an understanding among formal equals that they will refrain from actions that would significantly interfere with the realization and maintenance of common goals or interests. Solidarity requires an understanding and acceptance by every member of the community that it consciously conceives of its own interests as being inextricable from the interests of the whole. No state may choose to exercise its power in a way that gravely threatens the integrity of the community.⁶¹

[t]he principle of solidarity envisages equalizing deficits which result from the fact that jurisdictional powers of States are necessarily limited. Therefore States acting merely on an individual basis cannot provide satisfactorily for solutions which the interests of the community demand. Such demands

⁵⁶ Andrew Mason, *Community, Solidarity and Belonging: Levels of Community and Their Normative Significance* (Cambridge University Press 2003) 27.

⁵⁷ 'Discussion Following the Presentation by Karel Wellens' (intervention by Fred Morrison) in Wolfrum/Kojima (n 1) 51.

⁵⁸ Wilde (n 22) 18. See also Ross (n 24) 33.

⁵⁹ Scelle (n 31) 43-44.

⁶⁰ Koskenniemi (n 34) 267.

⁶¹ MacDonald (n 1) 290; Simma (n 17) 238.

require a common action. ... generally speaking ... States in shaping their positions in international relations should not only take into consideration their own individual interests but also those of other States or the interests of the community of States or both.⁶²

These statements expose the basic normative content of solidarity, i.e. to motivate and restrain international law subjects in their decision-making which is the result of their belonging to a qualified community. However, due to the lack of precision they can be partially blamed for promoting an overly ambiguous picture of solidarity. I seek to repair this deficiency through the analysis of a specific international law regime endowed with key elements of solidarity originating from the EU law.

III. SOLIDARITY IN EU LAW

In the EU Treaties, the number of references to solidarity is striking compared to other international treaties.⁶³ Though intuitive, this difference could be of certain legal significance.⁶⁴

In TEU, solidarity qualifies the system of Union values in the context of relations between peoples,⁶⁵ generations,⁶⁶ men and women,⁶⁷ as well as Member States between themselves, with the Union and the outside world.

⁶² Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1087-1088. See also Christian Tomuschat 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' (1999) 281 *Recueil des Cours de l'Académie de Droit International* 9, 261 (where he refers to 'a duty of cooperation' that trumps sovereignty).

⁶³ Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 36-37; Hanspeter Neuhold 'Common Security: The Litmus Test of International Solidarity' in Wolfrum/Kojima (n 1) 212.

⁶⁴ Dann (n 17) 64, fn 31 ('It is interesting to speculate why the word [solidarity] is used so little in legal documents. During the time of the Cold War there was probably strong resistance on the side of the industrialised countries to use it, since solidarity was certainly rather a word of the then Second World, i.e. the socialist countries. But today, after the end of the Cold War, there would not be any need to avoid the notion anymore; so why is it still not used? Is it just not so essential? Is it really vague? Or is it considered to entail real duties?').

⁶⁵ TEU, recital (7).

⁶⁶ TEU, art 3(3).

⁶⁷ TEU, art 2.

Under Article 3(3) TEU, solidarity among Member States – alongside economic, social and territorial cohesion – is coined as the goal of the Union. Moreover, TEU bases the EU's external action on the principle of solidarity, which, among others, 'ha[s] inspired [the Union's] own creation, development and enlargement, and which it seeks to advance in the wider world'.⁶⁸ TFEU refers to solidarity predominantly in areas of energy (specifically as regards the internal energy market⁶⁹ and delivery disruptions⁷⁰) as well as of joint response to terrorist attacks, natural and man-made disasters.⁷¹

Not surprisingly, international lawyers see the degree of solidarity among EU Member States as unprecedented.⁷² For some EU law scholars, solidarity has achieved nothing short of a constitutional role.⁷³ If so, can one still argue that solidarity in the EU legal order is 'too abstract'?

Among many contexts of solidarity in EU law,⁷⁴ I have identified two which seem the most relevant for further analysis of Ukraine-EU gas market integration.⁷⁵ Firstly, it is Article 4(3) TEU which migrated word-for-word to Article 6 EnC. Secondly, it is the EU *acquis* on the security of gas supply, which promotes solidarity as a specific legal tool and is likewise included in the bilateral integration agenda. Combined with its reading as a constitutional principle, solidarity is thus analysed in three legally relevant dimensions (to be extrapolated to the international plane in Section IV).

⁶⁸ TEU, art 21(1). See also TEU, art 3(5).

⁶⁹ TFEU, art 194.

⁷⁰ TFEU, art 122.

⁷¹ TFEU, art 222 (the so-called 'solidarity clause'). See Kotzur/Schmalenbach (n 1) 78-80.

⁷² Neuhold (n 63) 211; Alain Pellet, 'Les fondements juridiques internationaux du droit communautaire' (1994) V/2 *Collected Courses of the Academy of European Law* 193, 268 ('la solidarité plus forte entre les Etats membres que celle qui unit (?) les éléments de la "communauté internationale"').

⁷³ Ross (n 24) 45; Kotzur/Schmalenbach (n 1) 73; Klamert (n 63) 35.

⁷⁴ Ross (n 24) 41.

⁷⁵ EnC, art 94.

1. Article 4(3) TEU: Constitutional Principle and General Legal Maxim

Last two lines⁷⁶ of Article 4(3) TEU (previously – Article 10 EC, 5 EEC and 86 ECSC) stipulate that EU Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the EU Treaties or resulting from the acts of the institutions of the Union and that they shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

That the said legal formula (which does not refer to the notion by name) embodies solidarity has been noted by legal scholars⁷⁷ as well as by EU law actors themselves. The Court of Justice of the EU and its predecessors (CJEU, the Court) explicitly recognize that:

The solidarity which is at the basis of these obligations as of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty, is continued for the benefit of the States in the procedure for mutual assistance provided for in Article 108 where a Member State is seriously threatened with difficulties as regards its balance of payments.⁷⁸

The Court reiterated this position implicitly in at least two cases.⁷⁹ Governments and national courts on several occasions relied on the cited provision as embodying solidarity.⁸⁰

⁷⁶ The first line was added to this article only in TEU.

⁷⁷ MacDonald (n 1) 297; Ross (n 24) 42; Klamert (n 63) 31-32.

⁷⁸ C-6/69 *Commission v France* ECLI:EU:C:1969:68, para 16.

⁷⁹ C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* ECLI:EU:C:2006:443, Opinion of AG Kokott, para 48 (referring to C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* ECLI:EU:C:1997:628, para 45); Case C-304/02 *Commission of the European Communities v French Republic* ECLI:EU:C:2005:444, Opinion of AG Geelhoed, para 8 (referring to Case 44/84 *Derrick Guy Edmund Hurd v Kenneth Jones (Her Majesty's Inspector of Taxes)* ECLI:EU:C:1986:2, paras 57-58).

⁸⁰ Joined Cases C-63/90 and C-67/90 *Portuguese Republic and Kingdom of Spain v Council of the European Communities* ECLI:EU:C:1992:381, para 51; Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* ECLI:EU:C:2004:17, para 19.

On its face, the cited *Commission v France* associates solidarity with the duty of mutual assistance. Yet, other judgements demonstrate that Article 4(3) TEU encompasses a broader set of duties designed to safeguard the essence of the EU legal order, which fits into the parameters of solidarity set in Section II. As early as in *Costa v ENEL*, CJEU coins 'reciprocity' as the basis of the EU's legal system and adds that:

[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.⁸¹

Thus, common objectives, 'reciprocity' and intolerance to discrimination are all cited as reasons to reject the untenable position of a Member State which negates its national court's right to seek a preliminary ruling from CJEU. Although in our definition solidarity is based on mutuality rather than reciprocity,⁸² the difference between the two is not always scrutinised and the terms are often used interchangeably.

For the Court, it is indeed what we call mutuality that lies at the heart of Article 4(3) TEU. In another case, it states that the Member State's refusal to implement a regulation 'undermines the efficacy of the provision decided upon in common, while at the same time taking an undue advantage to the detriment of its partners in view of the free circulation of goods'.⁸³ This distortion, according to CJEU, 'strikes at the fundamental basis of the Community legal order'.⁸⁴ The free-rider problem thus described is characteristic of a mutuality relationship: due to strong dependencies where one member benefits, all others suffer. In organised systems (e.g. harmonised VAT), this can even lead to a tangible shift in financial burdens.⁸⁵ Importantly, CJEU also mentions that this unlawful situation 'brings into

⁸¹ Case 6-64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66, 593-594.

⁸² Dann (n 15) 61, fn 20.

⁸³ Case 39-72 *Commission of the European Communities v Italian Republic* ECLI:EU:C:1973:13, para 21.

⁸⁴ *Ibid*, para 25.

⁸⁵ Case C-493/15 *Agenzia delle Entrate v Marco Identi* ECLI:EU:C:2017:219, paras 16-19.

question the equality of Member States before Community law',⁸⁶ thus supporting the third element of our definition.

The ample CJEU jurisprudence not only helps to uncover the constitutional dimension of solidarity but also to depart from its elusive image of a socio-political notion. Distancing from principles and institutions specific to the Union, most fundamentally solidarity can be said to mean:

- Duty of coordinated action: 'in a field ... in which worthwhile results can only be attained thanks to the co-operation of all', members may not adopt unilateral measures outside the common framework;⁸⁷ where, however, the collective interest is in danger, a member must step in (but, again, after effectively consulting others);⁸⁸
- Duty of uniformity: members must ensure uniform application of common rules;⁸⁹
- Duty of enforcement: members must ensure effective, proportionate and dissuasive penalties for violation of common rules⁹⁰ and take necessary actions to combat fraud;⁹¹

⁸⁶ *Commission of the European Communities v Italian Republic* (n 83) para 24.

⁸⁷ Case 141/78 *French Republic v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:1979:225, para 8; John Temple Lang, 'The Duty of Sincere Cooperation as a Lawyering Strategy' in Fernanda Nicola, Bill Davies (eds), *EU Law Stories Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

⁸⁸ Case 32/79 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:1981:93, paras 25, 28; Case C-105/02 *Commission of the European Communities v Federal Republic of Germany* ECLI:EU:C:2006:637, para 60.

⁸⁹ Joined cases 205 to 215/82 *Deutsche Milchkontor GmbH and others v Federal Republic of Germany* ECLI:EU:C:1983:233, para 17.

⁹⁰ Case C-7/90 *Criminal proceedings against Paul Vandevenne, Marc Wilms, Jozef Mesotten and Wilms Transport NV* ECLI:EU:C:1991:363, para 11.

⁹¹ Case C-352/92 *Milchwerke Köln/Wuppertal eG v Hauptzollamt Köln-Rheinau* ECLI:EU:C:1994:294, para 23.

- Duty of diligence: members must ensure correct use of common resources,⁹² including by promptly countering cases of misuse;⁹³
- Duty of transparency: members must provide necessary information to establish the availability of common resources⁹⁴ and their correct use;⁹⁵
- Duty of trust: members must rely on representations that others make within the system of shared responsibility;⁹⁶
- Duty of external abstention: members may not enter into external commitments 'capable of affecting [common] rules already adopted [...] or of altering their scope'.^{97,98}

This bundle of duties constitutes a general legal maxim of solidarity and represents its second legally relevant dimension.

2. EU *acquis* on Security of Gas Supply: Duty of Cross-Border Assistance

The third dimension of solidarity can be observed through the secondary legislation on the security of gas supply approved under Article 194 TFEU. This treaty provision crystallizes the Union policy direction on energy⁹⁹ and

⁹² Case C-8/88 *Federal Republic of Germany v Commission of the European Communities* ECLI:EU:C:1990:241, para 20.

⁹³ Case C-34/89 *Italian Republic v Commission of the European Communities* ECLI:EU:C:1990:353, para 12.

⁹⁴ Case C-275/04 *Commission of the European Communities v Kingdom of Belgium* ECLI:EU:C:2006:641, para 83.

⁹⁵ Case C-38/06 *European Commission v Portuguese Republic* ECLI:EU:C:2010:108, para 70.

⁹⁶ Case C-202/97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* ECLI:EU:C:2000:75, paras 51-52.

⁹⁷ *Opinion 2/91 delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* ECLI:EU:C:1993:106, para 11.

⁹⁸ See also John Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC' (2007) 31(5) *Fordham International Law Journal* 1483.

⁹⁹ Leigh Hancher and Francesco Maria Salerno, 'Energy Policy After Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012); Rafael Leal-Arcas and Andrew Filis, *The Energy*

mandates its pursuit 'in a spirit of solidarity between Member States'. According to Ahner/Glachant, '[t]here is an obligation flowing from Article 194 to pursue solidarity actively'.¹⁰⁰

The security of gas supply broadly means the availability of the technical and resource capacity to satisfy gas demand in different circumstances,¹⁰¹ and it is currently listed as the first objective of the Energy Union (alongside solidarity and trust).¹⁰² Article 194 TFEU has given rise to two pivotal Union-wide acts on the security of gas supply,¹⁰³ namely: Regulation 994/2010¹⁰⁴ (now

Community and the Energy Charter Treaty: Special Legal Regimes, their Systemic Relationship to the EU, and their Dispute Settlement Arrangements (2014) 12(2) Oil, Gas & Energy Law Intelligence I, 11-12.

¹⁰⁰ Nicole Ahner and Jean-Michel Glachant, 'The Building of Energy Solidarity in the EU' in Jean-Michel Glachant and others (eds), *A New Architecture for EU Gas Security of Supply* (Claeys & Casteels Publishing 2012) 145.

¹⁰¹ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC {2009} OJ L211/94, art 2(32) (referred to in Regulation 994/2010 (n 104) art 2, Regulation 2017/1938 (n 105) art 2(1)). For different approaches to defining energy security in the EU, see Leal/Filis (n 99) 10-11.

¹⁰² Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' COM(2015) 80 final; Natasha A Georgiou and Andrea Rocco, 'Energy governance in EU-Russia energy relations: paving the way towards an energy union' (2017) Institute of European Law Working Paper 01/2017 12-17 <<http://epapers.bham.ac.uk/2944>> accessed 02 December 2018.

¹⁰³ There is another interesting legal act adopted under this TFEU Article 194, namely: Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU {2017} OJ L99/1. However, as explained above, here we dwell upon the legal rules and mechanisms coming under the topic of Ukraine-EU gas market integration. So far Decision (EU) 2017/684 is not part of the Energy Community *acquis* and its prospects to become one are unclear.

¹⁰⁴ Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC {2010} OJ L295/1.

repealed) and Regulation 2017/1938¹⁰⁵ (effective as of 01 November 2017). The two documents have the same philosophy: while the ultimate security depends on a situational combination of factors, it is the state of preparedness and resilience that can be managed constantly and systematically. They are identical in preaching preference towards security built by market forces with exceptional state interventions when 'the market can no longer deliver the required gas supplies'.¹⁰⁶ But their reliance on solidarity as a last-resort, non-market-based security of supply tool differs significantly.

Regulation 994/2010 was born out of unprecedented events of January 2009 when for almost two weeks Russian gas transit through Ukraine was halted, leaving the EU without the critical supply source.¹⁰⁷ Despite the legislation in force at that time (i.e. Directive 2004/67/EC), the EU proved poorly prepared to counter a disruption of such a magnitude.¹⁰⁸ The Commission's legislative proposal launched in July 2009 under then effective Article 95 EC contained few references to solidarity¹⁰⁹ (all of which survived in the final text) but failed to clarify its meaning. When adopted, Regulation 994/2010 read in the preamble that 'Member States should devise measures to exercise solidarity' associating it with agreements between gas undertakings for additional gas volumes and fair and equitable compensation for them.¹¹⁰ The body of this Regulation gave a single practical instruction on solidarity:

in a spirit of solidarity, the Competent Authority shall identify in the Preventive Action Plan and the Emergency Plan how any increased supply

¹⁰⁵ Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 {2017} OJ L280/I.

¹⁰⁶ Regulation 994/2010 (n 104) art 1; Regulation 2017/1938 (n 105) art 1.

¹⁰⁷ Ahner/Glachant (n 100) 123-153.

¹⁰⁸ Commission, 'Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC – The January 2009 gas supply disruption to the EU: an assessment' COM (2009) 363.

¹⁰⁹ Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC' COM/2009/0363 final.

¹¹⁰ Regulation 994/2010 (n 104) recital (36).

standard or additional obligation imposed on natural gas undertakings may be temporarily reduced in the event of a Union or regional emergency.¹¹¹

This meant that only additional gas amounts were at stake and could be shared with the Member State in an emergency.

Recently enacted Regulation 2017/1938 deals with this problem – How to compensate for missing gas in a Member State affected by a substantial gas shortage? – differently. Its solution is that (roughly)¹¹²

[c]ustomers others than households, essential social services and district heating cannot continue to be supplied with gas in a given Member State - even if it is not in an emergency situation - as long as households, essential social services and district heating are not being supplied in another Member State in emergency to which the first country's transmission network is connected.¹¹³

This is the common objective behind the 'solidarity measure of a last resort'¹¹⁴ for the first time introduced in a Union regulation.¹¹⁵ Triggered in a dire situation where at the affected state level all efforts have been exhausted and the neighbouring states have lowered additional supply standards applicable to their gas undertakings,¹¹⁶ it should be operationalized through separate inter-state arrangements.¹¹⁷ However, the Regulation sets forth mandatory

¹¹¹ Ibid, art 8(2).

¹¹² While this excerpt from the proposal aptly captures the basic principle, the exact boundaries of the solidarity measure are specified through the definition of 'solidarity protected customers' and other provisions of the Regulation (Regulation 2017/1938 (n 105) arts 2(6), 13(1)).

¹¹³ Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010' COM/2016/052 final, p.12.

¹¹⁴ Regulation 2017/1938 (n 105) art 1.

¹¹⁵ Ibid, recital (45).

¹¹⁶ Ibid, art 13(3).

¹¹⁷ Commission Recommendation (EU) 2018/177 of 2 February 2018 on the elements to be included in the technical, legal and financial arrangements between Member States for the application of the solidarity mechanism under Article 13 of Regulation (EU) 2017/1938 of the European Parliament and of the Council concerning measures to safeguard the security of gas supply {2018} OJ L32/52.

elements of this legal mechanism and creates the necessary environment for its subsistence rooted in mutuality and equality.

Specifically, the integrity of the internal gas market requires that no Member State, by taking unilateral action, disturb its proper functioning even in face of a gas crisis.¹¹⁸ Instead, Member States are required to prepare for an emergency and coordinate their steps with others, including the European Commission. Regulation 2017/1938 lays down a harmonized format for this exercise: mandatory templates for risk assessment as well as for Preventive and Emergency Action Plans;¹¹⁹ joint development of regional chapters and their incorporation into national plans¹²⁰ based on a common risk assessment conducted in risk groups;¹²¹ review of national plans by the Commission.¹²² It also stipulates that only pre-agreed actions shall be deployed in an emergency, except for 'duly justified exceptional circumstances' (in which case immediate notification to the Commission and Member States in the same risk group is warranted).¹²³ Understanding the aggregated security of supply situation in the Union is another mutual challenge, which the Regulation handles through information provision obligations related to most relevant gas contracts.¹²⁴

To sustain equality, the Regulation employs a uniform definition of solidarity-protected customers¹²⁵ and harmonized supply and infrastructure standards of conduct for gas undertakings (including the obligation to reduce increased supply standards to a common level where the neighbouring Member State suffers a gas disruption).¹²⁶ It imposes an obligation on the receiving Member State to pay all reasonable costs associated with the delivered gas to the Member State providing solidarity (inter-state 'fair and

¹¹⁸ Regulation 2017/1938 (n 105) recital (7).

¹¹⁹ Ibid, arts 7(5), 8(5).

¹²⁰ Ibid, art 8(3).

¹²¹ Ibid, art 7(2).

¹²² Ibid, art 8(7)-(9).

¹²³ Regulation 2017/1938 (n 105) recital (7), art 11(4).

¹²⁴ Ibid, art 14.

¹²⁵ Ibid, recital (24), art 6(1).

¹²⁶ Ibid, arts 5-6, 11(3).

prompt compensation')¹²⁷ and a duty to select the most advantageous offer of solidarity among offers made.¹²⁸

These and other elements of Regulation 2017/1938¹²⁹ mirror the set of legal duties derived from Article 4(3) TEU. This indicates that the three dimensions of the notion in EU law spring on a single ideological basis and add up to a wholesome picture of solidarity. As opined by AG Mengozzi in relation to Article 194 TFEU:¹³⁰

This reference to solidarity between Member States [...] is made in a context in which the principle of solidarity between Member States has taken on a character that could be defined as a 'constitutional principle'. The idea of solidarity between Member States is not only expressed in various places in the Treaties, but also, under the third subparagraph of Article 3(3) of the TEU, constitutes one of the objectives of the Union.¹³¹ [...] [I]n interpreting the provisions of Regulation No 994/2010, account must be taken of the fundamental role played by the principle of solidarity between Member States in the context of that regulation.¹³²

Solidarity can thus be said to permeate the EU legal order. Starting as a constitutional principle and panning out in specific legal duties under EU Treaties and secondary legal acts, it affects international relations within the Union. It can likewise affect international relations of the Union and the outside world where the relevant international law framework is in place.

¹²⁷ Ibid, art 13(8).

¹²⁸ Ibid, art 13(4).

¹²⁹ Ibid, art 14(10) (requiring the imposition of effective, proportionate and dissuasive sanctions); *ibid*, recital (44), art 11(3) (endowing the European Commission with the coordination role for managing third-party relations).

¹³⁰ Case C-226/16 *Eni SpA and Others v Premier ministre and Ministre de l'Environnement, de l'Énergie et de la Mer* ECLI:EU:C:2017:1005, Opinion of AG Mengozzi, paras 32-38.

¹³¹ *Ibid*, para 33 (references omitted).

¹³² *Ibid*, para 37. Treaty references to solidarity were also taken into account also in Case C-370/12 *Thomas Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756, Opinion of AG Kokott, paras 142-143.

IV. SOLIDARITY IN THE LAW OF UKRAINE-EU GAS MARKET INTEGRATION

The 2016 Ukraine-EU Memorandum of Understanding on a Strategic Energy Partnership introduces the EU's Energy Union objectives into the bilateral cooperation agenda.¹³³ Compared to previous political documents, the Memorandum's language is pronounced on solidarity: as noted elsewhere, '[c]ouched in diplomatic terms, the gas-related sections of the 2016 Memorandum are still precise, principle-based and charged with solidarity'.¹³⁴

The question is how this impetus is reflected in the international law framework of Ukraine-EU relations in the gas sector, which by far is dominated by three major international treaties: EnC; the Ukraine-EU Association Agreement (UA-EU AA)¹³⁵ and the Energy Charter Treaty (ECT).¹³⁶

EnC is 'the first multilateral treaty integrating a specific economic sector in south-east Europe',¹³⁷ which highlights the special role of energy on the region's political and economic scene. EnC is said to have marked a qualitative transition in the EU's external energy policy thanks to its varied

¹³³ Memorandum of Understanding on a Strategic Energy Partnership between the European Union together with the European Atomic Energy Community and Ukraine (24 November 2016) <https://ec.europa.eu/energy/sites/ener/files/documents/mou_strategic_energy_partnership_en.pdf> accessed 02 December 2018.

¹³⁴ Ielyzaveta Badanova, 'Ukraine-EU political agenda 1991-2016: premises for mutual solidarity obligations in the natural gas sphere' (2017) 2 *Ukrainian Journal of International Law* 17, 20.

¹³⁵ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (signed 27 June 2014; entered into force 01 September 2017) OJ L161/3 (UA-EU AA).

¹³⁶ Energy Charter Treaty (adopted 17 December 1994; entered into force 16 April 1998) 2080 UNTS 100 (ECT).

¹³⁷ 'Summary of Treaty' (European Union External Action), <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=3421>> accessed 02 December 2018.

membership and a relatively high degree of institutionalisation.¹³⁸ UA-EU AA supplements EnC with additional bilateral mechanisms setting the current legal landscape of the Ukraine-EU partnership in the gas sector.

Meanwhile, ECT has a different mission. It does not as such promote integration but rather seeks to 'establish a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [Energy] Charter' (Article 2). In such a way, it highlights the shared values (market economy) and objectives (free flow of energy products, fair and equal treatment of energy investments) of its members, which are, however, pursued based on reciprocity (rather than mutuality). For instance, ECT seeks to reconcile divergent interests in relation to transit (interests of those who transport v. those who sell) through a set of duties imposed on transit countries.¹³⁹ Compare this with the approach taken by EnC where transit as a category is eliminated¹⁴⁰ and network users are enabled to sell gas freely within the integrated market area with the help of the entry-exit system for booking and pricing of gas transmission services.¹⁴¹ Finally, ECT's voting system is largely unbalanced in favour of the EU,¹⁴² which 'presents an inherent bias towards EU industrial and energy

¹³⁸ Heiko Prange-Gstöhl, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?' (2009) 37 *Energy Policy* 5296, 5297.

¹³⁹ Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (Oxford University Press 2015) 67.

¹⁴⁰ Agency for the Cooperation of Energy Regulators, 'Transit Contracts in EU Member States: final results of ACER inquiry' (2013) 15-17 <<http://www.acer.europa.eu/Media/News/Pages/ACER-finds-that-gas-Transit-Contracts-in-seven-EU-Member-States-do-not-comply-with-EU-rules-.aspx>> accessed 02 December 2018.

¹⁴¹ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36, art 13(1) (implemented in the Energy Community by Decision of the Ministerial Council of the Energy Community 2011/02-MC-EnC of 06 October 2011).

¹⁴² Irina Kustova, 'A Treaty à la Carte? Some Reflections on the Modernization of the Energy Charter Process' (2016) 9 *Journal of World Energy Law and Business* 357, 367.

interests'.¹⁴³ This combination of reasons has arguably diminished ECT's role as a forum for stepping up energy cooperation between the EU and its neighbouring countries, including Ukraine.¹⁴⁴ In these circumstances, further analysis concentrates on the solidarity footprint in EnC and UA-EU AA only.

1. EnC: Solidarity Regime in the Making

A. Solidarity as Constitutional Principle

The Energy Community is founded on the resolve 'to establish among the Parties an integrated market in gas and electricity, based on common interest and solidarity'.¹⁴⁵ Solidarity is thus named the key feature of a target model of sectoral (gas, electricity, oil; together referred to as Network Energy)¹⁴⁶ relations between the EU and the so-called 'Contracting Parties' (CPs), i.e. six Western Balkan countries, Ukraine, Moldova and, since recently, Georgia.¹⁴⁷

In terms of import/export profile, the Energy Community membership is relatively homogenous. As explained by one researcher, 'Ukraine, Energy Community countries and the EU in general as a community of consumer states have similar goals and priorities of the energy policy that produce natural motivation for creating a security space'.¹⁴⁸ On a bilateral plane, already the 2005 Memorandum of Understanding on co-operation in the field of energy recognised that 'in [this] field, the EU and Ukraine share convergent interests and both could benefit from the integration of their

¹⁴³ Leal (n 99) 22.

¹⁴⁴ Kustova (n 142) 358.

¹⁴⁵ EnC, preamble.

¹⁴⁶ Ibid, art 2(2).

¹⁴⁷ 'Who we are' (Energy Community) <<https://www.energy-community.org/aboutus/whoweare.html>> accessed 02 December 2018.

¹⁴⁸ Oleksandr Sukhodolya, 'Energy Community and Ukraine: Objectives, Priorities and Problems of Cooperation' (in Ukrainian) (2016) 2(39) *Strategic Priorities* 13, 15.

respective energy markets, thereby enhancing the energy security of the European continent'.¹⁴⁹

This convergence of interests is reflected in the Energy Community's task formulated with reference to five objectives: (1) 'a stable regulatory and market framework capable of attracting investment' (investment climate promotion); (2) 'a single regulatory space for trade in Network Energy' (trade climate promotion); (3) enhancement of the security of supply in the single regulatory space; (4) promotion of energy efficiency, environmental protection and renewables, as well as (5) development of Network Energy competition to profit from economies of scale.¹⁵⁰ According to Article 3 EnC, this task is pursued through three types of 'activities', each having a progressively expanding geographical coverage:

(i) implementation by CPs of the agreed EU *acquis* in energy, environment, competition, renewables, energy efficiency and statistics (EnC is viewed as a 'core legal instrument that the EU uses [to] export ... EU energy norms and regulations to neighbourhood countries and beyond'¹⁵¹);

(ii) establishment of a regulatory regime for efficient market operation in-between CPs and neighbouring EU Member States, in particular for Network Energy transmission and in cases of unilateral safeguard measures; and

(iii) creation of a single energy market across the whole of the Energy Community, including joint response to energy supply disruptions and, potentially, a common external energy trade policy.

In the gas market context, the achievement of these objectives dictates a high degree of mutuality, especially for the EU and Ukraine. This is particularly true for objectives (3) and (5).

Already upon Ukraine's accession to EnC, the EU underscored that 'in the gas sector, the fulfilment of the obligations deriving from the accession to the

¹⁴⁹ Memorandum of Understanding on co-operation in the field of energy between the European Union and Ukraine (01 December 2005) <https://ec.europa.eu/energy/sites/ener/files/documents/2010_ukraine_mou.pdf> accessed 02 December 2018.

¹⁵⁰ EnC, art 2(1).

¹⁵¹ Prange-Gstöhl (n 138) 5296.

Energy Community requires specific attention due to the importance of this sector for the security of supply of all Parties'.¹⁵² The EU, in turn, is instrumental in ensuring the security of gas supply to Ukraine through, *inter alia*, sustaining current gas transit flows¹⁵³ and enabling access to its internal gas market.¹⁵⁴ Other CPs mostly act as security-takers. However, their commitment starts to matter when new gas transit routes are being developed by the Russian exporter to bypass Ukraine.¹⁵⁵ Thus, the full participation of the Energy Community membership is essential to the common cause of sustainable supply security.

Likewise, the effective pooling of resources and needs within the Energy Community is essential for achieving benefits from economies of scale. This can be ensured through fair competition for gas throughout the integrated market area. As of now, the whole of the Energy Community faces similar challenges linked to the historical role of the dominant external gas source.¹⁵⁶ Here again mutuality plays a key role.

¹⁵² Decision of the Ministerial Council of the Energy Community 2009/04/MC-EnC of 17 December 2009. See Commission, 'Proposal for a Council Decision on establishing the European Community position within the Ministerial Council of the Energy Community' COM/2009/0632 final.

¹⁵³ See the Appeal by the Verkhovna Rada (Parliament) of Ukraine to MPs and executive authorities of the EU concerning the enhancement of cooperation on energy security and potential risks of realization of gas transit projects to bypass Ukraine (in Ukrainian) dated 15 November 2016 No.1733-VIII <<http://zakon5.rada.gov.ua/laws/show/1733-19>>.

¹⁵⁴ Since autumn 2015, National JSC Naftogaz of Ukraine secures necessary volumes of gas to cover the country's gas needs through physical reverse flows from the EU. See Naftogaz of Ukraine, 'Annual Report 2016: in the black' (2017) 73-74 <http://www.naftogaz.com/files/Zvity/Annual_report_eng_170608.pdf> accessed 02 December 2018.

¹⁵⁵ 'Serbia, Russia revive gas pipeline plans' (Reuters, 09 March 2018) <<https://af.reuters.com/article/africaTech/idAFL5N1QR3QK>> accessed 02 December 2018.

¹⁵⁶ See above n 7. As to Ukraine, virtual reverse flows are blocked by current contractual arrangements involving Gazprom and in future would depend on the availability of gas transit through Ukraine. See Naftogaz of Ukraine, 'Annual Report 2014: Changing for the Future' (2015) 82-83 <http://www.naftogaz.com/files/Zvity/Naftogaz_Annual_Report_2014_engl.pdf> accessed 02 December 2018.

At first glance, investment and trade climate promotion reminds of ECT's regime. However, as exemplified above, EnC handles these objectives through community building, including by harmonising the basic regulatory framework for market and infrastructure operations. In the Energy Community, the prohibition of customs duties, quantitative restrictions and measures having equivalent effect¹⁵⁷ is complemented with requirements of the EU's Third Energy Package¹⁵⁸ and, since recently, Gas Network Codes.¹⁵⁹ These measures are designed to eliminate unnecessary restrictions on gas trade across borders and create a predictable investment regime. In addition, under the TEN-E Regulation¹⁶⁰ a list of Projects of Energy Community Interest is developed, approved and updated resulting in prioritisation and facilitation of meaningful infrastructure upgrades.¹⁶¹

In the meantime, Article 7 EnC speaks of equality within the Energy Community stating that discrimination within the scope of the Treaty shall be prohibited. It can be plausibly argued that EnC would have never been signed if it provided otherwise. The 'solidarity motive', i.e. the chance to place normative constraints on the EU's behaviour, can be a powerful driver for joining the Energy Community.¹⁶² From an international law viewpoint, EnC is an international treaty by virtue of which the parties have agreed to a set of mutual rights and obligations to be put in place through a specific institutional framework. It is recognised that 'the Energy Community has autonomous decision-making powers'.¹⁶³ Within the EU legal order, EU

¹⁵⁷ EnC, art 41.

¹⁵⁸ Decision of the Ministerial Council of the Energy Community 2011/02-MC-EnC of 06 October 2011.

¹⁵⁹ Decision No 2018/02/PHLG-EnC of the Permanent High-Level Reflection Group of the Energy Community of 22 January 2018.

¹⁶⁰ Decision of the Ministerial Council of the Energy Community 2015/09/MC-EnC of 16 October 2016.

¹⁶¹ Decision of the Ministerial Council of the Energy Community 2016/11/MC-EnC of 14 October 2016.

¹⁶² In addition to those listed in Prange-Gstöhl (n 138) 5300-5302.

¹⁶³ Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty {2006} OJ L 198/15, recital (11).

institutions and Member States, in the relevant part, are required to abide by the rules of this international treaty.¹⁶⁴

Yet, it is true to say that the EU has the driver's seat in the organisation. The European Commission has a mandate to move forward the integration process within the Energy Community.¹⁶⁵ The EU has two (instead of one) representatives in the organisation's political bodies, the Ministerial Council and the Permanent High-Level Group,¹⁶⁶ and several in the technical body, i.e. the Regulatory Board.¹⁶⁷ On top of that, it enjoys a decisive vote in all these bodies.¹⁶⁸ Compared to ECT, these peculiarities are less drastic and would arguably not suffice to ultimately distort the balance of powers. For instance, at least one infringement case against an EU Member State has officially been registered with the compliance monitoring body, Energy Community Secretariat (ECS).¹⁶⁹

The bigger issue with equality is posed by the alleged failure of EnC to adequately address the legal regime of interconnection points between the EU and CPs. According to EnC institutions, acts of the Ministerial Council adopted under Title II do not bind the EU, which means that implementation of EU's legislation at these points is not sanctioned by either the EU (where it is voluntary) or the Energy Community.¹⁷⁰ This goes against the overall market integration efforts, especially in the context of Network

¹⁶⁴ According to CJEU, 'the fact that [an international treaty] is intended essentially to promote the economic development of [a non-EU country] and therefore involves an imbalance in the obligations assumed by the Community towards the non-member country concerned' should not prevent the legal effects on this treaty in the EU. See Case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzepowicz-Meyer* ECLI:EU:C:2002:57, para 27.

¹⁶⁵ EnC, arts 4, 79.

¹⁶⁶ *Ibid*, arts 48, 54.

¹⁶⁷ *Ibid*, arts 59.

¹⁶⁸ *Ibid*, arts 83.

¹⁶⁹ Case ENC 01/17 <<https://www.energy-community.org/legal/cases/2017/case0117BU.html>> accessed 02 December 2018.

¹⁷⁰ Policy Guidelines by the Energy Community Secretariat on the Application of the Energy Community Acquis between the Contracting Parties and the European Union, 12 November 2014, PG 01/2014.

Code implementation.¹⁷¹ For example, the Capacity Allocation Mechanism Network Code (CAM NC)¹⁷² harmonises the procedures and timing for auctions at cross-border points, which makes it ineffective to introduce this code in CPs alone leaving out important interconnectors between CPs and EU Member States. On a similar note, a separate category of infrastructural projects (Projects of Mutual Interest) was created to compensate for the fact that in the Energy Community the above-mentioned TEN-E Regulation tied the granting of the status of a Project of Energy Community Interest to its previous qualification as a Project of Common Interest in the EU.¹⁷³

All in all, this is an urgent matter of constitutional significance that needs to be addressed in the Energy Community, so that the pronounced language of integration is fully realised. Without solidarity, integration will be reduced to either simple association (no mutuality) or expansion (no equality).

B. Solidarity as General Legal Maxim

Title I EnC incorporates Article 6 which is identical to Article 4(3) TEU, except for the reference to 'Parties' instead of 'Member States'. Under Article 94 EnC, the Energy Community institutions shall interpret 'any term of other concept used in this Treaty that is derived from European Community law' (let alone a set of wholesome sentences) in conformity with CJEU case law.¹⁷⁴ This is a solid basis to argue that Article 6 EnC should convey the same basic scope of obligations as Article 4(3) TEU. While CJEU has given a rather restrictive interpretation to a similar provision in the context of one association agreement,¹⁷⁵ that case related to an agreement

¹⁷¹ Energy Community Secretariat, 'The State of Gas Market Integration in the Energy Community: Special report for the CESEC High Level Group Meeting' (2018) 17 <<https://www.energy-community.org/news/Energy-Community-News/2018/06/29.html>> accessed 02 December 2018.

¹⁷² Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 {2017} OJ L 72/1.

¹⁷³ Recommendation R/2016/01/MC-EnC of 14 October 2016.

¹⁷⁴ Leal (n 99) 31.

¹⁷⁵ Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400, para 24.

where no such interpretative guidance was given and dealt with direct effect (rather than the legal impact on public international law relations).¹⁷⁶

In practice, Article 6 EnC is widely employed in dispute settlement proceedings under EnC.¹⁷⁷ On several occasions it even justified the recognition of a CP's treaty violation¹⁷⁸ and the call for the EU to implement equivalent sanctions (e.g. suspension of financial support) against a persistently defaulted CP.¹⁷⁹

However, the full potential of legal integration through Article 6 EnC remains underexploited. On the one hand, EnC practice has developed in such a way that this article is invoked in most compliance cases. This differs from CJEU's approach where the relevant provision is not normally used in simple non-compliance proceedings.¹⁸⁰ On the other hand, reliance neither on Article 6 nor on Article 7 EnC has seemingly allowed clarifying the above-mentioned frustrating situation with interconnection points (despite the duty of uniformity under Article 4(3) TEU).

Both these deficiencies can be attributed to the absence of an adjudicatory authority capable of enforcing EnC as well as of objectively resolving disputes where the EU is blamed. This fact naturally affects the selection of cases that are brought for consideration before the Ministerial Council as well as the sophistication and volume of legal reasoning in the infringement proceedings. When the dispute settlement is ultimately political, the motivation on the part of the monitoring body becomes not to bring to justice as many complaints as possible (and thus promote the unity of the legal

¹⁷⁶ Ibid, para 13.

¹⁷⁷ In particular, it is relied upon mostly to allege the failure to lay down the basic legal framework such as the Third Energy Package or state aid rules. For more information on cases, see <https://www.energy-community.org/legal/cases.html>.

¹⁷⁸ See Case ECS-08/11 <<https://www.energy-community.org/legal/cases/2011/case0811BH.html>> accessed 02 December 2018.

¹⁷⁹ Decision of the Ministerial Council of the Energy Community 2016/16/MC-EnC of 14 October 2016.

¹⁸⁰ Joined cases C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 and C-83/90 *Compagnie Commerciale de l'Ouest and others v Receveur Principal des Douanes de La Pallice Port* ECLI:EU:C:1992:118, para 19 ('the wording of Articles 5 and 6 of the Treaty is so general that there can be no question of applying them independently when the situation concerned is governed by a specific provision of the Treaty').

order), but rather to pursue only those complaints which are likely to find support among political representatives (and thus promote the legitimacy of the legal order).

C. Solidarity as Specific Obligation of Cross-border Assistance

Regulation 2017/1938 is not yet part of the Energy Community *acquis* (neither is Regulation 994/2010), which means that the solidarity mechanism endorsed thereunder has not yet been extended to the rest of the Energy Community, including Ukraine. Currently CPs are only bound by adapted Directive 2004/67/EC,¹⁸¹ which is clearly obsolete. However, discussions on implementation of the new Regulation in the Energy Community have been ongoing for some time; more importantly, they include pronounced calls for comprehensive legal coverage (which would resolve the above-mentioned issue of cross-border application).¹⁸² Nevertheless, EnC itself and the unilateral practice thereunder point to the actual interplay of solidarity in Ukraine-EU relations as inspired by EnC.

Under Article 37 EnC (contained in Title III), when the relevant Party takes temporary safeguard measures to address a sudden gas crisis, such measures need to 'cause the least possible disturbance in the functioning of the Network Energy market of the Parties, and not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen' as well as 'not distort competition or adversely affect trade in a manner which is at variance with the common interest'. Falling short of establishing a positive duty of help, this provision represents a negative inter-state obligation to assist in a crisis by not aggravating the unfortunate stance. It effectively limits the choice of crisis management tools available to the parties,¹⁸³ thus

¹⁸¹ Decision of the Ministerial Council of the Energy Community 2007/06/-MC-EnC of 06 October 2011.

¹⁸² Energy Community Secretariat, 'Revised security of gas supply regulation covering the Energy Community is best guarantee for Europe's security of gas supply' (08 April 2015) <<https://www.energy-community.org/news/Energy-Community-News/2015/04/08.html>> accessed 02 December 2018.

¹⁸³ There remains a question as to its binding effect on the EU as a whole (or on the European Commission which under Article 12(3) of Regulation 2017/1938

signalling the prevalence of the joint belief in the well-functioning market capable of handling a gas disruption. The mutual assistance mechanism organised under Article 46 EnC in the form of the Security of Supply Coordination Group should be helpful in implementing the relevant EnC provisions. Noteworthy, the preamble of the Procedural Act establishing this forum reads that 'securing energy supply through solidarity constitutes one of the main objectives of the Energy Community'.¹⁸⁴

In addition, Ukraine has voluntarily implemented all core requirements of Regulation 994/2010 in its 2015 Law on the Natural Gas Market.¹⁸⁵ Article 6(3) thereof reads that in case of a gas crisis the competent authority may take safeguard measures which shall, *inter alia*, 'not create unjustified obstacles to the flow of gas in gas transmission systems of Ukraine and of other state parties to the Energy Community', 'not create likely serious threat to the security of gas supply of the other state party of the Energy Community' and 'not limit access to gas transmission systems or storages of Ukraine for customers established under the laws of the other state party of the Energy Community where this is technically possible and safe'.¹⁸⁶ This wording is copied from Article 10(7) of Regulation 994/2010 (which later migrated to Article 11(6) of Regulation 2017/1938) and bears a self-imposed constraint on the freedom to act in a gas crisis linked to the membership in the Energy Community. The EU is yet to reciprocate these efforts as Regulation 2017/1938 shows little extra solidarity towards CPs.¹⁸⁷ The Commission's initiative which linked the provision of solidarity to CPs' compliance with their EnC commitments¹⁸⁸ was stricken down in the final text.

coordinates crisis management during a regional or Union emergency) given the limited territorial coverage of Title III.

¹⁸⁴ Procedural Act 2008/02/MC-EnC of 11 December 2008.

¹⁸⁵ Energy Community Secretariat (n 171) 11.

¹⁸⁶ Law of Ukraine 'On the Natural Gas Market' of 09 April 2015 #329-VIII (Закон України 'Про ринок природного газу') <<http://zakon2.rada.gov.ua/laws/show/329-19>> accessed 02 December 2018.

¹⁸⁷ Regulation 2017/1938 (n 97) recital (57), art 16.

¹⁸⁸ Commission (n 109) 40-41.

2. UA-EU AA: *Additional Instruments for Solidarity*

UA-EU AA is an all-encompassing cooperation agreement which marked a turning point in the history of Ukraine and Europe as a whole. Per the CJEU's interpretation, it 'create[s] special, privileged links with a non-member country which must, at least to a certain extent, take part in the [Union] system'.¹⁸⁹ The treaty started to apply provisionally from 01 November 2014 (the Deep and Comprehensive Free Trade Agreement part – from 01 January 2016) to ultimately come into force as of 01 September 2017. It repeals and replaces the Partnership and Cooperation Agreement (PCA)¹⁹⁰ concluded previously as part of the European Neighbourhood Policy (ENP).¹⁹¹

In contrast to PCA, UA-EU AA bears explicit references to solidarity in the context of energy cooperation (Article 338) as well as migration and asylum issues (preamble and Article 16). Reminiscent of EU Treaties, this approach highlights that on these topics interests of the EU and Ukraine are specially interrelated and interdependent.

UA-EU AA explicitly 'builds on the commitment of the Parties to implement [EnC]'. This preambular statement is further expanded in Article 278 whereby Ukraine's obligation to implement the EU *acquis* is automatically updated with the advent of the Energy Community *acquis*. Nevertheless,

¹⁸⁹ *Demirel* (n 175) para 9.

¹⁹⁰ Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine (adopted 14 June 1994; entered into force 01 March 1998) OJ L49/3 (PCA). For the relation between the two agreements, see UA-EU AA, Articles 479, 486(6).

¹⁹¹ Marise Cremona and Christophe Hillion, 'The Potential and Limits of the European Neighbourhood Policy' in Nathaniel Copsey and Alan Mayhew, *European Neighbourhood Policy: the Case of Ukraine* (SEI Seminar Paper Series No 1 2007) 37-38. Promoting common values, ENP fell short on the rest of solidarity elements and is rightly described as 'clearly and unambiguously an EU policy directed at its neighbours rather than the creation of something new (a space or an area) or a shared enterprise (a process or partnership)' (ibid 39). Not surprisingly, PCA did not contain any references to solidarity or related provisions. In the gas sector, it simply confirmed the parties' attachment to the European Energy Charter and in a single article devoted to energy (Article 61) sketched the areas of bilateral cooperation.

Article 278(3) UA-EU AA prevents parties from using this treaty's dispute settlement fora to raise issues of EnC compliance.

On the solidarity front, UA-EU AA supplements EnC with at least two additional instruments: the early-warning mechanism (EWM) under Annex XXVI to Chapter I of Title V and a strategic decision-making clause (Article 274).

Operating under Article 340 and Annex XXVI, EWM is designed to react to an emergency situation or a threat of such a situation defined as a significant disruption or physical interruption of gas supply between the EU and Ukraine. It presupposes a procedure for notification and joint assessment of the situation which should end up in a joint action plan. During this time, it is prescribed that the parties 'will do their utmost to minimise negative consequences for the other Party' and 'refrain from any actions unrelated to the ongoing emergency situation that could create or deepen the negative consequences for the supply of natural gas [...] between Ukraine and the European Union'. Regulation 2017/1938 mandates that once EWM is activated, 'the Union should take appropriate action to try to defuse the situation'.¹⁹² It can arguably lead to the declaration of an early warning level crisis in EU Member States.¹⁹³

Article 274 UA-EU AA located in a special chapter on energy trade broadly relates to decision-making on gas infrastructure, namely gas transmission and storage facilities. Overall, it imposes a duty of consideration of the other party's interests during infrastructure developments and 'when developing policy documents regarding demand and supply scenarios, interconnections, energy strategies and infrastructure development plans' as well as a duty to cooperate on related matters of trade, sustainability and supply security. While the chapter where this provision is located deals with both gas and electricity, this article focuses on gas, which can be explained by the search for a commitment to safeguard Ukraine's gas transit status. It was, for instance, invoked by National JSC Naftogaz of Ukraine as a justification to

¹⁹² Regulation 2017/1938 (n 105) recital (59).

¹⁹³ *Ibid.*, art 11(1)(a).

sue the European Commission for amending the access regime of the OPAL pipeline in Germany.¹⁹⁴

At the moment, UA-EU AA does not operate as a self-sufficient solidarity regime. It relies on the institutional and constitutional basis of the Energy Community while at the same time reinforcing bilateral cooperation and communication. Nevertheless, the situation can change if the solidarity potential of the Energy Community is not developed. For instance, the already mentioned issue of cross-border application of the Energy Community *acquis* could be resolved on a bilateral level by extending the internal market treatment to this sector under Annex XVII of UA-EU AA.

IV. CONCLUSIONS

The present article illustrates that in understanding an ambiguous concept of public international law, one can rely on its application in a particular international law regime, including in a very specific and technical area such as gas market regulation. This epistemological approach is rarely used because, on the one hand, it requires quite diversified knowledge and, on the other, it may be difficult to duplicate in respect of each problematic notion. However, it has proven effective in this case where we have looked at the definition and normative force of solidarity.

In particular, we have established that early teachings of solidarity and its later doctrinal applications can be summarised in such a way as to produce its (relatively) non-contentious definition and a sketch of its normative powers. Formulated as a combination of three elements (common values and objectives, mutuality, and equality), solidarity features as a fundamental socio-political notion underlying the EU legal order and, in a way described by its first teachers, emits legal rules and mechanisms that serve to solidify this particular community. Apart from a constitutional dimension, solidarity takes the form of a general legal maxim of Article 4(3) TEU as well as of the duty to safeguard gas supply to a closed circle of customers under Regulation 2017/1938. Technicalities of a solidarity measure of last resort under this

¹⁹⁴ Case T-196/17 Action brought on 27 March 2017 – Naftogaz of Ukraine v Commission {2017} OJ C 151/45.

Regulation provide an especially interesting case of how solidarity could be translated into legal rules and procedures.

When these dimensions operate in the legal framework of Ukraine-EU gas market integration, they exemplify the rule of solidarity in international law. The search for solidarity in these relations has led to the incorporation of the Energy Community; dissatisfaction with the level of mutuality and equality in this forum could engender the creation of a new solidarity regime under UA-EU AA. EnC, which possesses fundamental characteristics of a solidarity regime, contains a mechanism of self-preservation, i.e. Article 6 analogous to Article 4(3) TEU. The full potential encrypted thereunder needs to be explored and promoted in practice upon the initiative of EnC bodies which seem to be more cognisant of illuminating CJEU jurisprudence. Finally, solidarity is embodied in duties of emergency assistance between Ukraine and the EU: while mostly negative or procedural in nature, they have a strong tendency to be complemented with positive duties of help (using the format of Regulation 2017/1938).

The methodology applied in this article can be expanded to other fields where solidarity engrained in EU law migrates to international law regimes fuelled by integrationist forces (e.g. migration, disaster relief, etc). This looks like a viable way to finally establish solidarity, which historically started as a legal notion, as a valid international law concept.