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Hunger and Politics**
Wolfgang Maier

■ **Energy Law and Security
of Supply in Europe**
Hartmut Kahl

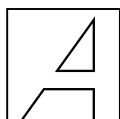
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Phone (030) 2 69 96-33 83
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e-mail: redaktion-auslandsinformationen@kas.de

Account Details:

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EDITORIAL

Dear Readers,

While we are currently experiencing a collapse in crude oil prices, global energy demand continues unabated. Competition for resources is set to increase further over the medium to long term. This trend applies equally to industrialised countries and developing regions. In these times of global unrest, crises and wars, this observation becomes more critical when one considers the aspect of energy supply security. Regulatory policies – and therefore the significance of the supply of energy and natural resources as a vital prerequisite for any economy – are becoming increasingly intertwined with foreign and security policy. In addition, the field of actors involved in this area has become more diverse, providing potential for conflicts of interest. Where energy security is concerned, private companies, (semi-)state-owned enterprises, government institutions, international organisations, the civil society and other market players pursue different goals.

With a view to ensuring long-term energy supply security and careful use of scarce resources, Germany is pushing the *Energiewende* forward, the virtually complete move to renewable energies by 2050. The U.S., by contrast, prefers to invest in its vast reserves of domestic shale gas to cover its energy demand. Compared to coal and oil, this fuel is lower in emissions, and its production does not entail the risks nuclear energy does. It does, however, entail unforeseeable environmental risks. The collapse of crude oil prices also raises questions about the cost-effectiveness of shale gas production. By pointing to the United States, energy expert Jan-Justus Andreas explains that

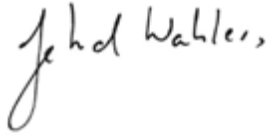
while its concern for energy independence “does not provide total protection against external crises in the era of globalised energy markets, it does place the United States in a stronger geopolitical position”.

The continuing crisis in Ukraine illustrates how energy supply issues can serve as bargaining chips for power politics and territorial interests. Energy supply security as a public good cannot be provided by market forces alone or decreed by law. Legal expert Hartmut Kahl points this out in his analysis of European energy security. That said, the European Union can put various legislative instruments in place to provide a framework as a provision for the future and as a means for coping with acute crisis situations. Under former EU Energy Commissioner Günther Oettinger, important steps were taken to set the course for a common energy policy. The new EU Commission is maintaining this approach, which is reflected, among other things, by the creation of the post of Vice President for the Energy Union and by the goals set for the further development of the internal energy market. The EU is intent on reducing its dependence on fuel imports and on diversifying its sources and channels of supply while at the same time fulfilling its international obligations regarding climate protection.

2015 will be a crucial year in this respect. Previous UN climate conferences have left many questions unanswered, and industrialised and emerging countries are deliberating over binding obligations. As a case in point, the Lima Climate Change Conference (COP 20) held a few weeks ago produced only a compromise. The outcome gives little hope for an effective climate protection agreement – measured by the two-degree target – to be reached in Paris (COP 21) in December 2015. This is in part due to the conduct of the two largest carbon dioxide emitters, the U.S. and China, who only agreed to non-binding and low-scale goals. And in China’s case, these will not enter into effect until 2030.

The activities of the Konrad-Adenauer-Stiftung in Germany and around the world reflect its support for a secure, economically viable and climate-friendly energy supply. We see this topic as a challenge that bears security and regulatory implications. In that respect, inter-generational equity and preservation nature are determining factors. As

two sides of the same coin, the protection of climate and resources as well as energy security therefore represent a central cross-cutting task, which we engage with competence and commitment.

A handwritten signature in black ink, reading "Gerhard Wahlers," with a stylized, cursive script.

Dr. Gerhard Wahlers
Deputy Secretary General

gerhard.wahlers@kas.de

INTERJECTION: HUNGER AND POLITICS

Wolfgang Maier

We have been engaged in efforts to fight hunger and poverty in developing countries for decades. Some progress has been made, but we cannot be satisfied with the overall results to date. According to the Food and Agriculture Organisation (FAO),¹ the number of people suffering from hunger around the world has declined (it is still above 800 million). But large regional differences persist. In Africa in particular, the number of those suffering from malnutrition has only been declining slowly over the last few decades, while the concentration of malnourished people is still highest in Asia. Bearing in mind the Millennium Development Goals (MDGs), the goal of reducing the prevalence of hunger to half its 1990 rate has at least come within reach. However, this does not mean the problem has been solved by any means.

THE FIGHT AGAINST HUNGER IN THE DEBATE ON DEVELOPMENT COOPERATION

Many international institutions and national governments have since begun efforts to tackle the challenge. The German Federal Government has set up programs of its own (for instance a special initiative entitled "Eine Welt ohne Hunger", A World without Hunger)² and is heavily engaged in the international debate and the further development of



Dr. Wolfgang Maier has been Deputy Head of the Department for European and International Cooperation since 2012 and has been working with the Konrad-Adenauer-Stiftung since 1983. He is an agricultural economist and received a doctorate in agricultural sciences (University of Hohenheim, Stuttgart). During his career he spent several years abroad on behalf of the foundation, namely in Swaziland, Tanzania and Namibia.

1 | Cf. FAO, *The State of Food Insecurity in the World 2014*, Rome, 2014, p. 4, <http://fao.org/3/a-i4030e.pdf> (accessed 10 Dec 2014).

2 | Cf. BMZ, "100 Tage Bilanz: Eine Welt ohne Hunger", http://bmz.de/de/zentrales_downloadarchiv/Presse/100Tage/100-Tage-Bilanz-EineWelt-ohne-Hunger.pdf (accessed 8 Dec 2014).

the systematic approaches connected to the Sustainable Development Goals (SDGs)³ of the United Nations.



Without breakthrough: Many donor agencies have declared rural development as a focus of their work. However, hunger remains widespread. In India, about 17 percent of the population is affected by chronic malnutrition. | Source: Prashant Panjiar, Gates Foundation, flickr ©①②③.

It was, in fact, over 30 years ago that the Federal Ministry for Economic Cooperation and Development (BMZ) and the German Federal Enterprise for Technical Cooperation (GTZ) declared rural development the key task of technical cooperation. Due to a decline in food production in many developing countries since 1970, the fight against poverty and hunger had become a high-priority goal in development cooperation.⁴ The conclusions and recommendations for development projects included in a handbook published jointly by the BMZ and the GTZ⁵ were innovative for the time. One new idea involved focusing on “target groups”, whose inclusion was to be secured using novel planning tools (for instance through Goal-Oriented Project Planning, GOPP).

3 | Cf. United Nations, “Open Working Group proposal for Sustainable Development Goals”, <http://sustainabledevelopment.un.org/sdgsproposal> (accessed 8 Dec 2014).

4 | In 1983/1984, the BMZ set up the working group “ES 31: Armutsbekämpfung durch Selbsthilfe”. Cf. Deutscher Bundestag, “Dritter Bericht über die Armutsbekämpfung in der Dritten Welt durch Hilfe zur Selbsthilfe”, 6 Jun 2001, p. 4, <http://dip21.bundestag.de/dip21/btd/14/062/1406269.pdf> (accessed 8 Dec 2014).

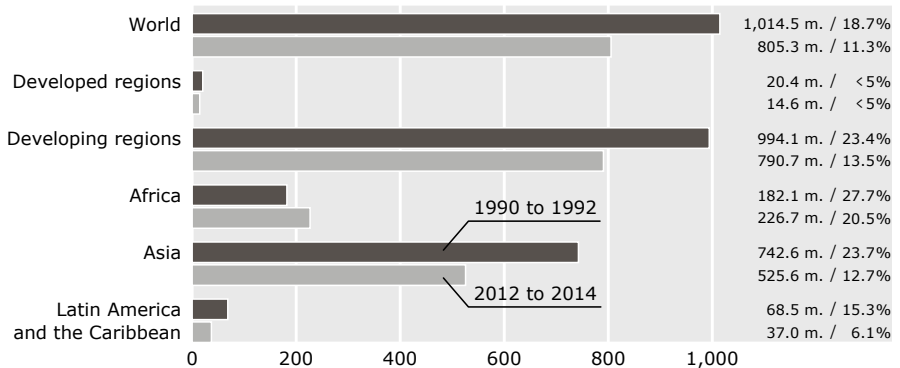
5 | Cf. BMZ and GTZ (eds.), *Handbuchreihe Ländliche Entwicklung*, 2nd edition, Eschborn, 1987.

The fact that many donor countries and donor organisations focused on rural development projects resulted in a rise in food production in many countries. However, the “breakthrough”, i.e. the eradication of poverty, still failed to materialise. Oxfam⁶ has recently responded to the question as to why there are still over 870 million people suffering from hunger by pointing out the following correlations:

- Reduction in cultivated land
- Low incomes
- Climate change
- Biofuels
- Gender inequality
- Land grabbing
- Speculation
- Soil degradation
- Rising meat consumption
- Lack of preventative action

Fig. 1

**Prevalence of undernourishment
in absolute numbers and per cent**



Source: FAO, n. 1, p. 8.

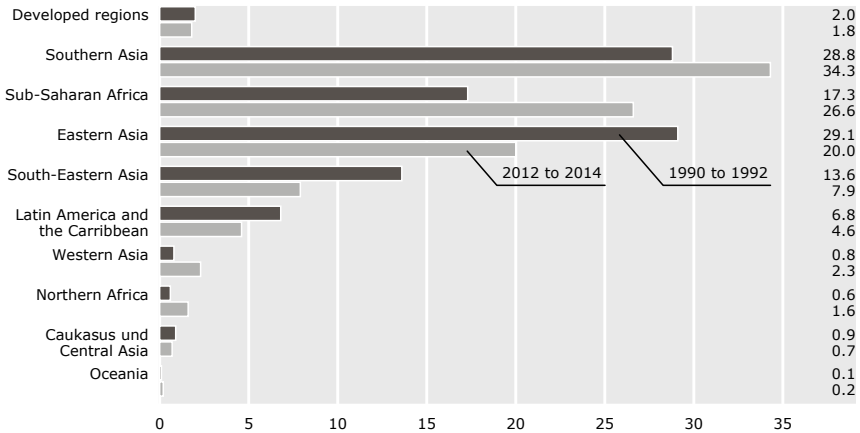
This attempt to examine the causes of hunger in a more comprehensive manner represents some progress compared to previous, rather one-dimensional perspectives, which, for instance, depicted hunger as a result of insufficient rainfall. It shows that there is now a greater awareness of the varied correlations involved.

6 | Cf. Oxfam Deutschland, “10 Gründe für Hunger: Warum hungern 870 Millionen Menschen auf der Welt?”, <http://oxfam.de/informieren/gruende-fuer-hunger> (accessed 8 Dec 2014).

In its report, the FAO went further and placed the issue in an even broader context. First of all, it declared that “sustained political commitment at the highest level” is a decisive prerequisite for all activities to fight hunger.⁷ To complement this statement, the FAO report included further, highly notable aspects of the correlations between the existence of hunger and the fight against it: participation and involvement of all stakeholders, democratic principles and a reliable legal framework, coherence among the different programs, better coordination and governance, improvements in information provision and communication.

Fig. 2

Division of undernourished people by region (in per cent)



Source: FAO, n. 1, p. 11.

When an organisation such as the FAO, founded some 70 years ago as an “institute for technology transfer”, now interprets the complex causes of hunger by taking social and political aspects into account, then it is a noteworthy step. Therefore, the simplistic reasons for the existence of hunger that are still being put forward should be off the table. It is simply not true that hunger is triggered or exacerbated solely by “catastrophic climate events” or “land grabbing”, by “inequitable global trade” or “poor water management”. And for quite some time, this debate

7 | Cf. FAO, n. 1, p. 39.

certainly has not been centered on the tractor that shall replace the buffalo to work the fields.

THINKING ABOUT THE CAUSES OF HUNGER MORE COMPREHENSIVELY – THREE PROPOSITIONS

1. Hunger is a consequence of poor policy-making.

One indication of this proposition having merit is probably the fact that there are states that turn from enjoying a food surplus to suffering a food deficit – virtually overnight – due to policy changes. This has usually nothing to do with climate-related, technical or similar factors or obstacles. There have been specific examples of this, for instance in Southern Africa.

There are states that turn from enjoying a food surplus to suffering a food deficit due to policy changes.

So, if the above-described realisation by the FAO were to be reflected in the future work of international institutions and major donors, would that help to overcome the problem of hunger for good? Unfortunately not, and for a very simple reason: neither the FAO nor other international institutions or the donor countries with their implementing organisations are, in fact, capable of implementing the demands they have formulated on the ground. While it is possible in most cases to elicit commitment in multilateral and bilateral agreements, local commitment at grassroots level is very difficult to enforce. That has been the crux and the tragedy of past endeavours.

2. Anti-hunger policies are not implemented at conferences but exclusively on the ground.

Policy measures aimed at combating hunger need to be designed in the villages, the small towns and in the capital – simultaneously and in a participative manner. These are also the places where the people in charge, the politicians of all parties, live. They must declare the fight against hunger one of their political goals and act accordingly.

Seen in this context of a “transmission task”, politics is, however, no longer necessarily what the FAO, the major donors or the diplomats understand by the term. Here, politics is the competition between political parties and

programs, between groups and individuals; it is simply about attaining power, gaining scope for political action. It is obvious that neither the FAO or other international institutions nor the donors or their governments wish to, can or should interfere at this juncture. But if the agents of politics (of development cooperation) fail to engage with this process or retreat, they must assume some of the blame – because they ought to know better by now.



Conference policy is not enough: International meetings such as the FAO have no effect if the implementation fails at the grass-roots level because of weak governance. | Source: U.S. delegation for specialized agencies of the UN in Rome, flickr ©①①.

3. Rural development and the fight against poverty are in the remit and responsibility of politics and politicians in the respective countries.

Fighting hunger and poverty is first and foremost the responsibility of national politics, political parties, parliaments and politicians. They create the legal framework, and can hold their governments accountable. This responsibility cannot be delegated to international platforms or donors. If it is true that rural development (and therefore also the fight against hunger) is not at the very top of the priority list of many politicians in developing countries, then there are reasons for that. Food riots in the cities, for instance, present a greater risk to a country's power elite than those in rural areas, which is why they prioritise urban areas.



Good governance and political dialogue: Poverty reduction is a national political task. Politicians and citizens have to make the decisions. | Source: © KAS Senegal.

It must also be borne in mind that the sectors of development policy, agricultural policy, trade policy and financial/budgetary policy are subject to potential tensions. There may be a situation, for instance, where a country in a region threatened by famine is granted special loan conditions. Maintaining this status for as long as possible could make perfect sense from an economic point of view – even if the country's own granaries happen to be filled and its population is not suffering from hunger. There is no shortage of similar examples, for instance of hunger being politically exploited. Many development workers can tell similar and worse stories, involving aid supplies being “diverted”, for example.⁸

The correlations between the above-mentioned policy areas are complex and not always transparent. In most countries, the sectors of society most affected by hunger generally do not have a sufficiently effective political lobby. The politicians simply do not take an interest in them.

8 | Cf. Rupert Neudeck, “Afrika – eine Herausforderung”, Cap Anamur, press release of 6 Aug 2002, <http://cap-anamur.org/projekte/pressemitteilungen/2002-08-06/afrika-eine-herausforderung> (accessed 17 Dec 2014).

CONCLUSION: RURAL DEVELOPMENT REQUIRES POLITICAL DIALOGUE

Rural development has undoubtedly come a long way and has become richer in experience. Today, those involved in development cooperation are not only more knowledgeable, they also have a more extensive apparatus available to combat poverty and hunger. And when the BMZ addresses the fight against hunger with a special initiative, it is to be welcomed.

Hunger can only be eradicated if those ultimately carrying responsibility have declared this challenge their very own duty.

However, this initiative too is destined to fail if there is reluctance to take the last, absolutely essential step, namely acting in recognition of the fact that hunger can only be eradicated if those ultimately carrying responsibility have declared this challenge their very own duty. And this refers to the politicians at different levels of the countries affected by hunger themselves – and not the development experts of the FAO, the World Bank, the EU or the donors.

In line with these points some recommendations for (development-related) politics are presented here, which comprise a collection of goals essential for combating hunger effectively and open the floor for discussion:

1. Politicians from the countries affected by hunger have realised that they themselves bear ultimate responsibility for overcoming hunger in their countries.
2. Both the urban and rural populations have realised that their own governments bear key responsibility for the fight against poverty and hunger.
3. The topic of "hunger/food security" has been put on the countries' domestic policy agenda and is being addressed by the media, the political parties and the political figures.
4. The topic of "hunger/food security" is given adequate prominence during elections. It can become a topic that is crucial to the election outcome.
5. (Development) politics and cooperation have transformed into a political dialogue with local politicians and political parties. Combating hunger has become a topic in parliamentary debates. If development

cooperation makes no efforts to this end, it will also be held responsible.

Whether the instruments currently being used can fulfil these demands is doubtful. It is, after all, not our contribution to the fight against hunger that matters most. It is the decision by the responsible politicians in the villages, towns and capitals and, above all, in the parliaments of the countries affected by hunger to make it part of their political agenda. But as long as those engaged in development cooperation do not have access to all those bearing political responsibility, awareness of what is required⁹ cannot guarantee success either. However admirable the good intentions of the BMZ may be, progress in this area cannot be accomplished through traditional development approaches.

9 | Translated quotation "To increase agricultural output, it is not sufficient to merely provide support to the agricultural sector in the developing countries. The political will must exist to realise the human right to food and to implement comprehensive development of the rural regions. This is not possible if public administration does not work properly, laws are interpreted arbitrarily, conflicts of interest about resources are not resolved equitably and corruption is rife. The fundamental prerequisite for food security is therefore good, responsible governance [...]." BMZ, "Basiswissen: Unabdingbar: politischer Wille", http://bmz.de/de/was_wir_machen/themen/les/ernaehrung/basiswissen/politik_als_chance/index.html (accessed 9 Dec 2014).



Dr Hartmut Kahl, LL.M. (Duke) is head of the department for international environmental energy law of Stiftung Umweltenergierecht in Würzburg.

ENERGY LAW AND SECURITY OF SUPPLY IN EUROPE*

Hartmut Kahl

In many respects, the Ukrainian crisis is one of the key foreign policy challenges that the new EU Commission is facing. Not at least, Russia's behaviour in this conflict is critically important for the security of energy supplies¹ in Europe.² To varying extents, this affects the energy landscapes of the Member States, but it also impacts neighbouring states which are transit countries or energy suppliers themselves. They now find themselves located in EU's spheres of interest and responsibility according to its role as a soft power. This was made very clear by the mediating role played by the EU Commission and the Presidency of the EU Council in last autumn's conflict on natural gas between Ukraine and Russia³ and the sporadic restrictions in gas supplies also to EU Member States.⁴

* Translation from German.

- 1 | In a national context, the concept of (energy) supply security is frequently described in terms of two specific risk situations: the "availability of energy to meet demand and the technical elements of plant safety". In an international context, the concept is often focused on the "availability of sufficient energy", cf. Katja Frey, *Globale Energieversorgungssicherheit*, Tübingen, 2013, p. 7 et seq.
- 2 | Cf. Kirsten Westphal, "Russlands Energielieferungen in die EU – Die Krim-Krise: Wechselseitige Abhängigkeiten, langfristige Kollateralschäden und strategische Handlungsmöglichkeiten der EU", *SWP-Aktuell* 11, 3/2014, http://swp-berlin.org/fileadmin/contents/products/aktuell/2014A11_wep.pdf (accessed 17 Nov 2014); Tim Altegör, "Katar statt Russland?", *neue energie*, 10/2014, p. 12 et sqq.
- 3 | Cf. "Russland sagt Gasversorgung für den Winter zu", *Frankfurter Allgemeine Zeitung*, 30 Oct 2014, <http://faz.net/-gqg-7vs08> (accessed 11 Dec 2014).
- 4 | Cf. "Österreich erhält ein Viertel weniger russisches Gas", *Frankfurter Allgemeine Zeitung*, 22 Sep 2014, <http://faz.net/-gqe-7u7vz> (accessed 11 Dec 2014).

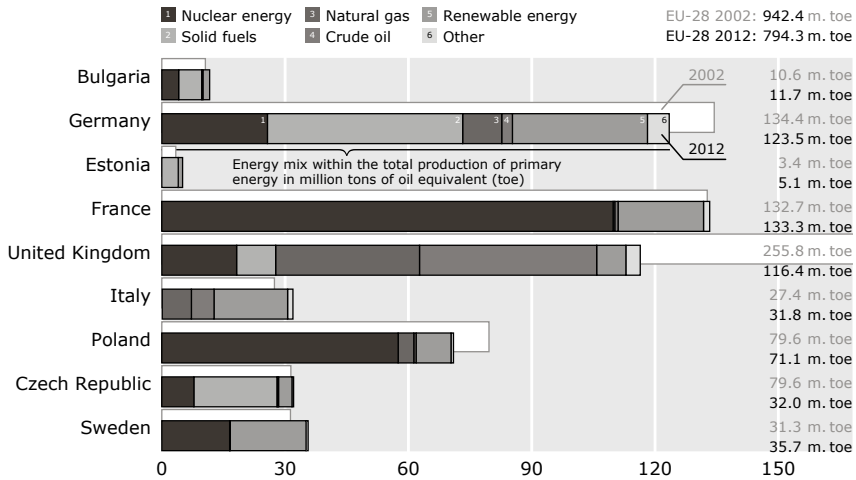
FOCUS OF THE EU'S NEW LEADERSHIP

The selective pricing and supply policy of Russia's state-owned company Gazprom led former Polish Prime Minister and now acting President of the EU Council, Donald Tusk, to propose the creation of a European Energy Union with a mandate to negotiate uniform supply conditions. This proposal triggered a response that should certainly not be underestimated. For example, Jean-Claude Juncker's new Commission includes a Vice-President for the Energy Union. Experienced Slovakian diplomat Maroš Šefčovič will be shaping, coordinating and implementing key initiatives in order to develop energy policy across all EU departments. The controversial hearing held in the European Parliament for the original nominee for this position, Slovenian candidate Alenka Bratušek, revealed that the Energy Union remains a concept that is still lacking in substance. It is therefore all the more important for the project to be directed by someone who is able to raise its profile.



Experienced diplomat: As one of the Commission's Vice Presidents Maroš Šefčovič is in charge of coordinating EU's energy policy. | Source: Pietro Naj-Oleari, European Parliament ©©©©.

Fig. 1
Energy production of selected EU states 2002 and 2012



Source: Eurostat, "Energieerzeugung und -einführen", http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Energy_production_and_imports/de (accessed 10 Dec 2014).

In his mission letter,⁵ President Juncker has already given the new Vice-President some guidelines on the future direction of the Energy Union. He states that the internal energy market must be completed and that, for the sake of its own credibility, the EU must set an ambitious energy efficiency target and become the world's number one in renewable energy. He concludes by giving his vision of what an Energy Union must achieve:

"We need to pool our resources, combine infrastructures and unite our negotiating power vis-à-vis third countries. We need to diversify our energy sources, and reduce the high energy dependency of several of our Member States. I want to keep our European energy market open to our neighbours. However, if the price of energy from the East becomes too expensive, either in commercial or political terms, Europe should be able to switch swiftly to other supply channels."⁶

5 | Jean-Claude Juncker, "Mission Letter to Maroš Šefčovič, Vice-President for Energy Union", Brussels, 1 Nov 2014, http://ec.europa.eu/about/juncker-commission/docs/sefcovic_en.pdf (accessed 11 Dec 2014).

6 | Ibid., 4.



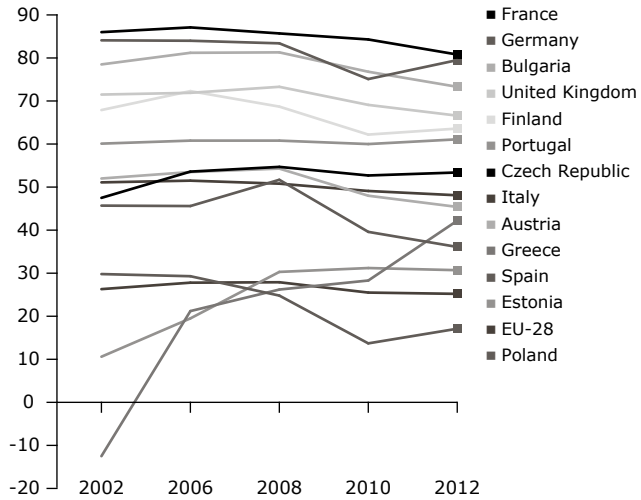
Agenda-setting: President Juncker and his new Commission are facing big challenges in the field of energy policy. | Source: Pietro Naj-Oleari, European Parliament ©©©©.

This underlines that energy supplies from third parties can only be used as a means of strategic pressure if the EU and its Member States persist with established dependencies. Yet in the past, gas crises involving Russia and Ukraine led to the creation of the post of an Energy Commissioner. Now the renewed conflict between the two countries has acted as a catalyst for a more stringent institutionalisation of energy policy in the EU. It might be regrettable that these lessons are only ever learned as a consequence of external pressures. But now the Commission's agenda on energy policy as outlined by Juncker has set some ambitious goals. These involve increasing the long-term resilience⁷ of European energy supplies and might serve as a counter part to Member States' common tendency of renationalising energy policies. We now have to keep a close eye on how this will play out in the Commission's day-to-day activities, as the Commissioners responsible for this area under former President Barroso often failed to demonstrate joint action.

7 | See Friedbert Pflüger, "Resilienz – Schlüsselwort der Energiesicherheit", *Energiewirtschaftliche Tagesfragen*, vol. 63, no. 11, 2013, 30 et sqq.

Fig. 2

Energy Dependency of selected EU Member States



Energy dependency shows the extent to which an economy relies on imports in order to meet its energy needs. The indicator is calculated as net imports divided by the sum of gross domestic energy consumption plus storage. | Source: Eurostat, "Energieabhängigkeit (tsdcc310)", http://epp.eurostat.ec.europa.eu/portal/page/portal/energy/data/main_tables# (accessed 10 Dec 2014).

However, in addition to the issue of setting stringent policy goals, there is also the important question of how the challenge of security of supply should be approached in legal terms and which instruments and mechanisms should be used in this respect. Clearly, the market alone is not in a position to create security of supply as a public good. So this article will focus on the sources of law and legal procedures that determine the legal framework for actions by the EU and its Member States in this area. The focus will lie on EU law and international investment protection law.⁸

8 | With regard to EU legal texts and documents, these mainly come from the time of the Barroso-led Commission and therefore cannot be viewed as representative of energy policy under Juncker. But they provide a precise delineation of the spheres of activity where appropriate concepts should be developed or expanded over the next five years.

EU LAW

Security of supply is a prominent issue in EU primary law. Article 194, paragraphs 1 and 2 of the Treaty on the Functioning of the European Union (TFEU) states:

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

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

(2) Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1.”

This sets out the EU’s goals on energy policy, but they still have to be consistently implemented in (at times lengthy) legislative procedures and spelled out in secondary law. However, the Council also has emergency powers at its disposal on an ad hoc basis. Article 122 paragraph 1 of the TFEU states:

“Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.”

So this provision relates to short-term measures that may be put in place in urgent situations. In this case, as an exception, it is not necessary to comply with the normal legislative process in accordance with Article 194 paragraph 2 of the TFEU. Such measures could include the concerted release of stockpiled reserves or the signing of international treaties if that may contribute to solve an emergency situation.⁹ However, these kinds of crisis reaction mechanisms can only be applied in response to specific situations and over a limited period of time. In contrast, the strategic direction of legislation on guaranteeing security of supply must go beyond the conceptual basis of long-term instruments and be applied in classic secondary law, as in the form of Regulations and Directives. Both of these approaches must be used “in a spirit of solidarity between Member States”.¹⁰



Minimum reserve: The EU's supply strategy requires that Member States hold a reserve of oil and gas. For that purpose, for instance, huge oil tanks are used, like here in the Netherlands. | Source: E. Dronkert, flickr ©©.

9 | Cf. Daniel Hackländer, *Die allgemeine Energiekompetenz im Primärrecht der Europäischen Union*, Frankfurt/M., 2010, p. 172, 174.

10 | For a more detailed view, see Georg Hermes, “Die Solidaritätsklausel in der europäischen Energiepolitik”, in: Stefan Kadelbach (ed.), *Solidarität als europäisches Rechtsprinzip?*, Baden-Baden, 2014, p. 59 et sqq.

In fact, secondary law now has a wide range of starting points which directly or indirectly serve to guarantee the security of energy supplies. A good example of this is the Member States' obligations to stockpile reserves. The Directive on emergency oil stocks¹¹ obliges them to maintain reserves for at least 90 days. On the other hand, the Regulation on the security of natural gas supply¹² stipulates that the supply of protected customers (particularly households) is guaranteed: Each Member State, depending on the weather conditions, must have reserves to cover seven days (during extreme temperatures) or 30 days (during average winter conditions). In response to the gas crises of the winters of 2006 and 2009, the Regulation also obliges Member States to produce national prevention and emergency plans. Other important elements of the Regulation are the creation of the Gas Coordination Group to act as an interface between authorities, suppliers and consumers, and provisions to create reverse flow capacities. It is hardly surprising that in its latest European Energy Security Strategy¹³ (simply referred to as the Strategy in the following), the Commission repeatedly refers to the instruments introduced by the Regulation as a basis for potential emergency measures and updated risk assessments. The latest gas stress test¹⁴ to assess the effects of possible supply interruptions by Russia during winter 2014/2015 is also based on this Strategy but is not an

In response to the gas crises of the winters of 2006 and 2009, Member States had to launch national prevention and emergency plans.

11 | Cf. "Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products", <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0119&from=EN> (accessed 11 Dec 2014).

12 | Cf. "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", <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0994&from=EN> (accessed 11 Dec 2014).

13 | European Commission, "Communication from the Commission to the European Parliament and the Council on European Energy Security Strategy", 28 May 2014, COM(2014) 330 final, [http://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/com_com\(2014\)0330_/com_com\(2014\)0330_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/com_com(2014)0330_/com_com(2014)0330_en.pdf) (accessed 11 Dec 2014).


14 | Cf. European Commission, "Communication from the Commission to the European Parliament and the Council on the short term resilience of the European gas system", 16 Oct 2014, COM(2014), 654 final, http://ec.europa.eu/energy/doc/nuclear/2014_stresstests_com_en.pdf (accessed 11 Dec 2014).

element of the Regulation. Thus, the stress test looks not only at the EU's internal data but also at its neighbouring non-member states.¹⁵

Along with the emergency mechanisms, the European Energy Security Strategy also emphasises the need to protect critical infrastructures:

"This debate should address the control of strategic infrastructure by non-EU entities, notably by state-companies, national banks or sovereign funds from key supplier countries, which aim at penetrating the EU energy market or hampering diversification rather than the development of the EU network and infrastructure."¹⁶



Securing the energy supply is impossible without the reliableness of investments into the infrastructure. | Source: Uwe Hees, flickr ©.

15 | On p. 3, the stress test report states (ibid.): "In the present Communication, the Commission reports on the main findings of this stress test exercise and formulates a number of specific recommendations. In parallel to this Communication, the Commission services have prepared staff working documents which contain the reports of the three 'focus groups', a report on the cooperation with G7 and other partner countries as well as a report on the review of the Security of Gas Supply Regulation. In addition, the Commission is also adopting its Recommendation for the application of internal market rules for the Energy Community."

16 | European Commission, n. 13, p. 6.

In this respect, the Commission also draws attention to the fact that European regulations for unbundling the infrastructure activities of grid operators¹⁷ must also be complied with by companies controlled by non-EU legal entities. Also this has to be taken into account when tightening or intensifying their application. This was a critical aspect in the (now abandoned) talks on the South Stream gas pipeline that was to run from Russia via the Balkans to Austria. Gazprom wanted to both supply the gas and operate the pipeline across EU territory.¹⁸ EU law requires that energy production and sales must be separate from energy transportation, i.e. from its supply and grid operation. In fact, this is aimed at avoiding conflicts of interest, supporting investment in the grid infrastructure and preventing discriminatory behaviour in terms of competition.¹⁹ It should be pointed out that the EU Commission also has merger control mechanisms at its disposal in order to limit the influence of foreign state-owned companies (SOEs). In order to ensure a level playing field, the Commission monitors whether SOEs are actually independent business operators or whether they belong to larger state-controlled corporations.²⁰

EU law requires that energy production and sales must be separate from energy transportation to avoid conflicts of interest.

Some Member States follow even a more restrictive approach in their foreign trade legislation,²¹ particularly in strategic sectors. However, their instruments are limited

17 | Cf. "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", https://beck-online.beck.de/default.aspx?bcid=Y-100-G-EWG_RL_2009_73 (accessed 11 Dec 2014).

18 | See also Michael Thumann, "Sein großer Pipeline-Schwenk. Wladimir Putin beendet das Röhrengroßprojekt South Stream. Was bedeutet der Anschluss an die Türkei?", *Die Zeit*, no. 50, 4 Dec 2014, p. 27.

19 | See also: European Commission, "EU adopts new rules strengthening the internal energy market", http://europa.eu/rapid/press-release_IP-09-1038_en.htm?locale=en (accessed 11 Dec 2014).

20 | Cf. Alex Nourry/Nelson Jung, "Protectionism in the Age of Austerity – A Further Unlevelling of the Playing Field", *Competition Policy International*, vol. 1, no. 8, 2012, p. 5.

21 | Cf. Art. 5 paragraph 2 of the German Foreign Trade Act (AWG): "Restrictions or obligations [...] can particularly be imposed with reference to the acquisition of domestic companies or shares in such companies by non-EU residents if the acquisition endangers the public order or security >

when it comes to enterprises that are domiciled in the EU or when the Commission has a special competence because of the importance of a particular transaction for the Union as a whole. This was illustrated by the discussions about the takeover of Western Europe's largest gas storage facility in the town of Rehden (Lower Saxony) by a German subsidiary of Gazprom and by the sale of Dea AG, RWE's oil and gas business, to a Luxembourg holding company controlled by Russian oligarch, Mikhail Friedman.²²

Fig. 3

Gas pipelines in Central Europe



Pipelines from Russia supply customers in the EU with gas and oil. In political conflicts control over the gas tap might become a serious point of leverage to enforce interests. | Source: Illustration © racken.

As part of the optimisation of the internal electricity and gas market, the Strategy also highlights the importance of speeding up the construction of key cross-border interconnections. The Regulation on the guidelines for trans-European energy networks (TEN-E) identifies certain projects of common interest (PCI). 27 projects in gas and six in electricity have been identified as critical for EU's energy

of the Federal Republic of Germany [...]. For this to be the case, there must be an actual and sufficiently serious danger affecting a fundamental interest of society."

22 | For more details see the response of the Federal German Government in BT-Drs. 18/1210 of 17 Apr 2014 to the parliamentary query in BT-Drs. 18/961 of 1 Apr 2014, <http://dipbt.bundestag.de/dip21/btd/18/012/1801210.pdf> (accessed 11 Dec 2014).

security in the short and medium terms,²³ “because their implementation is expected to enhance diversification of supply possibilities and solidarity in the most vulnerable parts of Europe.”²⁴ These projects are mainly situated in Eastern and South Western Europe and also involve liquid gas terminals and storage facilities. Their completion is planned for 2017 and 2020, aided by special funding from the Connecting Europe Facility (CEF) and by speeding up and improving the cross-border coordination of their approval processes.



Anchored in EU law: Article 194 of the Treaty of the Functioning of the European Union states that the EU promotes the development of new and renewable energy sources within its energy policy framework. | Source: Mark Mühlhaus/attenzione, Windwärts Energie GmbH ©©©©.

As a generally long-term contribution to increasing energy supply security in the EU, the Strategy highlights certain instruments that could help to save energy and improve domestic energy production. In terms of energy saving, a major priority is to immediately begin the consistent implementation of the measures set out in the Directive on energy efficiency and the Directive on the energy performance of buildings. Only then will it be possible to achieve the objective of 20 per cent energy savings in the EU by 2020 (compared to 1990). But the Directive on the labelling of energy consumption and the Eco-design Directive also need to be revised in order to reduce the energy

23 | See indicative list in Annex 2 of the TEN-E.

24 | European Commission, n. 13, p. 11.

consumption of products. In its Strategy however, the Commission has failed to respond to the question of how higher total energy consumption caused by an increase in the number of devices can be minimised, despite the introduction of products that consume less energy (known as the rebound effect). Instead, energy saving is simply equated with energy efficiency. With regard to making maximum use of domestic energy sources as substitutes for imports, the Strategy highlights the EU's target that 20 per cent of final energy consumption should come from renewable sources by 2020. Renewably produced electricity and thermal heat in particular are sources that could offer a cost-effective alternative and help achieve the goal of making significant reductions in gas consumption by 2020. With technology cost reductions, many renewable energy sources are increasingly competitive and ready to join the market (e.g. onshore wind power).

It seems doubtful that solely the basic freedoms of the internal market and the restraints of state aid law will define a concise European framework for expanding renewable energies.

However, there is no reference to how this would be specifically reflected in an amendment to the Renewable Energy Directive. Instead, the fundamental freedoms of the internal market and state aid rules are

referred to as presenting problems for national subsidy policies. It seems doubtful though that these issues alone will define a departure point for a concise European framework for expanding renewable energies. There does not seem to be a truly constructive approach to create legislation in this respect. Indeed, this corresponds with the decision of the European Council to set the EU's efficiency objective and proportion of energy from renewables at a minimum of 27 per cent by 2030 only.²⁵ This level of ambition is unlikely to send a signal from the EU that it is making itself much less dependent on imports thanks to sweeping energy savings and exchanging energy from fossil sources for energy from renewable sources. It seems that such kinds of externally-directed messages have only played a subordinate role in this respect.

25 | Cf. "European Council Conclusions of 23/24 October 2014" (here: I. 2030 Climate and Energy Policy Framework), http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/145397.pdf (accessed 11 Dec 2014).

INVESTMENT PROTECTION LAW

Since there is (still) no general framework in international law²⁶ covering the secure supply of energy, international investment protection law is an issue for EU Member States – and not only for them – as another area of activity in guaranteeing security of supply. This area of law draws on sources of law in bilateral and multilateral treaties. Investment protection as a special form of international law relating to foreigners has traditionally played an important role with respect to long-term foreign investments that are typical of the energy sector. Project-related agreements between investors and governments are particularly important for large cross-border infrastructure projects (such as gas pipelines). An Intergovernmental Agreement (IGA) is generally signed by the nations involved, setting forth the particular rights of investors for specific projects under international law. These are often accompanied by a Host Government Agreement (HGA), which stipulates the specific project conditions between the (private) investor and the government in question.²⁷ One of the key goals of an HGA is to hedge infrastructure projects with long realisation/operation/amortisation timeframes against political and legislative changes which could put the investment at risk.

International investment protection law draws on sources of law in bilateral and multilateral treaties.

It is obvious that these kinds of agreements could have a severely limiting effect on the sovereignty of the nation state in question. That is why, such clauses are somewhat controversial. However, without the instruments contained in such intergovernmental agreements, it is unlikely whether any major energy transportation projects between Eastern and Western Europe would have ever materialised. It is vital that the parties to the agreement find a fair way of balancing their interests that goes beyond their merely individual interests in how the value created is distributed. In any case, major imbalances in liabilities are not likely to increase the political reliability of such agreements. Thus,

26 | Cf. Frey, n. 1, p. 64.

27 | See also Ralf Schäfer/Christian Thole/Jan Voß, "Die Ausgestaltung von Investor-Staat-Verträgen für internationale Infrastrukturprojekte", *Energiewirtschaftliche Tagesfragen*, vol. 63, no. 7, 2013, p. 75 et sqq.

balancing the project risks as fairly as possible is important for guaranteeing security of supply in the destination countries.²⁸

Another key source of law for investment protection in the European energy sector is the 1994 Energy Charter Treaty which contains a whole section on investment promotion and protection. It prohibits discrimination against foreign investors by requiring equal treatment with national investors and containing a most favoured nation clause. It also requires protection for both completed investments

The aim of the Energy Charter was to increase security of supply to Western Europe after the fall of the Iron Curtain by means of a new East-West partnership.

and investments that are in the preparation stage.²⁹ It takes a relatively broad view of investment³⁰ and establishes the right of investors to take legal action.³¹ The Energy Charter Treaty is the result of an initiative by former Dutch Prime Minister Ruud Lubbers, which initially led to the (non-binding) European Energy Charter of 1991.³² The aim of this initiative was to increase security of supply to Western Europe after the fall of the Iron Curtain by means of a new East-West partnership.³³ Nowadays the Energy Charter Treaty which resulted from the European Energy Charter is no longer limited to Europe but counts many Asian countries among its signatories.³⁴

The legal provisions on investment protection are the key elements of the Energy Charter Treaty in practical terms,³⁵ but it goes well beyond this. It also includes rules on trade and transit, technology transfer, access to capital and markets, transparency, environmental protection, taxation and settling disputes. However, the actual significance of the Energy Charter Treaty for Europe's energy supply

28 | Cf. *ibid.*

29 | Cf. *ibid.*, Part III "Investment Promotion and Protection" from Art. 10 et seqq.

30 | Cf. *ibid.*, Art. 1 No. 6.

31 | Cf. *ibid.*, Part V "Dispute Settlement" from Art. 26 et seqq.

32 | Cf. Markus Kachel, „Handel, Transport und Verteilung von Energie – gegenwärtige und künftige Rechtsfragen“, in: Dirk Ehlers/Hans-Michael Wolfgang/Ulrich Jan Schröder (ed.), *Energie und Klimawandel*, Frankfurt/M., 2010, p. 17 et seqq.

33 | Cf. *ibid.*, p. 18.

34 | A list of members can be found at Energy Charter Secretariat, "Members and Observers", <http://www.encharter.org/index.php?id=61> (accessed 11 Dec 2014).

35 | Cf. Tim Martin Metje, *Der Investitionsschutz im internationalen Anlagenbau*, Tübingen 2008, p. 92.

security has faded somewhat since October 2009, when Russia announced it would definitely not be seeking its ratification. Russia initially hesitated to ratify the Treaty and for years had only applied it in a provisional way as far as it coincided with domestic laws.³⁶ Years of negotiations on transit conditions have come to nothing and a separate transit treaty has never been signed.³⁷ It is hardly over-pessimistic to say that the aim of Lubber's original initiative has – at least for the time being – come to nothing. However, it is possible that the existing institutional framework of the Energy Charter Treaty could in the medium term serve as a platform for beginning new talks on energy supply security with Russia.

With regard to the reliability of fossil fuel imports, the Energy Charter Treaty highlights a particular principle of international law that should not be neglected in legal discussions on supply security. Article 18 emphasises the sovereignty of the state over energy resources and its "rights to decide the geographical areas within its area to be made available for exploration and development of its energy resources [...] and the rate at which they may be depleted or otherwise exploited". This view of state sovereignty is formulated in a similar way in Resolution 1803 of the United Nations General Assembly (Permanent Sovereignty over Natural Resources) from 1962. This refers to "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States". Therefore in terms of international law, no third party can require a state to exploit the fossil fuel resources on its territory, let alone export such resources. If a state commits itself, however, and enters into specific agreements, then the state becomes legally accountable and might not invoke its sovereignty to this

36 | Cf. Kachel, n. 32, pp. 17-25.

37 | For more details on the background, see Kirsten Westphal, "Medjedew beim Wort nehmen. Der Energiecharta-Vertag und der Vorschlag des russischen Präsidenten für ein internationales Energierahmenabkommen", *SWP-Aktuell* 42, 7/2009, http://swp-berlin.org/fileadmin/contents/products/aktuell/2009A42_wep_ks.pdf (accessed 11 Dec 2014).

extent. This applies to both multilateral agreements³⁸ and bilateral contracts. Significantly, when it comes to Russian exports of gas to the West, uncertainty rather looms over pricing and the reliability of particular transport routes than of the question whether the gas will actually be supplied.



Gas conflict: Ukraine is a transit country for Russian gas supplies to Europe. Therefore, the infrastructure is also a matter of concern for European stakeholders. | Source: Dmytro Glazkov, The World Bank, DG-UK003 ©️©️©️.

Finally a note on legal protection: Almost all relevant sources of international law mandate disputes in the energy sector to private tribunals. As a reminiscence of the Cold War, when Sweden's neutrality was a significant factor, most disputes involving Russian businesses are traditionally settled by arbitrators at the Stockholm Chamber of Commerce.³⁹ In the end, the latest dispute between Gazprom and Ukrainian state-owned company Naftogaz over the price of Russian gas will also be settled in Stockholm.⁴⁰ However, this example also shows that the use of

38 | This is exemplified by the World Trade Organisation's pending action against Chinese export restrictions on rare earths. Cf. World Trade Organization, "China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum", World Trade Organization Appellate Body Report, 7 Aug 2014, WT/DS/431/AB/R, http://wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm (accessed 11 Dec 2014).

39 | See also Helmut Steuer, "Das Schweigen der Schlichter im Gasstreit", *Die Welt*, 14 Jul 2014, <http://welt.de/politik/ausland/article130133100/Das-Schweigen-der-Schlichter-im-Gasstreit> (accessed 11 Dec 2014).

40 | Cf. *ibid.*

private arbitral tribunals is often inappropriate to solve acute situations, even if it is only for a temporary solution, since it takes them up to twelve months to conclude a case sometimes. So the EU's mediation was much more important for Ukraine's supply situation, as it at least provided an interim solution at the beginning of winter.

CONCLUSION

Security of supply as a public good can neither be guaranteed by the market alone, nor can it be simply mandated by law, at least not in the kinds of liberalised energy markets that are increasingly evolve in Europe. However, legislation at EU level has a number of instruments at its disposal for promoting security of supply and providing a framework for taking precautions and dealing with acute crisis situations. If these precautions are legally well-structured, there will be a reduced need for crisis response and short-term emergency and solidarity mechanisms to be applied within the EU. International investment protection law cannot replace this European legal framework, but it can certainly complement it. President Juncker rightly observed that the price of energy imports for the EU can be too high in both economic and political terms. The question of a coherent EU energy policy which consistently develops renewable (and hence domestic) energy sources in order to increase diversification, and which increases the actual value of energy by implementing ambitious energy efficiency targets, can no longer be defined purely in terms of climate policy. By now it also provides an indication of how EU policies are based on a solid strategy in terms of the security of supply. In the end, the freedom of action available to the EU and its Member States depends on it as regards their foreign policies towards Russia.



Jan-Justus Andreas is completing his PhD in Environmental Economics and Management at the University of York. From 2013 to 2014, he was a KAS Energy Security Fellow at the European Centre for Energy and Resource Security (EUCERS), King's College London. In that role, he produced the study "Fracking for Freedom – The economic and geopolitical implications of the U.S. drive for energy independence in light of the shale revolution", which was published in December 2014.

THE SHALE REVOLUTION IN THE U.S. AND ITS IMPACT ON ENERGY MARKETS, ENERGY SECURITY AND THE U.S. ENERGY TRANSITION

Jan-Justus Andreas

The energy world is experiencing profound changes. The last decade has been characterised by significant developments on the energy markets, which the International Energy Agency has summarised as follows: "many of the long-held tenets of the energy sector are being rewritten" as "major importers are becoming exporters, large exporters are becoming large consumers and previously small consumers are becoming the dominant source of global demand".¹ The latter statement relates particularly to the rising energy demand in developing regions, most notably Asia. At the same time, energy consumption is on the rise in countries such as Saudi Arabia, which has traditionally influenced the market primarily through vast oil exports. The most noticeable change, however, is taking place in the U.S., the largest energy importer in recent decades, which is transforming into an energy exporter. This has been facilitated by the expansion of the extraction of fossil fuels by unconventional methods in connection with the so-called shale revolution and fracking technology.

The shale revolution is an essential element and result of the U.S. government's efforts to achieve energy independence in order to improve the country's energy security. This has been dominating the energy and national security policies since the 1973 oil crisis at the latest, with far-reaching geopolitical consequences, for instance in connection with activities to defend U.S. interests in the

1 | IEA, *World Energy Outlook 2013*, Paris, 2013, p. 23.

Gulf Region. At the same time, billions of U.S. dollars were invested in domestic energy production. Financial support, tax breaks and joint projects involving the Department of Energy and the private sector allowed for developing and testing new technologies over decades before the first profitable operations to produce shale gas were set up in the early 2000s. Gas and oil extraction from shale has increased exponentially since 2008. Between 2007 and 2014, the proportion of shale gas contributing to U.S. natural gas production increased from five to 44 per cent.² Between 2007 and 2011 alone, total shale gas production increased more than sixfold: from 36.2 billion cubic feet to 223.8 billion cubic feet.³ This meant that the U.S. replaced Russia as the world's largest natural gas producer in 2009 (total natural gas production in 2013: U.S. 687.6 billion cubic meters, Russia 604.8 billion cubic meters).⁴ At the same time, U.S. shale oil production⁵ rose from 100,000 barrels a day in 2003 to 3.5 million barrels a day in 2014.⁶ As a result of this development, the U.S. was able to reduce its net oil imports from over 60 per cent in 2005 to approximately 30 per cent in 2013.⁷ Total crude

Between 2007 and 2014, the proportion of shale gas contributing to U.S. natural gas production increased from five to 44 per cent.

- 2 | Cf. Daniel Yergin, "The Global Impact of US Shale", *Project Syndicate*, 8 Jan 2014, <http://project-syndicate.org/commentary/daniel-yergin-traces-the-effects-of-america-s-shale-energy-revolution-on-the-balance-of-global-economic-and-political-power> (accessed 10 Dec 2014).
- 3 | Cf. U.S. Energy Information Administration (EIA), "U.S. Shale Production 2007-2011", 12 Apr 2014, http://eia.gov/dnav/ng/ng_prod_shalegas_s1_a.htm (accessed 10 Dec 2014).
- 4 | Cf. BP, *Statistical Review of World Energy 2010*, http://bakerinstitute.org/media/files/event/fb8a8c2c/BP_SR_2011_US_secured.pdf (accessed 10 Dec 2014); BP, *Statistical Review of World Energy 2014*, <http://bp.com/content/dam/bp/pdf/Energy-economics/statistical-review-2014/BP-statistical-review-of-world-energy-2014-full-report.pdf> (accessed 10 Dec 2014).
- 5 | Shale oil is also called tight oil, as crude oil is also extracted from other dense types of rock. For reasons of coherence, crude oil extracted in connection with the shale revolution is referred to as shale oil in this paper.
- 6 | Cf. Ambrose Evans-Pritchard, "Oil and gas company debt soars to danger levels to cover shortfall in cash", *The Telegraph*, 11 Aug 2014, <http://telegraph.co.uk/finance/newsbysector/energy/oilandgas/11024845/Oil-and-gas-company-debt-soars-to-danger-levels-to-cover-shortfall-in-cash.html> (accessed 10 Nov 2014).
- 7 | Cf. IHS CERA, *Fueling the Future with Natural Gas: Bringing it Home*, 1/2014, pp. ES-10, <http://www.fuelingthefuture.org/assets/content/AGF-Fueling-the-Future-Study.pdf> (accessed 10 Dec 2014).

oil production is forecast to rise to 11.8 million barrels by 2025.⁸

Although the U.S. economy as well as the U.S. and international energy markets benefit from the shale revolution, it is subject to considerable controversy. The debate is dominated by two aspects which relate first and foremost to the environmental impact: the direct effects of the gas and oil extraction process on the environment and the consequences of declining natural gas prices and increasing carbon emissions on the role of renewable energies in energy generation.

THE SHALE REVOLUTION IN THE U.S. – BACKGROUND AND IMPACT

The term shale revolution describes the unconventional extraction of gas and oil from shale formations. The term unconventional refers mainly to the untypical geology of the locations of the gas and oil reserves, possibly combined with lower rock permeability, which makes it more difficult for liquids or gases to rise to the surface. Consequently, special extraction techniques are required. However, there is no standardised unconventional gas and oil extraction as there is no uniform definition, for instance with respect to clear permeability values (measured in Darcy) or specific geological formations.⁹

Fracking is the special technique to extract natural gas and oil from shale. This involves two different technologies, hydraulic fracturing and horizontal drilling. Although these have both been known for some time, they have not been used in combination until several years ago. In the case of horizontal drilling, the vertical well is complemented by a horizontal well running across the rock layer containing

8 | Cf. Kirsten Westphal/Marco Overhaus/Guido Steinberg, "Die US-Schieferrevolution und die arabischen Golfstaaten", *SWP-Studie*, S15, 9/2014, p. 11, http://swp-berlin.org/fileadmin/contents/products/studien/2014_S15_wep_ovs_sbg.pdf (accessed 10 Dec 2014).

9 | Cf. Maximilian Kuhn/Frank Umbach, "Strategic Perspectives of Unconventional Gas: A Game Changer with Implications for the EU's Energy Security", *EUCERS Strategy Paper*, vol. 1, 1/2011, pp. 11-12, <https://kcl.ac.uk/sspp/departments/warstudies/research/groups/eucers/strategy-paper-1.pdf> (accessed 10 Dec 2014).

the gas and/or oil. This is necessary as the gas and oil are far more widely dispersed in the shale (approximately 0.2 to 3.2 billion cubic meters per square kilometer) than in conventional reserves (two to five billion cubic meters per square kilometer).¹⁰ Furthermore, the permeability of the shale does not permit direct extraction. Instead, a mixture of water and chemicals is pumped into the rock in several phases to produce artificial permeability. The mixture is 99 per cent fresh water, with various chemicals making up the remaining one per cent. During the first phase, this liquid is pressed into the ground to create fractures in the rock. Then the pressure is increased in the next phase, followed by a third phase during which proppants, mainly sand, are added to the liquid to maintain the porosity. This fracking fluid fills the created fractures, which would otherwise close again immediately due to the enormous pressure from the layers of rock above. The liquid is subsequently pumped back out, leaving behind the sand with its high permeability values, thus facilitating the extraction of gas and oil.¹¹

The revolutionary aspect of the shale revolution has less to do with the technology than with the significance for global natural gas and oil reserves and the noticeable direct impact on the economy, politics and energy security for the U.S. in particular. The development of the large-scale and largely cost-effective extraction of shale gas and oil has resulted in a considerable increase in the recoverable energy reserves of the U.S. and the world. Unconventional gas and oil extraction is not limited to the North-American continent, and gas reserves around the world have tripled. In this context, shale gas accounts for 64 per cent of total reserves. In the U.S., this has resulted in an increase in natural capital from 16 per cent of gross national income (GNI) in 2000 to 30 per cent of GNI in 2008. The development also means that according to current figures national natural gas reserves in the U.S. would

The shale revolution has resulted in a considerable increase in the recoverable energy reserves of the U.S. and the world.

10 | Cf. Paul Stevens, "The 'Shale Gas Revolution': Hype and Reality", *A Chatham House Report*, 9/2010, p. 10.

11 | Cf. CSUR, *Understanding Hydraulic Fracturing*, 2013, p. 12, http://chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/r_0910stevens.pdf (accessed 10 Dec 2014).

last 200 years instead of 50 to 60 on the basis of the gas consumption in 2012.¹²



Due to a lower permeability of the rock where shale gas and oil are located a mixture of chemicals and water is injected into the ground. Technological advances allow for fewer chemicals to be used. | Source: Joshua Doubek ©©©.

The exponential rise in the extraction of natural gas and oil in the U.S. has brought about enormous changes in the country's economy and energy market. According to calculations by IHS CERA, shale gas alone has led to a growth in GDP of 76.9 billion U.S. dollars, which is expected to reach 118.2 billion U.S. dollars in 2015. By 2035, this figure is forecast to rise more than threefold to 231.1 billion U.S. dollars.¹³ Due to the fact that the U.S. is the market leader in all areas of the production chain of the shale industry, this is benefiting above all the domestic job market. Unemployment has fallen steadily over the last few years, most noticeably in the federal states where shale oil and gas are extracted. In North Dakota, for instance, where the Bakken field is located, the unemployment rate is 2.8 per

12 | Cf. Douglas Sutherland, "Making the best of new energy resources in the United States", *OECD Economics Department Working Papers*, no. 1147, 21 Jul 2014, <http://dx.doi.org/10.1787/5jz0zbb8ksnr-en> (accessed 10 Dec 2014).

13 | Cf. IHS CERA, "Shale Gas Supports More Than 600,000 American Jobs, Study Says", *Pipeline & Gas Journal*, vol. 239, 1/2012, <http://pipelineandgasjournal.com/shale-gas-supports-more-600000-american-jobs-study-says> (accessed 10 Dec 2014); IHS CERA, n. 7.

cent, far below the national average of 5.8 per cent (figures from December 2014).¹⁴ In addition to the opportunities for employment in the shale industry, other companies involved indirectly in the production benefit as well. The U.S. Federal Reserve expects an increase in industrial output of close to five per cent by 2035 due to the shale revolution.¹⁵ The reasons for this include falling gas and oil prices as well as stable electricity prices. The development has also produced a price advantage for the U.S. industry over the German industry, for instance, for which natural gas as a raw material and electricity are up to 25 per cent more expensive.¹⁶ This means the shale revolution is having a direct impact on disposable household incomes in the U.S. as it affects both electricity and heating costs as well as consumer goods prices. According to estimates, household incomes are likely to rise by an average 2,000 U.S. dollars by 2015 and by over 3,500 U.S. dollars by 2025. The positive economic effects have produced billions of investments in the chemical, steel and fertiliser industries as well as in other energy-intensive sectors.

The U.S. Federal Reserve expects an increase in industrial output of close to five per cent by 2035 due to the shale revolution.

Further impacts relate to the U.S. oil market. Crude oil is traded on the global market. It is therefore subject to demand and supply dynamics, which influence price developments. However, there is, in fact, no standard global price as such; instead there are regional prices, so-called benchmarks, which are based on the quality of the main

14 | In individual regions of the federal states where shale gas is extracted, unemployment is as low as one per cent. Cf. Bureau of Labor Statistics, "Labor Force Statistics from the Current Population Survey", <http://data.bls.gov/timeseries/LNS14000000> (accessed 4 Dec 2014); Bureau of Labor Statistics, "Current Unemployment Rates for States and Historical Highs/Lows", <http://bls.gov/web/laus/lauhsthl.htm> (accessed 10 Dec 2014).

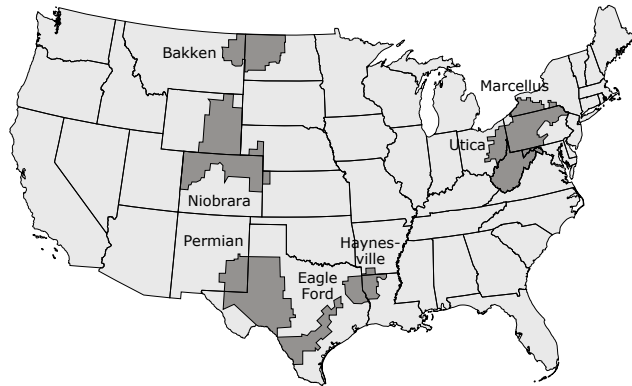
15 | During the period from 2013 to 2014 alone, industrial production has increased by 2.8 per cent. Cf. Board of Governors of the Federal Reserve System, "Industrial Production and Capacity Utilization – G.17", <http://federalreserve.gov/releases/g17> (accessed 10 Dec 2014); IHS CERA, n. 13.

16 | Since 2007, gas prices fell from twelve U.S. dollars per million British thermal unit (BTU) to under two U.S. dollars in the summer of 2012, and they settled at approximately four U.S. dollars per million BTU in 2014. By contrast, prices in Germany are around eleven U.S. dollars per million BTU and in Japan approximately 18 U.S. dollars per million BTU. Cf. IEA, n. 1, p. 282.

product from the region. Under normal circumstances, price differences between the benchmarks solely reflect transport costs and differences in oil quality. However, the Western Texas Intermediate (WTI), the U.S. oil benchmark, fell to below 80 U.S. dollars a barrel for a period (September 2011), while the European Brent was at 105 U.S. dollars a barrel.¹⁷ The cause of this discrepancy was a ban on crude oil exports, which continues to be in place in the U.S. since the 1970s. This prevented the increasing oil stocks from being traded on the international markets.¹⁸ The ban did not cover refined oil products, and these could be sold internationally. However, the infrastructure initially proved inadequate for transporting the huge volumes of crude oil to the refineries. Also, U.S. refineries were set up to deal with Venezuelan and Arab heavy oil and not with shale oil (light oil). This resulted in oversupply and in domestic oil prices dropping significantly.

Fig. 1

Drilling areas in the U.S.



Source: EIA, *Drilling Productivity Report*, 8 Dec 2014, <http://eia.gov/petroleum/drilling/#tabs-summary-2> (accessed 12 Dec 2014).

17 | Cf. EIA, "Spot Prices", 3 Dec 2014, http://eia.gov/dnav/pet/pet_pri_spt_s1_d.htm (accessed 10 Dec 2014).

18 | With the exception of crude oil extracted in Alaska, which can be exported to Canada.



By using unconventional extraction techniques the U.S. is able to access giant energy reserves. Commercialisation requires liquefaction and regasification facilities. | Source: Bilfinger SE ©©©.

The benchmarks have since rebalanced thanks to improvements to the transport infrastructure and greater output by the refineries. However, the fact that refined products are still sold on the global market means that consumers in the U.S. have hardly seen any price advantages from the increase in domestic oil production, as petrol and diesel prices continue to follow international price trends. By contrast, refineries achieved huge profit margins as they were able to buy crude oil at the WTI price of 80 U.S. dollars a barrel and sell the refined products at global prices. Further winners include manufacturing industries that rely on crude oil such as the chemical industry. The American Chemistry Council has calculated that nearly 150 investment projects are directly linked to the shale revolution and that these would bring over 16 billion U.S. dollars into state coffers by 2023.¹⁹

19 | According to these figures, the investments amount to 100 billion U.S. dollars, 50 per cent of which are from international investors. Cf. American Chemistry Council, "U.S. Chemical Investment Linked to Shale Gas Reaches \$100 Billion", 2/2014, <http://americanchemistry.com/Policy/Energy/Shale-Gas/Fact-Sheet-US-Chemical-Investment-Linked-to-Shale-Gas-Reaches-100-Billion.pdf> (accessed 10 Dec 2014).



An increase in oil supplies does not necessarily affect fuel prices which follow international trading mechanisms. Therefore, consumers might not see the positive impact at the gas station. | Source: m01229, flickr ©.

U.S. ENERGY INDEPENDENCE AND GEOPOLITICAL IMPLICATIONS

The security concept of the U.S. includes economic and other non-military dimensions. This has resulted in comprehensive and cross-departmental strategies, which are being applied at a domestic as well as foreign policy level. Contrary to the situation in Europe, important global (economic) developments are therefore linked directly to national security in the United States. Resource and energy security plays a central role in this, including the factors of security of supply, energy prices as well as energy infrastructure. The level of dependence on imports is of considerable significance for the security of supply and therefore pricing. In response to increasing oil imports and the experiences from the 1973 oil crisis, the U.S. initiated "Project Independence", the aim of which was to boost the use of domestic natural resources through state support. The shale revolution is a result of this policy. The "Eastern Gas Shales Project" ran from 1976 to 1992 and involved a number of public-private partnership projects in shale drilling. In 1980, Congress adopted the "Windfall Profits Tax Act", which granted the industries a tax credit of 50 U.S. cents per 1,000 cubic feet of unconventional gas. By the

time the law expired in 2002, it had produced tax breaks for the sector amounting to over ten billion U.S. dollars. In addition, crucial technology tests were conducted by public-private partnerships, including the first multi-stage fracking at the Devonian shale field in 1986 and the first horizontal drilling in the Barnett shale field in 1991.²⁰ The IEA forecasts that the U.S. will achieve its energy and security-policy goal of energy autonomy by 2030 at the latest.²¹ Wood Mackenzie expects the entire North-American continent to achieve energy independence by 2020.²²

Due to the strongly declining gas prices, the export of natural gas was soon being considered as well. While a large number of import terminals for liquefied natural gas (LNG) were being planned and built back in 2005, these are now being converted for export. The first exports are expected to take place this year, and full capacity should be reached by the end of the decade. In view of likely higher profit margins in Asia, it is expected that the exports will go predominantly to China, Japan and South Korea. The associated increase in volumes of LNG on the global market may well produce significant geopolitical consequences in the medium term. Currently, the majority of natural gas deliveries are made on the basis of long-term pipeline projects and are therefore necessarily regional in character. As the building of pipelines is capital-intensive, natural gas exporters require security of demand guaranteed by long-term contracts. The price is frequently linked to the oil price in order to counter gas price volatility and obtain certainty of planning. A strong increase in the trade in LNG may allow this approach to be replaced by spot market trading. Greater competition in the gas market would also weaken the monopoly position of some suppliers and thereby strengthen the energy security of importing countries. Capacities for regasification (necessary to

Greater competition in the gas market would also weaken the monopoly position of some suppliers and thereby strengthen the energy security of importing countries.

20 | Cf. Alex Trembath et al., "Where the Shale Gas Revolution Came From", Breakthrough Institute Energy & Climate Program, 5/2012, http://thebreakthrough.org/blog/Where_the_Shale_Gas_Revolution_Came_From.pdf (accessed 10 Dec 2014).

21 | Cf. IEA, n. 1.

22 | Cf. "Geopolitical implications of North American energy independence", Wood Mackenzie, 9/2013, http://woodmacresearch.com/content/portal/energy/highlights/wk4__13/Wood_Mackenzie_Report_Geopolitical_implications_of_North_American_energy_independence.pdf (accessed 10 Dec 2014).

transform the liquefied gas back into its original gaseous form) used to be much greater than the global LNG supply. The reasons for this include existing pipeline contracts, which tie the natural gas to the importer, a lack in investment in costly gasification projects as well as the limited size of the similarly costly LNG tanker fleet. However, in 2014 alone, a further 31 tankers were added to this fleet, amounting to a total number of 388 tankers.²³

Table 1
Global regasification capacity, 2000 to 2015
(in million tons)

	2000	2003	2006	2009	2012	2015
Global	255.6	289.7	362.3	648.3	983.8	987.4
Japan	158.7	163.0	168.0	168.0	193.0	169.3
United States	22.2	25.4	39.2	185.0	330.8	330.8
South Korea	35.9	46.1	54.1	84.6	84.6	84.6
Spain	10.6	19.4	35.7	46.4	53.9	53.9
United Kingdom	0.0	0.0	3.3	24.8	41.7	41.7
France	11.4	11.4	12.5	18.5	31.0	33.9
Other Countries	16.8	24.4	49.5	122.9	272.4	273.2

Source: Kable, "Global LNG Industry Heads Towards Supply Crunch", <http://hydrocarbons-technology.com/features/feature50048/feature50048-3.html> (accessed 12 Dec 2014) with data from GlobalData.

The prospect of increased competition in the Asian gas trade has since forced Qatar, one of the main suppliers of LNG, to lower the prices of its long-term contracts for LNG in order to undercut increasing competition from Australia, Papua New Guinea and soon the U.S.²⁴ According to Daniel Yergin, CEO of IHS CERA, the first geopolitical loser of the

23 | Cf. International Gas Union (IGU), *World LNG Report – 2014 Edition*, p. 6, http://www.igu.org/sites/default/files/node-page-field_file/IGU%20-%20World%20LNG%20Report%20-%202014%20Edition.pdf (accessed 10 Dec 2014).

24 | Cf. Oleg Vukmanovic, "Qatar cuts gas prices to keep competition at bay", Reuters, 8 Nov 2013, <http://uk.reuters.com/article/2013/11/08/uk-qatar-lng-asia-analysis-idUKBRE9A70AD20131108> (accessed 10 Dec 2014).

shale revolution is Iran, which would not have been forced to the negotiating table without the exponential rise in gas production in the U.S.²⁵ In the medium term, Europe could also benefit from this development, as LNG from Qatar or Nigeria, for instance, which would no longer reach the Asian or U.S. markets, could be shipped to Europe.

The export ban on crude oil remains a fixed element of U.S. energy security policy. Therefore, it remains to be seen whether there will also be oil exports in the future – particularly in view of the domestic oil production’s limited impact on the actual improvement of energy security. Crude oil and its derivatives depend on global production and global prices. An oil crisis in the Gulf states would also have far-reaching consequences for the U.S., in spite of its potential autonomy. Conversely, one can assume that Saudi Arabia’s decision in early October 2014 to sell crude oil to Asia at lower prices was directly related to the shale revolution.²⁶ For the U.S., the global oil market and the increasingly global gas market mean that a stable, well-supplied global energy market for all actors worldwide would provide the greatest benefit in terms of energy security.

CONSEQUENCES FOR THE ENVIRONMENT AND THE TRANSFORMATION OF THE U.S. ENERGY SYSTEM

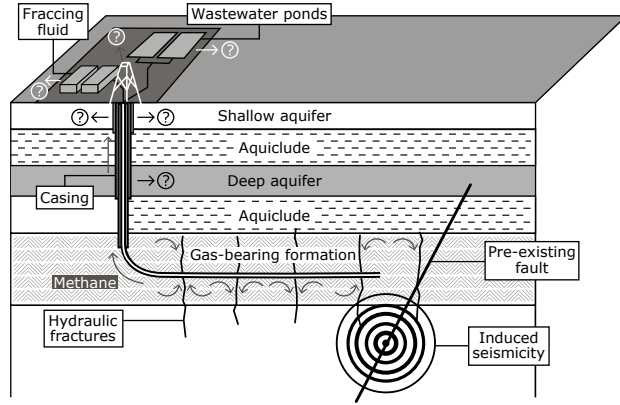
The increasing supply of gas and oil in the U.S. energy market has alarmed environmentalists and proponents of a more sustainable energy production. The U.S. government, however, stresses lower carbon dioxide emissions though the use of natural gas as a more environmentally friendly alternative to coal in energy generation. The environmental risks the shale revolution primarily entails include potential ground water contamination by chemicals from the fracking mixture and by naturally occurring radioactive and other toxic substances that are extracted in the process. The fracking of the rock can also cause minor seismic shocks. To date, investigations have not produced hard evidence of any environmental impacts.

The U.S. government stresses lower carbon dioxide emissions and the use of natural gas as a more environmentally friendly alternative to coal in energy generation.

25 | Cf. Yergin, n. 2.

26 | Cf. Pepe Escobar, "The Saudi oil war against Russia, Iran and the US", *Russia Today*, 15 Oct 2014, <http://on.rt.com/y12xsh> (accessed 10 Dec 2014).

Fig. 2

Risks of fracking

Source: Illustration according to Mike Norton, Wikimedia, http://de.wikipedia.org/wiki/Datei:HydroFrac_de.svg (accessed 11 Dec 2014).

Fracking technology has existed for decades, and it has also been used in Germany since the 1960s for the stimulation of conventional reserves. So far, there have been no reports of environmental damage or deterioration of the ground water in Germany. The present public debate on fracking relates mainly to the unconventional gas and oil production from shale. The current bill on fracking by the German federal government envisages the general permission for fracking in conjunction with conventional drilling to remain in effect, albeit under strict environmental regulation. During drilling, the upper meters of the well are always enclosed in a cement sheath to protect the fresh water. The industry further points out that the chemicals used pose no danger to people in the applied concentrations. Drilling company Baker Hughes stated in early October 2014 that it would disclose the composition of the fracking fluid in the future to increase public trust.²⁷ No other company has taken a similar step to date, as it is generally a matter involving trade secrets.

27 | Cf. Katie Valentine, "Major Drilling Services Company Will Now Disclose All Fracking Chemicals", *Climate Progress*, 2 Oct 2014, <http://thinkprogress.org/climate/2014/10/02/3575249/baker-hughes-fracking-chemical-disclosure> (accessed 10 Dec 2014).



Boom vs. protest: The extraction of shale gas also raises criticism. The State of New York has issued a moratorium because of the risks the technology is connected with. | Source: Adam S. Welz, CREDO Action, flickr ©©.

Ultimately, there are no significant differences in the hazards posed by unconventional and conventional oil and gas extraction. Both can entail gas migration and affect ground water through faulty well construction as well as above-ground contamination through inadequate storage and disposal of waste water and toxic waste, for instance. The risk management is subject to pertinent conditions imposed by the relevant legislation. In the U.S., the George W. Bush government did, however, exclude fracking from the “Clean Water Act”, the main instrument to protect the ground water. The risks related to fracking have caused individual federal states, such as New York and Vermont, to impose moratoria. Another criticism voiced by environmentalists relates to the enormous quantities of fresh water required for this extraction method. A single fracking well requires between 10,000 and 30,000 cubic meters of water, compared to 2,000 cubic meters for a conventional well. Furthermore, the Baker Botts law firm has calculated that the required truckloads can cause as much damage as 3.5 million car trips.²⁸ Industry statements indicate

28 | Cf. David Buchan, *Can Shale Gas Transform Europe’s Energy Landscape?*, Centre for European Reform, 7/2013, http://cer.org.uk/sites/default/files/publications/attachments/pdf/2013/pbrief_buchan_shale_10july13-7645.pdf (accessed 10 Dec 2014).

that the use of recycled water would be possible thanks to technological advances. The proportion of chemicals in the fracking mix also continues to diminish. The U.S. Environmental Protection Agency is currently working on a study about the effect of fracking on drinking water. The analysis covers the entire water cycle and promises clear information about the environmental consequences of shale production.

Table 2
**Carbon dioxide emissions of the
five largest economies, 2000 to 2010**

	2000		2002		2004	
	CO ₂ emissions in million metric tons	CO ₂ emissions in metric tons per capita	CO ₂ emission in million metric tons	CO ₂ emissions in metric tons per capita	CO ₂ emission in million metric tons	CO ₂ emissions in metric tons per capita
United States	5.713	20.25	5.651	19.65	5.791	19.78
China	3.405	2.70	3.694	2.89	5.288	4.08
Japan	1.219	9.61	1.217	9.55	1.259	9.86
Germany	0.829	10.10	0.828	10.05	0.826	10.01
United Kingdom	0.543	9.23	0.532	8.96	0.540	9.01

	2006		2008		2010	
	CO ₂ emissions in million metric tons	CO ₂ emissions in metric tons per capita	CO ₂ emissions in million metric tons	CO ₂ emissions in metric tons per capita	CO ₂ emissions in million metric tons	CO ₂ emissions in metric tons per capita
United States	5.738	19.23	5.657	18.60	5.433	17.56
China	6.414	4.89	7.035	5.31	8.267	6.19
Japan	1.231	9.64	1.207	9.45	1.171	9.19
Germany	0.809	9.82	0.783	9.54	0.745	9.11
United Kingdom	0.542	8.91	0.522	8.45	0.494	7.86

Source: World Bank, "World Development Indicators" (accessed 12 Dec 2014).

Aside from the consequences for the environment, one should also consider the changes to the energy mix in the U.S.. Many observers fear that the shale revolution may

have a negative impact in this area as the falling gas price may jeopardise the competitiveness of renewable energies. Experts expect that the large-scale investments in the extraction of fossil fuels, which go into billions, will cause use of these fuels to be extended in order to obtain the greatest possible financial benefit. At the same time, they fear that this expenditure may take away potential investment from renewable energies and thus have a negative impact on the competitiveness of wind power and photovoltaics.

The use of natural gas as a bridge fuel – a solution to serve for the transition from the era of coal and oil to the time when renewable energies become competitive – is a double-edged sword. Each transition to a new energy system took the U.S. between 50 and 60 years. Some proponents of the transition towards renewables and sustainability do not think that the present focus on shale gas is necessary and represents an intermediate step that wastes time. In spite of this, natural gas can serve as a new basis of the energy systems. The dependence of renewable energies on the availability of wind and sun and the fact that storage technologies and infrastructure are currently still inadequate mean that a reliable supply can currently not (yet) be guaranteed. Natural gas is both a lower-emission alternative to coal and oil and safer than nuclear energy. In absolute figures this means that a natural gas power plant on average produces 61 kilograms of carbon dioxide per megawatt hour (MWh) and 0.05 kilograms of sulphur dioxide per MWh. Compared to the average air emissions from coal-fired power plants, a plant burning natural gas produces half as much carbon dioxide, a third as much nitrogen oxides and less than one per cent as much sulphur oxides.²⁹

Natural gas is both a lower-emission alternative to coal and oil and safer than nuclear energy.

In the U.S., the shale revolution has resulted in the proportion of natural gas in electricity generation rising from 649,908 thousand MWh to 1,113,665 thousand MWh. At the same time, electricity generation from coal has

29 | Cf. Laura Parmigiani, "The European Gas Market. A Reality Check", *Note de l'Ifri*, 5/2013, p. 6, <http://www.ifri.org/sites/default/files/atoms/files/ifrinoteeuropeangasmarketvf176.pdf> (accessed 10 Dec 2014).

fallen from its highest level of 2,016,456 thousand MWh in 2007 to 1,585,998 thousand MWh in 2013, a reduction of over 20 per cent, despite an overall rise in electricity generation.³⁰ The rapid transition from coal to gas was possible because many gas-fired power plants did not operate at full capacity as a result of the high gas prices. Coal-fired power plants, which are due to be closed down over the next few years under the emissions policy, are to be replaced by combined gas-and-steam power plants. The Obama administration has also issued some carbon dioxide restrictions for new and existing power plants for the first time in U.S. history.³¹ In private households, carbon dioxide emissions dropped by 8.6 per cent between 2005 and 2012. While the financial and economic crisis and the associated decline in demand have had an impact on this trend, studies have shown that between 35 and 50 per cent of the reduction in carbon dioxide in the U.S. is due to the shale revolution.³² Gas price increases following a low in 2012 have caused a slight resurgence of coal in electricity generation, but still far below the 2007 level.

Developments took the opposite turn in Europe. Thanks to the shale revolution, U.S. coal exports increased considerably. Large parts reached the European market, where particularly countries such as Germany with high gas and electricity prices have gone back to using more coal. At the same time, natural gas, more of which has become available due to exports to the U.S. declining, is being sold to the Asian market rather than Europe for commercial reasons. So while gas consumption is on the increase and carbon dioxide emissions are on the decrease in the United

While gas consumption is on the increase and carbon dioxide emissions are on the decrease in the United States, the opposite is the case in the European market.

30 | Cf. EIA, *Electric Power Monthly*, 11/2014, http://eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_1_1 (accessed 10 Dec 2014).

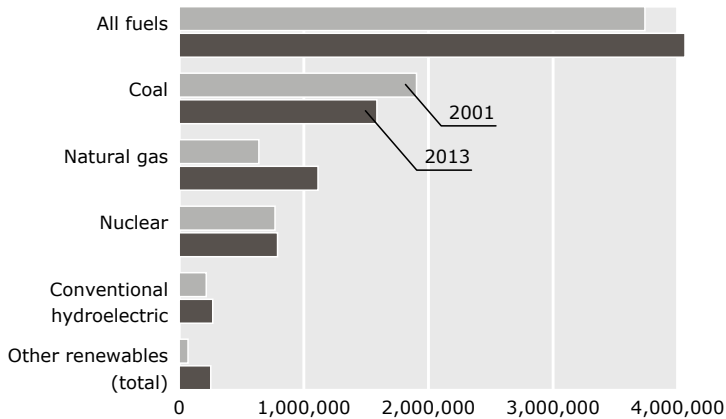
31 | Cf. "US carbon emissions rise 2%", *Associated Press*, 14 Jan 2014, <http://theguardian.com/environment/2014/jan/14/us-carbon-emissions-rise-coal-energy> (accessed 10 Dec 2014).

32 | Cf. John Broderick/Kevin Anderson, "Has US Shale Gas Reduced CO₂ Emissions? Examining recent changes in emission from US power sector and traded fossil fuels", Tyndall Manchester, 10/2012, http://tyndall.ac.uk/sites/default/files/broderick_and_anderson_2012_impact_of_shale_gas_on_us_energy_and_emissions.pdf (accessed 10 Dec 2014).

States, the opposite is the case in the European market.³³ According to the German Federal Environment Agency, Germany experienced a further increase in emissions in 2013 to 951 million tonnes of carbon dioxide equivalent (an increase of 1.2 per cent compared to 2012).³⁴

Fig. 3

Net electricity generation for all sectors in the U.S., 2001 and 2013 (in thousand MWh)



Source: EIA, "Electricity Data Browser: Net generation for all sectors, annual", <http://eia.gov/electricity/data/browser> (accessed 15 Dec 2014).

Besides the proportion of natural gas in electricity generation, the proportion of renewable energies has also increased in the U.S. Disregarding hydropower, these more than tripled in the period from 2003 to 2013.³⁵ The proportion of renewable energies in the total energy mix therefore rose to 12.2 per cent in 2013, although there was a slight reduction in electricity produced by hydropower. As that energy source does not offer much scope for expansion, the growth is generated from the wind, solar and biofuel

33 | Cf. BP, "On the global implications of shale: the environment", 2013, <http://bp.com/en/global/corporate/about-bp/energy-economics/energy-blog/global-implications-of-shale/global-implications-of-shale-the-environment.html> (accessed 10 Dec 2014).

34 | Cf. Umweltbundesamt, "Treibhausgas-Emissionen in Deutschland", 11 Aug 2014, <http://umweltbundesamt.de/daten/klimawandel/treibhausgas-emissionen-in-deutschland> (accessed 10 Dec 2014).

35 | From 79,487 thousand MWh to 253,328 thousand MWh. Cf. EIA, n. 30.

sectors. Total generation capacity of these fuels in the U.S. is approximately 93 gigawatt.³⁶ Investments are crucial for renewable energies, but they did, in fact, decline worldwide in 2013. In Europe, capital investments in these sectors have declined for two years in succession since 2012 after years of increases, falling by 44 per cent year on year in 2013 alone. This meant that the People's Republic of China invested more in renewable energies than Europe for the first time in history. In the U.S., investments fell by ten per cent. At a national level, however, it was still the country with the second-largest volume of investments at 40 billion U.S. dollars behind China (54.2 billion U.S. dollars), while Germany invested 9.9 billion U.S. dollars. Venture capital investments in the U.S. declined to just one billion U.S. dollars – the lowest amount since 2005.



Climate policy: Even though the shale revolution has been leading to larger energy reserves in the U.S., the expansion of renewable energies is striding ahead like here in California. | Source: John N. Weiss, flickr ©11111111.

The reasons include both the low gas prices and therefore higher investments in natural gas projects as well as uncertainty about the future of state subsidies for renewable energies. In terms of quantity, the renewable energy

36 | This puts the U.S. in 2nd place globally, behind China (118 gigawatt) and ahead of Germany (78 gigawatt). Cf. REN21, *Renewables 2014. Global Status Report*, Paris, 2014, p. 26 et seq., <http://ren21.net/ren21activities/globalstatusreport.aspx> (accessed 10 Dec 2014).

market still receives the lion's share of the subsidies. In 2010, 2.8 billion U.S. dollars went to the oil and gas market and 14.7 billion U.S. dollars to renewable energies (disregarding direct funding and tax breaks in each case). The former subsidies support mainly consumers rather than industry.³⁷ A growing public interest and support for the transformation of the energy system were apparent in the public market, where there was an enormous increase in investment from 949 million U.S. dollars in 2012 to 5.3 billion U.S. dollars in 2013, mainly for solar and biofuels.³⁸

FROM POLITICAL REALISM TO POLITICAL IDEALISM?

Recognised as a part of national security, efforts towards greater energy independence have been a key element of U.S. policies and state funding for decades. These efforts promise to achieve the goal within a few years as well as providing greater economic growth and an improved carbon footprint (for the time being). In light of the recent crisis in Ukraine, the topic of energy security made a reappearance on the agenda of European decision-makers, with the debate centering mainly on the dependence on energy imports. Even though energy independence does not provide total protection against external crises in the era of globalised energy markets, it does place the United States in a stronger geopolitical position. As an ally in the Western world, Europe could become a beneficiary of the shale revolution where energy prices and import diversification are concerned. With the next generation of fracking technology (soon to be ready for application), expectations that the shale revolution will peak in 2020 are possibly also premature.

In light of the recent crisis in Ukraine, the topic of energy security made a reappearance on the agenda of European decision-makers.

It remains to be seen whether and to what extent fears that the shale revolution is slowing down the development of renewable energies and extending the use of fossil fuels will be realised. While lower gas prices have contributed to

37 | For each billion BTU, renewable energies receive 25 times the subsidies as fossil fuels. Cf. Kevin Begos, "Fracking Developed with Decades of Government Investment", *Huffington Post*, 23 Sep 2012, http://huffingtonpost.com/2012/09/23/fracking-developed-government_n_1907178.html (accessed 10 Dec 2014).

38 | Cf. Ren21, n. 36, p. 67 et seq.

the current caution to invest in renewable energies, this is a global phenomenon and may have other causes, such as the impact of the economic crisis as well as budget consolidation in many Western countries. Meanwhile, the U.S. has succeeded in improving its energy security, stimulating its economy and simultaneously reducing its carbon dioxide emissions. However, the growing economy and potentially increasing energy consumption in private households due to lower prices could cause emissions to rise again in the medium term, particularly as until now energy-saving measures do not receive the same attention in the U.S. as they do in Germany.

The shale revolution has shown the huge potential of innovative technological research. This gives rise to the fundamental question, however, as to whether investments in fossil fuels should still have a place in an era of transition towards sustainable energy generation. Whether the benefits of the shale revolution outweigh its external effects (the impact on the environment, which is not represented in the product price) remains to be seen. So far, the U.S. government has put forward many arguments in favour of the shale revolution – arguments that can only be viewed with envy from a European perspective considering the current situation regarding energy markets, the economy and energy security.

LAND USE AND EXPROPRIATION IN EAST AND SOUTHEAST ASIA

THE ROLE OF THE LAW

Marc Spitzkatz / David Grebe

Reflecting skyscrapers and shopping malls, multi-lane highways, massive factories and industrial complexes – China and Southeast Asia’s tiger states are becoming resolutely modern. And as their infrastructure expands, their traditional forests and agricultural landscapes of small rice paddies and fields of grain are being transformed at breathtaking speed via forest clearances, mining activities and the planting of monocultures. This progress affects the lives of millions of people, but not everyone’s life is improved. Many opportunities for sustainable development are missed and valuable natural resources go to waste because there are inadequate structures for guaranteeing the rule of law.

The modernisation and industrialisation of East and Southeast Asia have progressed on an impressive scale and at breathtaking speed.¹ This expansion has been largely driven by globalisation and population growth, and has had a major impact on the way land is used. In the cities, old buildings are making way for modern apartment buildings and shopping malls. At the same time, arable land on the margins of cities is being covered with houses and industrial complexes. These new areas are now surrounded by roads and railway tracks connecting the cities with the surrounding areas. It is this hinterland that often finds itself faced with even more serious changes. Ancient forests are being cleared for timber and to make way for agricultural or



Marc Spitzkatz is Head of the Konrad-Adenauer-Stiftung’s Rule of Law Program in Asia, based in Singapore.




David Grebe studies law at the University of Heidelberg. He completed an internship with the Rule of Law Program in Asia of the Konrad-Adenauer-Stiftung while studying at the National University of Singapore.

1 | Cf. Organisation for Economic Co-operation and Development (OECD), *Economic Outlook for Southeast Asia, China and India 2014. Beyond the Middle-Income Trap*, 2013, p. 2 et sqq., <http://www.oecd.org/site/seao/Pocket%20Edition%20SAEO2014.pdf> (accessed 10 Dec 2014).

mining activities. The traditional landscape of small fields is being swept away by monocultures. Palm oil plantations now cover large swathes of Malaysia and Indonesia. But the countries involved are only having limited success in using their newly-gained wealth to combat poverty and drive sustainable development.



Due to a globally increased demand for palm oil countries like Indonesia and Malaysia expanded plantations on a massive scale. Also because of deficiencies regarding rule-of-law structures this development should not be called sustainable. | Source: Mokhamad Edliadi for Center for International Forestry Research (CIFOR), flickr .

The reason for this is the lack of strong frameworks for guaranteeing the rule of law and good governance. The mechanisms and processes for changing land use vary from country to country and case to case. However, it is possible to identify some regional similarities: ownership and land use are insufficiently legally protected; the relationship between formal and informal land rights is unclear; and political decisions are made for the benefit of major agricultural projects.² This results in economic and social inequalities and ecological problems.

2 | Cf. John Cherry, "The Great Southeast Asian Land Grab. Disputes over land tenure threaten social harmony in a number of ASEAN countries", *The Diplomat*, 8 Aug 2013, <http://thediplomat.com/2013/08/the-great-southeast-asian-land-grab> (accessed 10 Dec 2014).

CHANGES IN LAND USE

A number of developments are at the root of the socio-economic and environmental problems linked to the inadequate structures for upholding the rule of law in the affected countries.

Increasing Investment in Farmland

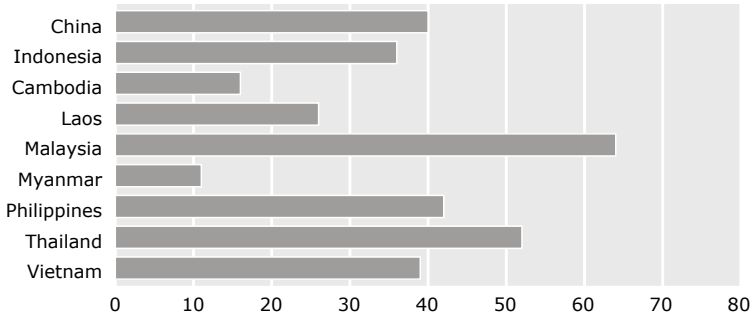
For some time now, governments and businesses have been buying up large swathes of land and changing their agricultural use. As a result the users up to then are often driven from their land. When this is done illegally or at least produces a negative social impact, it is known as land grabbing.³ Foreign investment in farmland plays a major role in this respect. In global terms, such investment increased from one billion U.S. dollars between 1989 and 1991 to three billion U.S. dollars between 2005 and 2007. The liberal economic policies of the emerging economies mean that they now claim a much larger proportion of this total foreign direct investment than the industrialised nations.⁴ In Southeast Asia, this particularly affects Indonesia, Cambodia, Laos and the Philippines. This is due to their limited agricultural productivity and to the fact that their democracies are less entrenched, with weak rule of law and various shortcomings in terms of governance.⁵

Foreign investment in farmland in Southeast Asia particularly affects Indonesia, Cambodia, Laos and the Philippines.

- 3 | The phrase is used in a number of ways, but increasingly it no longer differentiates between foreign and domestic actors. Cf. Saturnino M. Borras Jr./Jennifer C. Franco, *Political Dynamics of Land-Grabbing in Southeast Asia: Understanding Europe's Role*, Amsterdam, Transnational Institute, 2011, p. 21, <http://tni.org/files/download/Political%20Dynamics%20of%20Land-grabbing%20in%20Southeast%20Asia.pdf> (accessed 10 Dec 2014). It is important to note that not all investments in farmland deserve a negative connotation.
- 4 | Cf. Roel R. Ravanera/Vanessa Gorra, *Commercial pressures on land in Asia: An overview*, Rome, International Land Coalition, 2011, p. 8, http://landcoalition.org/sites/default/files/publication/909/RAVANERA_Asia_web_11.03.11.pdf (accessed 16 Dec 2014).
- 5 | Cf. German Federal Ministry for Economic Cooperation and Development (BMZ), development policy position on land grabbing, *BMZ-Diskurs*, 014, 8/2009, p. 3; Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Themen-dienst: Land Grabbing, 1 Sep 2011, Eschborn, p. 4.

Fig. 1

Worldwide Governance Indicators: Rule of Law 2013, percentile rank



Percentile rank indicates the rank of all countries and 0 corresponds to lowest rank.

Source: The World Bank "Worldwide Governance Indicators", <http://info.worldbank.org/governance/wgi/index.aspx> (accessed 11 Dec 2014). For methodological notes see Daniel Kaufmann/Aart Kraay/Massimo Mastruzzi, "The Worldwide Governance Indicators: Methodology and Analytical Issues", World Bank Policy Research Working Paper No. 5430, Sep 2010, <http://ssrn.com/abstract=1682130> (accessed 11 Dec 2014).

Olivier De Schutter, the UN Special Rapporteur on the Right to Food, comments: "Developing countries in general [...] are particularly targeted because of the perception that there is plenty of land available, because [...] climate is favorable to the production of crops, because the local labour is inexpensive, and because the land is still relatively cheap."⁶ The exact scale of major investment in farmland in Asia remains unclear because reliable information is lacking.⁷ Due to the high degree of speculation and level of secrecy in the negotiations, it cannot be ascertained whether even those reported in the media have actually

6 | Olivier De Schutter, "Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge", 11 Jun 2009, p. 3, <http://www2.ohchr.org/english/issues/food/docs/BriefingNotelandgrab.pdf> (accessed 10 Dec 2014).

7 | "[...] the lack of reliable information has made it difficult to understand what has been actually happening". Klaus Deininger u.a., "Rising Global Interest in Farmland. Can It Yield Sustainable and Equitable Benefits?", Washington D.C., The World Bank, 2011, <http://siteresources.worldbank.org/DEC/Resources/Rising-Global-Interest-in-Farmland.pdf> (accessed 10 Dec 2014).

taken place.⁸ Many global studies have been carried out on land grabbing, but there are very few detailed studies on regional and national land acquisition in Asia.⁹

Table 1

Agriculture in Southeast Asia and China

	Arable farmland as share of total area		Added value of agriculture as share of GDP		Farmland in hectare		Employees in agriculture as share of total employment	
	2000	2012	2000	2012	2000	2012	2000	2012*
China	55.60	54.80	15.06	10.08	0.09	0.08	50.00	34.80
Cambodia	27.02	32.60	37.84	35.56	0.30	0.28	73.70	51.00
Indonesia	26.04	31.19	15.60	14.5	0.10	0.09	45.30	35.09
Laos	8.02	10.69	45.17	27.98	0.17	0.21	—	—
Malaysia	21.37	23.59	8.59	10.05	0.04	0.03	18.40	12.60
Myanmar	16.54	19.28	57.24	—	0.20	0.2	—	—
Philippines	37.68	41.57	13.97	11.84	0.06	0.05	37.10	32.20
Thailand	38.82	42.79	9.02	12.27	0.25	0.24	48.80	39.60
Vietnam	28.23	34.97	22.73	19.67	0.08	0.07	65.30	47.40

* For China data from 2011, for Laos and Myanmar no data available.

Source: World Bank, fig. 1.

Scarcity of Farmland and Growing Demand for Food and Fuel

One of the socio-economic reasons for investing in farmland is its scarcity resulting from accelerating urbanisation. Moreover, climate change is having a negative effect on agricultural productivity while the demand for food increases due to growing populations. The energy/food/financial crisis which resulted in the doubling of world market prices for food and the collapse of the real estate markets in 2007 fuelled this trend and made farmland

8 | Cf. Roz-b. Guzmann, "Global Land Grabbing. Eroding Food Sovereignty", *Turning Point*, no. 12/2010, p. 14, http://panap.net/sites/default/files/TurningPoint_GlobalLandGrabbing.pdf (accessed 10 Dec 2014).

9 | Cf. Ravanera/Gorra, n. 4, p. 2.

Import-dependent countries such as the Philippines and Malaysia were particularly affected by soaring rice prices in 2007 and 2008 due to the financial crisis.

even more attractive to public and private investors.¹⁰ Import-dependent countries such as the Philippines and Malaysia were particularly affected by soaring rice prices in 2007 and 2008. The situation was exacerbated by export restrictions imposed by the world's largest rice exporters, India, Thailand and Vietnam. In the wake of the crisis, the Chinese government negotiated a number of investment projects in the area of food production with Myanmar, the Philippines, Laos and Kazakhstan. These countries were offered technological expertise and infrastructure developments in exchange for farmland.¹¹

Another factor that works in favor of investing in farmland is the growing demand for fuel. Biofuels play an important role in the energy supply of Asian countries that have no access to fossil fuels, or which, like China, have huge energy demands that necessitate the exploitation of every possible energy resource. Biofuels are also increasingly in demand in industrialised countries such as Germany in the wake of policies to promote alternative and renewable energy sources. For example, China has the highest production targets in Asia, at ten million megatonnes of bioethanol and two million megatonnes of biodiesel by 2020. This has a massive impact on land use in other Asian emerging economies.¹²

Urbanisation and Industrialisation

Changes in land use and expropriations are also occurring as a result of the rapid march of industrialisation and urbanisation in the region, particularly in China. Increased migration from rural areas is leading to an ever-growing urban sprawl. Large areas of land that were formerly used for agriculture are now being turned over to the construction of residential and industrial zones. According to the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), the urban population of the

10 | Cf. GIZ, n. 5, p. 1.

11 | Cf. Ravanera/Gorra, n. 4, p. 12; GRAIN, "Seized: The 2008 landgrab for food and financial security", *Grain Briefing*, 24 Oct 2008, p. 3, <http://grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security.pdf> (accessed 10 Dec 2014).

12 | Cf. Ravanera/Gorra, n. 4, p. 16.

Asia-Pacific region stood at 754 million in 2010, reflecting a 34 per cent increase in urbanisation. The UN estimates that this will reach 50 per cent by 2016. Most of this growth will occur in the emerging economies.¹³



Fish farming is an expanding economy in the Philippines. In order to prepare the shore for aquacultures vast mangroves are cleared (often illegally). | Source: Westly R. Rosario, WorldFish, flickr ©11111.

Raw Materials Production

Investment in mining, water supplies and logging are the main reasons for large-scale acquisitions of land. For example, mangrove forests and foreshores in the Philippines are increasingly used for fish farming. This had been preceded by illegal clearances for timber. Fish farming has become the local population's main industry and is generally unregulated.¹⁴ According to local NGOs, Indonesia's forests are not always cleared with a view to planting palm oil plantations. Instead, investors often simply sell the timber and then leave the land unused.¹⁵ All over the region there are signs of mining activity – huge opencast projects run by national or international conglomerates, such as the

13 | Cf. United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), "Factsheet: Urbanization Trends in Asia and the Pacific", 6 Nov 2013, <http://unescap.org/sites/default/files/SPPS-Factsheet-urbanization-v5.pdf> (accessed 10 Dec 2014).

14 | Cf. Ravanera/Gorra, n. 4, p. 18.

15 | Cf. *ibid.*

Freeport gold mine in West-Papua, are “supplemented” by the illegal operations of small local companies.

THE LEGAL DIMENSION – LAND RIGHTS, EXPROPRIATION AND COMPENSATION

The legal dimension of these briefly outlined processes varies and is, in regional terms, remarkably diverse. This is partly due to the region’s different legal traditions, which have in the recent past been influenced by the legal systems of other countries (for example that of the UK and the U.S. in Malaysia and the Philippines, and that of continental Europe in Indonesia and Thailand) and by communist legal systems (as in China and Vietnam).

Land ownership rights form a part of constitutional rights and fundamental liberties, but they are often affected by changes in land use.

The planning and approval process includes administrative acts, in which concerned parties can participate, as well as the judicial review of administrative decisions. Of fundamental relevance are acts infringing the constitutional right to property, frequently caused by a change in land use.¹⁶ Problems with registering land titles and “deals” between governments and investors are two factors that have a major impact on the rule of law.¹⁷

Registration of Land Titles

In the past, land use in developing and emerging economies was mainly based on customary law. Some of these rights have never been written down, making it difficult for local farmers to defend themselves against the public or private purchase of their land. This is particularly the case for many indigenous peoples in the region, who are still hunter-gatherers or subsistence farmers using slash-and-burn methods. For them, it is crucial that their unofficial land/land use rights are guaranteed. It should be

16 | The tensions that exist between land rights, expropriations and compensation was the subject of a conference organised by the Asia Rule of Law Program of the Konrad-Adenauer-Stiftung e.V. in April 2014 entitled “Appropriate Expropriation? Securing Land and Property rights in South-East Asia”, see <http://kas.de/rspa/en/events/58329> (accessed 15 Dec 2014). The author’s comments in this respect are based on the results of this conference. Unfortunately it is not possible to look in detail at the legal characteristics of the different countries of ASEAN and East Asia in this report.

17 | Cf. Cherry, n. 2.

emphasised that most Asian countries have laws or constitutional clauses that prevent large-scale acquisitions of land by foreigners.¹⁸ So it is easy to underestimate the role of the state as mediator and “dispossessor” in order to facilitate large economic projects that are often funded by foreign investors. On top of this, the land in question is often officially public land, even if people are living on it.

Deals between Governments and Investors

The main investors in farmland come from East Asia (China, South Korea and Japan), as they have a pressing need to meet soaring domestic demand for raw materials and food. These countries and Singapore also often provide the capital for the construction of shopping malls, residential complexes and infrastructure projects. Next come Arab countries such as Bahrain, Libya, Kuwait, Qatar and Saudi Arabia, which have limited freshwater and agricultural resources. In addition, oil companies from the industrialised West are trying to purchase farmland to grow maize, sugar cane and oilseed crops in order to guarantee future energy supplies that are not oil-dependent.¹⁹

Another important factor is the regional flow of investment between the emerging economies of and in the Global South. They make up almost 50 per cent of total investment volumes in South Asia, East Asia and Southeast Asia. Investment by emerging economies is growing rapidly and in future will exceed the rates of the developed nations.²⁰ **Investment by emerging economies is growing rapidly and will exceed the rates of the developed nations in the future.** The main agricultural investors in the region are Malaysia’s Sime Darby Berhad, the world’s largest palm oil producer; Charoen Pokphand Foods Public Company from Thailand, which is investing in China, India and the ASEAN countries; and Malaysia’s Kulim Berhad, which is investing in palm oil and oil-based chemicals in Indonesia.²¹

18 | Cf. Raul Q. Montemayor, “Overseas Farmland Investments – Boon or Bane for Farmers in Asia?”, in: Michael Kugelman/ Susan L. Levenstein (eds.), *Land Grab? The Race for the World’s Farmland*, Washington D.C., Woodrow Wilson International Center for Scholars, 2009, p. 99, http://wilsoncenter.org/sites/default/files/ASIA_090629_Land%20Grab_rptFINAL.pdf (accessed 10 Dec 2014).

19 | Cf. BMZ, n. 5, p. 3; GIZ, n. 5, p. 4.

20 | Cf. Ravanera/Gorra, n. 4, p. 10.

21 | Cf. *ibid.*

Not only private entities are heavily investing in farmland. They are often made by governments through their agriculture ministries, by semi-public entities such as sovereign wealth funds, and by private actors. Local policy-makers often have their own interests at heart when making deals with foreign investors or partners in joint ventures.²² The Philippines Agricultural Development and Commercial Corporation (PADCC, part of the ministry of agriculture) allocates specific farmers and landowners to interested investors.²³ However, Asian governments rarely play an active role in the search for investors. Along with the Philippines, the governments of Cambodia (where farmland is mainly in state hands) and Indonesia (which is trying to buy nominally uninhabited land in Papua) take a similarly aggressive stance.²⁴ However, farmland that is actually uninhabited is a rare commodity in most Asian countries.²⁵ Governments also play a significant indirect role in purely private investment projects by creating conditions such as free trade agreements and bilateral investment protection treaties which promote and protect investment. The signing of these agreements often leads to changes in domestic laws.²⁶ Similar constellations arise with regard to major investments in property, infrastructure, industry and mineral extraction.

Governments play a significant role in private investment projects by creating conditions such as free trade agreements and bilateral investment protection.

Administrative Procedures and Legal Protection

This context makes it particularly difficult to apply administrative law and to guarantee judicial review of administrative decisions needed for the approval of these kinds

22 | Cf. BMZ, n. 5, p. 3; GIZ, n. 5, p. 5.

23 | Cf. Riza Bernabe, "Private Sector Agricultural Land Investments: Impacts on Small Men and Women Farmers and on Food Security", Oxfam Great Britain Philippines, 2010 (unpublished).

24 | Michiko Katagami, quoted in: Megan Corrarino et al., *The Involvement and Responsibilities of International Financial Institutions in Asian Farmland Investment*, Yale Law School, Apr 2011, p. 5, http://www.law.yale.edu/International_Financial_Institutions_and_Asian_Farmland_Investment_Report.pdf (accessed 16 Dec 2014).

25 | Cf. De Schutter, n. 6, p. 3.

26 | Cf. Lorenzo Cotula, "Investment Contracts and Sustainable Development: How to make contracts for fairer and more sustainable natural resource investments", *Natural Resource Issues*, no. 20, 2010, p. 18, <http://pubs.iied.org/pdfs/17507IIED.pdf> (accessed 10 Dec 2014).

of projects. In any case, existing shortcomings – which increasingly affect implementation rather than the laws themselves – are intensified by the state’s particular economic interests (and self-interest), which can have an impact on the procedure. Lack of administrative capacity and problems with corruption mean that the interests of existing land users and environmental protection issues are either ignored or receive insufficient attention.

Expropriation and the Protection of Basic Rights

The situation is similar when it comes to protecting land ownership from expropriation. Expropriation generally only meets the standards pertaining to the rule of law when the property is expropriated for the public good and adequate compensation is paid. Traditional users of the land find their legal rights are curtailed because they are not the registered owners of the land. This is made all the more difficult by the property laws that are normally applied in communist states. According to their understanding, land belongs to the state and its sub-divisions, and people are only granted the right to use the land (as is the case in China).²⁷ There are also numerous problems in terms of compensation payments, which often represent a mere fraction of the land’s market value. On the other hand, international investment protection laws often prevent the host country from having access to assets (at least those of foreign investors).²⁸

Expropriation generally only meets the standards pertaining to the rule of law when the property is expropriated for the public good and adequate compensation is paid.

CONSEQUENCES AND RISKS

The local population is generally only subject to national laws and therefore enjoys much lower levels of ownership protection. All too often, they are simply dispossessed and confronted with poverty, resulting in heavy economic losses and social ruin. The legal and administrative frameworks in emerging economies are often not set up to provide a safety net against such economic and social risks. People generally receive little or no compensation. This is

27 | Cf. Asian Development Bank (ADB), *Compensation and Valuation in Resettlement: Cambodia, People’s Republic of China, and India*, Rural Development Institute, Nov 2007, p. 16.

28 | Cf. Cotula, n. 26, p. 18.

partly due to the difficulty of assessing the value of goods and land because of the aforementioned lack of records.²⁹ As a result, the profits of the construction boom and the economic benefits of natural resources do not trickle down to all levels of society as much as they should. These profits also tend to be massively reduced as a result of the high cost to the economy of dealing with the socio-economic and environmental damage caused.



Agricultural activities remain one of the major sources of income in Southeast Asia. But more and more farmers have to make room for large-scale farms. Searching for alternative employment might turn out difficult. | Source: Dani Bradford, International Food Policy Research Institute (IFPRI), flickr ©①③③.

Rural Populations

From a development policy perspective, investment in farmland can lead to intensified conflict over land, increased migration from rural areas, and the resettlement or eviction of local people. Foreign acquisitions can pose a real threat to stability and peace in countries where their legal security is lacking and where corruption is widespread and property laws fragile.³⁰ The goals of agricultural investment are problematic, as they tend to revolve around the production of biofuels and food for the markets of the investors' countries of origin. So the only value created in the

29 | Cf. ADB, n. 27, p. 3.

30 | Cf. BMZ, n. 5, p. 3; GIZ, n. 5, p. 8.

producer country is restricted to producing raw materials.³¹ Large-scale land-grabs make it more difficult for countries to produce food for local markets. This affects price levels and employment in these countries. If foreign investment drives out production for domestic consumption and this is not compensated for by additional purchases for the market, then the local population's food security might be at risk if they are producing food for export.³²

Local farmers may also face marginalisation if they lose their livelihoods. It is assumed that agricultural investment creates jobs.

The wages in large-scale food production are between ten to 50 per cent of what small farmers earned previously.

However, in reality it can lead to unemployment because of the increase in mechanised production methods.³³ The wages in large-scale food production are between ten to 50 per cent of what small farmers earned previously.³⁴ The use of machinery, pesticides and fertilisers means less labour is needed for each unit of land. But no new jobs are created in processing or selling the goods that are produced.³⁵ The World Bank estimates that to date only 21 per cent of land investments carried out between 2003 and 2008 are being used. After the drop in food prices on the world markets, follow-up investments were no longer considered to be urgently needed. No new job opportunities were created. But the land has been set aside for future needs, so it cannot be used.³⁶ Along with the potential of sparking social conflicts, capital-intensive agriculture also generates ecological risks because of forest clearances, the expansion of industrial plantations and the over-exploitation of water resources.³⁷ Investment projects are generally located on land that is relatively well supplied with water, meaning that local small farmers no longer have access to the resources they need. They are

31 | Cf. Helmut Goeser, "Land Grabbing. Ursachen, Wirkungen, Handlungsbedarf", Deutscher Bundestag, Wissenschaftliche Dienste, WD 5-3010-204/11, 21 Nov 2011, p. 10, https://bundestag.de/blob/192332/e135367c9c5de7bbfd987adda71c606/land_grabbing-data.pdf (accessed 10 Dec 2014).

32 | Cf. BMZ, n. 5, p. 3; GIZ, n. 5, p. 8.

33 | Cf. GIZ, n. 5, p. 2.

34 | Cf. Goeser, n. 31, p. 10.

35 | Cf. *ibid.*

36 | Cf. *ibid.*

37 | Cf. GIZ, n. 5, p. 2.

then forced to move into forested areas, to the damage of the environment.³⁸



The illegal but tolerated occupation of land by the people is called squatting. In many cases, squatters had lost their land due to lacking land titles. In Cambodia, this phenomenon is also a result of an insufficient poverty reduction. | Source: Leo Fung, flickr ©📷

Another phenomenon that goes largely unmentioned when discussing the negative effects of agricultural activity is the radical transformation of nature into land for growing crops, grazing or settlement as a result of the illegal – but to some extent tolerated – activities of squatters on publicly-owned land. This phenomenon is also to blame for much of the illegal logging that is observed in Cambodia, Indonesia, the Philippines and Thailand.³⁹ This is a consequence of inadequate action to fight poverty and a lack of state protection for public land, including nature reserves. It intensifies the effects of land grabbing, i.e. driving small farmers from the land they have traditionally worked.


38 | Cf. Goeser, n. 31, p. 10.

39 | According to the online magazine *Mongabay*, over 100,000 farmers are squatting in a Sumatran national park and growing coffee. Cf. Jeremy Hance, "Over 100,000 farmers squatting in Sumatran park to grow coffee", *Mongabay.com*, 06 Nov 2012, <http://news.mongabay.com/2012/1106-hance-squatters-bukit-barisan.html> (accessed 10 Dec 2014).

Urban Populations

Similarly, urban populations do not always benefit from urban development projects, which are usually conceived for well-off customers – whether it is residential complexes or shopping malls. The poorer members of society are often driven out of cheap housing in the cities and, as is the case in China, resettled in satellite towns miles away from the city. This may improve their living standards, but the social impact can be very negative, particularly when older people are uprooted from their familiar surroundings.⁴⁰



Opaque award procedures and “deals” regarding large-scale industrial and mining projects are one reason for land conflicts. The local population tries to organise protests like here in Myanmar in 2012 where the operation of a copper mine caused an uproar. | Source: Jason Eppink, flickr ©.

Industrial Complexes and Mining

The main risk associated with industrial zoning and mining is the lack of consideration given to environmental protection. This can harm the health of the local population and lead to significant collateral damage to the ecosystem, to

40 | Cf. Sophie Lee, “Landnahme in China: Tod des brennenden Bauern”, *Spiegel Online*, 21 Feb 2013, <http://spiegel.de/wirtschaft/soziales/landnahme-in-china-a-884154.html> (accessed 10 Dec 2014).

the detriment of water supplies and agricultural production. Such projects often cause opposition amongst the local population and civil society organisations, as is the case with Myanmar's controversial copper mining project.⁴¹

THE RULE OF LAW AND SUSTAINABLE DEVELOPMENT

In conclusion,⁴² shortcomings in the rule of law with regard to approval procedures and expropriations favour an imbalance in investment decisions, which have only limited benefits in overall economic terms. This is because of the inadequate application of mechanisms for monitoring, assessing and protecting basic rights. Firstly, the separation of power in the form of departmental responsibilities in public institutions such as ministries and specialist bodies is not sufficiently clear. And secondly, the authorities responsible for issuing permits fail to adequately weigh all the issues involved. This is often reflected in their procedures, with decisions often being made without official consultation and simply presented as a *fait accompli*. In addition, shortcomings in terms of procedures and assessments are often not successfully highlighted in legal terms. The lack of judicial independence is a factor in this respect, ranging from inadequate levels of professionalism to structural dependence to sheer corruption. And as previously mentioned, ownership rights in many countries are so vague that they present no serious obstacles. Finally, in many places the media is not allowed to report critically about projects or potential court proceedings. Journalists in countries such as the Philippines and Cambodia lead dangerous lives. Just recently, a Cambodian journalist who was investigating illegal logging was found shot dead.⁴³ Such cases result in decisions that only serve specific economic and social interests while contributing nothing to sustainable development in the long term.

41 | Cf. Khin Pyae, "Authorities Open Fire on Myanmar Copper Mine Protesters", *Radio Free Asia*, 15 Nov 2013, <http://rfa.org/english/news/myanmar/mine-11152013160128.html> (accessed 10 Dec 2014).

42 | Also the outcome of the conference on "Appropriate Expropriation? Securing Land and Property Rights in South-East Asia", n. 16.

43 | Cf. Reporters Without Borders, "Reporter Shot Dead While Investigating Illegal Logging", 13 Nov 2014, <http://en.rsf.org/cambodia-reporter-shot-dead-while-13-10-2014,47099.html> (accessed 10 Dec 2014).

CHANGING TIMES IN THE HINDU KUSH?

AFGHANISTAN FACING THE TRANSFORMATION DECADE

Nils Wörmer

To many Afghans, 2014 turned into a seemingly fateful year with the conclusion of the three-and-a-half-year transition phase, the end of the ISAF mission and the first presidential elections, from which Hamid Karzai, who had been in office since 2001, was constitutionally barred. This particularly applies to those who have a positive view of the international intervention. Frequent use of terms such as break, turning point or fateful year by international and Afghan observers becomes understandable when one looks back on the election process, which lasted for nearly six months and came close to failure, as well as the complicated and lengthy negotiations of the Bilateral Security Agreement (BSA) and the Status of Forces Agreement (SOFA).

Where does Afghanistan stand after 13 years of Western military presence and reconstruction work with over 140,000 foreign soldiers on its soil at times,¹ with an unprecedented influx of development aid² and with the



Nils Wörmer is the Resident Representative of the Konrad-Adenauer-Stiftung in Afghanistan.

1 | The number of foreign soldiers stationed in Afghanistan was at its highest during the period from May to July 2011, involving some 100,000 U.S. soldiers and over 40,000 soldiers from other nations, including some 5,000 from the German Bundeswehr. Cf. Ian S. Livingston/Michael O'Hanlon, "Afghanistan Index. Also including selected data on Pakistan", Brookings Institution, 10 Jan 2014, pp. 4-5, <http://brookings.edu/~media/Programs/foreign%20policy/afghanistan%20index/index20140110.pdf> (accessed 24 Nov 2014).

2 | During a hearing in the U.S. House of Representatives on 10 June 2014, Special Inspector General for Afghanistan Reconstruction (SIGAR), John F. Sopko, declared that the USA alone had provided 103.17 billion U.S. dollars for reconstruction, humanitarian aid and the development of the security forces in Afghanistan by 31 March 2014. This sum does not include the expenditure for the deployment of U.S. military since 2001. Cf. John F. Sopko, "Testimony. Before the Subcommittee ▶

international community focusing their policies strongly on the recently completed, three-and-a-half year transfer of security responsibility from the international assistance force ISAF to the Afghan security forces (transition phase)? Which of the objectives set for the transition phase at the conferences on Afghanistan held in 2010 and 2011 have been achieved and where are there still deficits? How do Afghans view the security situation and their living conditions at the beginning of 2015?



Cautious confidence: Many Afghans consider the security situation to be acceptable, although the governmental security institutions do not exert the monopoly on the use of force in every region. | Source: Will Craig, UK MOD/Crown Copyright, 2010, ISAF, flickr ©.

PERCEPTION OF THE SECURITY SITUATION AND PEOPLE'S LIVING CONDITIONS

Speaking of "the security situation" in Afghanistan is difficult. The situation differs from one province to the other (in terms of attacks, fighting as well as crime in some cases) and also varies considerably between individual

on the Middle East and North Africa", Committee on Foreign Affairs U.S. House of Representatives, 10 June 2014, <http://docs.house.gov/meetings/FA/FA13/20140610/102322/HHRG-113-FA13-Wstate-SopkoJ-20140610.pdf> (accessed 24 Nov 2014).

districts within a province.³ The provinces in the north and west are still considered safer than those in southern and eastern Afghanistan. This applies despite some districts in the north and west, in the provinces of Kunduz, Faryab and Herat for example, being in part or to a very large extent no longer under the control of the Afghan state and its security institutions.

That said, large parts of the Afghan population consider the security situation acceptable in spite of the drastic escalation in violence between 2010 and 2014. This is a consequence of having lived through the devastating armed conflicts of the 1990s. At that time, the Western countries and the Soviet Union had withdrawn and –

in the eyes of many Afghans – abandoned the country to its heavily armed warlords.⁴ Afghanistan subsequently turned into a playing field for regional powers, including India,

Basic care, access to medical facilities as well as elementary and higher education have undergone steady improvement since the end of the Taliban rule.

Pakistan, Iran and Saudi-Arabia. Compared to that phase of the conflict, basic care, access to medical facilities as well as elementary and higher education have undergone steady improvement since the end of the Taliban rule thanks to the efforts made by ISAF and actors of international Development Cooperation. The GNI per capita, for instance, rose from 1,020 U.S. dollars in 2005 to 2,000 U.S. dollars in 2013,⁵ the proportion of the population with access to basic medical care has increased from nine to

3 | Afghanistan has 34 provinces, subdivided into 398 districts. In Nangarhar Province to the east of Kabul, for instance, the districts around the provincial capital Jalalabad, Behsud, Surkh Rod, Kama and Kuz Kunar, are mostly stable and under the control of the Afghan government. In the districts of Rodat, Bati Kot, Shinwar and Nazyan, on the other hand, entire areas are under the control of the insurgents. Here, the Taliban are in power, including control of jurisdiction and taxation.

4 | On 13 Sep 1991, the foreign ministers of the USA and the Soviet Union, James Baker and Boris Pankin, signed an agreement ("Negative Symmetry Agreement"), in which the two states undertook to cease providing any financial and logistical assistance to the conflicting Afghan parties. Cf. Peter Tomsen, *The Wars of Afghanistan. Messianic Terrorism, Tribal Conflicts and the Failures of Great Powers*, New York, 2011, p. 448.

5 | Cf. The World Bank, "World Development Indicators, Afghanistan", <http://databank.worldbank.org/data/views/reports/tableview.aspx> (accessed 24 Nov 2014).

57 per cent since 2001,⁶ infant mortality (per 1,000 live births) fell from 95 in 2000 to 70 in 2013,⁷ and just under one third of the population now has access to electricity (in Kabul it is 70 per cent compared to six per cent in 2001).⁸ In addition, the number of university students has increased from some 8,000 in 2001 to approximately 100,000 now,⁹ and there are some 34,000 young people undergoing training at 250 institutions of technical and vocational training around the country.¹⁰ As far as freedoms of the individual are concerned, the situation has improved markedly compared to 2001, at least in parts of the country. The media have also been able to establish themselves more widely. In the press freedom ranking, Afghanistan outdoes most other countries in the region (including India and the large neighbours of Iran and Pakistan).¹¹

The early setting of the withdrawal date for the NATO combat troops resulted in a strong sense of uncertainty.

Against this backdrop, i.e. the experiences from the civil war after 1991 and the gradual improvement of the living conditions of large parts of the population between 2001 and the present day, the fear of a complete civil and military withdrawal by the international community is understandable. The debate about the withdrawal conducted in Europe and the USA in 2010 and 2011 and the early setting of the withdrawal date for the NATO combat troops resulted in

6 | Cf. Ministry of Finance of Afghanistan, Tokyo Mutual Accountability Framework (TMAF), Senior Officials Meeting Joint Report, 3 Jul 2013, http://mof.gov.af/Content/files/TMAF_SOM_Report_Final_English.pdf (accessed 24 Nov 2014).

7 | Cf. The World Bank, n. 5.

8 | Cf. Katerina Oskarsson, "Energy-Development-Security Nexus in Afghanistan", *Journal of Energy Security*, 11/2012, http://ensec.org/index.php?option=com_content&view=article&id=386:energy-development-security-nexus-in-afghanistan&catid=130:issue-content&Itemid=405 (accessed 24 Nov 2014).

9 | Cf. German Bundestag, Committee on Economic Cooperation and Development – 18th electoral term: Motion by the CDU/CSU and SPD parliamentary groups, Transformationsdekade mit zivilen Mitteln erfolgreich gestalten, printed matter 18/3405, <http://dip21.bundestag.de/dip21/btd/18/034/1803405.pdf> (accessed 8 Dec 2014).

10 | Cf. Ministry of Finance of Afghanistan, n. 6.

11 | Cf. Reporters without Borders, "World Press Freedom Index 2014", 11 Feb 2014, http://rsf.org/index2014/data/index2014_en.pdf (accessed 17 Dec 2014).

a strong sense of uncertainty, which is still persisting to this day.¹² The announcement of the transformation phase for the period from 2015 to 2024 and pledges of a long-term civil engagement by the international community were not made until December 2011 in Bonn and could not fully dispel people's fears and the lack of trust associated with it. Many Afghans are sceptical about the idea that the security forces trained by NATO will prevail in the conflict with the insurgents and that the newly established state institutions will be able to consolidate in the long term, given the endemic corruption and nepotism.



Part of the ISAF Mission was the training of Afghan security forces as seen here in Kunduz. But police and army lose about one quarter of their personnel during operations or due to desertion. | Source: Cynthia Van Cleve, ISAF, flickr ©📷

FROM TRANSITION TO TRANSFORMATION

At the London Conference on Afghanistan held in 2010, the states involved in ISAF and the Afghan government set the course for the process of the handover of security responsibility to the Afghan National Security Forces (ANSF), subsequently referred to by the term Transition by the international protection force. This phase was initiated in

12 | Cf. Kai Eide, *Power struggle over Afghanistan: an inside look at what went wrong – and what we can do to fix it*, New York, 2011, chapter 31, "The military buildup".

July 2011 and completed on schedule in December 2014. In London, the Karzai government had further announced that it would hold a Loya Jirga (Grand Assembly) in the early summer of 2010, which would initiate a national process of peace and reconciliation. This consultative national council, frequently referred to as the Peace Jirga, convened in June 2010 in Kabul, chaired by former President Burhanuddin Rabbani, and formally initiated the peace process. To this end, a High Peace Council was appointed, whose remit was to act as a permanent institution of the government's reconciliation policy and to drive the peace process forward. In addition, a program financed by the international community was set up in the country to encourage rebel fighters to lay down their arms and abandon their insurgency.¹³

The Bonn Conference on Afghanistan in December 2011 and the NATO Summit in Chicago in May 2012 set the course for the post-2014 period early on. First came approval of the Transformation Decade (2015 to 2024) to

One common element of the conferences on Afghanistan since 2010 has been the definition of areas where progress needs to be made, e.g. political reforms and regional cooperation.

follow on from the Transition.¹⁴ In Chicago, the NATO member states then announced plans for a training, advising and assistance mission to follow the ISAF mission. They further pledged annual financial support in the amount of 4.1 billion U.S. dollars to finance the ANSF after 2014.¹⁵ One common element of the conferences on Afghanistan and the NATO summits since 2010 has been the definition of areas where progress needs to be made. This was to be a crucial prerequisite for the withdrawal of the

13 | Cf. Permanent Mission of Afghanistan to the UN, "The Resolution Adopted at the Conclusion of the National Consultative Peace Jirga", 6 Jun 2010, <http://afghanistan-un.org/2010/06/the-resolution-adopted-at-the-conclusion-of-the-national-consultative-peace-jirga> (accessed 24 Nov 2014).

14 | Cf. "The International Afghanistan Conference in Bonn, "Afghanistan and the International Community: From Transition to the Transformation Decade. Conference Conclusions", 5 Dec 2011, http://auswaertiges-amt.de/cae/servlet/contentblob/603684/publicationFile/162762/Conference_Conclusions_-_International_Afghanistan_Conference_Bonn_2011_engl.pdf (accessed 24 Nov 2014).

15 | Cf. "Chicago Summit Declaration on Afghanistan. Issued by the Heads of State and Government of Afghanistan and Nations contributing to the NATO-led International Security Assistance Force (ISAF)", 21 May 2012, http://nato.int/cps/en/natohq/official_texts_87595.htm (accessed 17 Dec 2014).

ISAF combat troops by the end of 2014 and the country's long-term stabilisation. It was deemed that progress in the following areas was essential: the development of the ANSF, the improvement of governance, the peace process, regional cooperation (particularly with Iran and Pakistan) as well as economic development. In a strategy paper produced at the congress of the CDU/CSU parliamentary group of 28 November 2011, the late Deputy Chairman of the CDU/CSU parliamentary group Dr Andreas Schockenhoff MP described the Transition succinctly as follows under the headline "What needs to happen by 2014?":

"The responsible handover of security into Afghan hands has priority over the realisation of ambitious schedules. We will only be able to scale back our military engagement to the extent that the Afghans have the situation truly under control. [...] The capabilities of the Afghan security forces need to be strengthened further. [...] The Afghan side must act in concert with us and fulfil the undertakings it made at the conference in Kabul and which it last confirmed in Bonn – namely to exercise good governance, take action on corruption and develop an independent judiciary. [...] Continuing strenuous efforts must be made to pursue an approach aimed at a regional solution".¹⁶

GOVERNANCE

Former President Karzai had affirmed at virtually all major international conferences on Afghanistan in recent years that his government would take stronger action against corruption, nepotism and abuse of office. In Tokyo in July 2012, the international donor community had made an outline agreement ("Tokyo Mutual Accountability Framework", TMAF).¹⁷ This contained a commitment by the

In July 2012, the international donor community had made an outline agreement. This contained a commitment by the Afghan side to concrete and verifiable measures.

16 | Cf. CDU/CSU parliamentary group in the German Bundestag, "Afghanistan: Internationaler Einsatz im Wandel. Gemeinsam für eine sichere Zukunft", 01/2012, https://cducusu.de/sites/default/files/CDU_BR_Afghanistan_final.pdf (accessed 24 Nov 2014).

17 | Cf. Ministry of Foreign Affairs of Japan, "Tokyo Conference on Afghanistan: Annex. Tokyo Mutual Accountability Framework (Tokyo Framework)", 8 Jul 2012, http://www.mofa.go.jp/region/middle_e/afghanistan/tokyo_conference_2012/tokyo_declaration_en2.html (accessed 24 Nov 2014).

Afghan side to concrete and verifiable measures to improve its governance, the enforcing of the rule of law, the protection of human and women's rights, the monitoring of public finances and the development of private enterprise. It further undertook to conduct free, fair and transparent presidential elections in 2014 and parliamentary elections in 2015.¹⁸ To ensure better monitoring of the implementation of the TMAF undertakings by the Afghan government, it agreed to 17 so-called hard deliverables with the donor community in April 2013. These were reviewed for the first time in July 2013 and then again in January 2014. Eleven of the 17 reform promises are now deemed to have been fulfilled.¹⁹



Lengthy election process: The successor of President Karzai was determined in two rounds in April and June 2014 respectively. International monitoring missions like EUPOL kept a close eye during the counting of votes. | Source: EUPOL, flickr ©🇺🇸🇪🇺.

18 | Cf. Ministry of Foreign Affairs of Japan, "Tokyo Conference on Afghanistan: The Tokyo Declaration. Partnership for Self-Reliance in Afghanistan. From Transition to Transformation", 8 Jul 2012, http://www.mofa.go.jp/region/middle_e/afghanistan/tokyo_conference_2012/tokyo_declaration_en1.html (accessed 24 Nov 2014).

19 | Cf. The German Federal Government, "Fortschrittsbericht Afghanistan 2014 einschließlich einer Zwischenbilanz des Afghanistan-Engagements", 1 Nov 2014, http://auswaertiges-amt.de/cae/servlet/contentblob/691670/publicationFile/199511/141119-Fortschrittsbericht_AFG_2014.pdf (8 Dec 2014).

Besides the Tokyo process, the 2014 presidential elections in particular were considered an indicator of the level of democratisation in the country. It is not as if the international community had expected them to be perfect. They would be judged in part against previous elections. Seen in that light, they were to be deemed "successful" if they proceeded significantly better in terms of being transparent, fair, free and inclusive than the 2009 presidential elections, which had been marred by election fraud, abuse of office and violence. Despite a number of positive aspects, including the partly high turnout in both rounds, the effective deployment of ANSF personnel and predominantly peaceful demonstrations, the election process clearly demonstrated the inadequacies of some state institutions and existing deficits in the democratic process. Public structures were ultimately too weak to guarantee fairness

and transparency so that the cast votes would produce a clear winner and clear loser, who would then accept the outcome. It also became obvious that in some areas, leading politicians did not really want a clear winner

In the end, the lengthy election process produced a government of national unity after a number of failed negotiations and under massive pressure from the international community.

and a clear loser to emerge.²⁰ In the end, the process produced a government of national unity after a number of failed negotiations and under massive pressure from the international community, which some Afghan and international observers consider the "royal road", others a "poor compromise". Although there are signs of the new president taking some promising initial steps (see below), it remains to be seen to what extent the unity government can implement the election promises of Ashraf Ghani and Abdullah Abdullah, particularly with respect to curbing the pervasive corruption.

ECONOMIC DEVELOPMENT

A minimum level of security and stability is the most important prerequisite for creating opportunities for economic development. What is important in this context is not so much the official classification of individual areas as

20 | For a more detailed analysis of the election process see Nils Wörmer, "Unity Government in Kabul. Afghan Handover Undemocratic but Peaceful", KAS Country Report, 10/2014, <http://kas.de/afghanistan/en/publications/39346> (accessed 24 Nov 2014).

secure, partly secure or insecure, but rather the subjective perception of the security situation by the Afghan population and by domestic and foreign investors. Besides the security situation affecting economic development, structural factors such as the lack of legal certainty, skills shortages, poor (traffic) infrastructure and energy shortages as well as the dysfunctional system for collecting taxes and customs duties play an important role. Added to this is Afghanistan's demographic development,²¹ which means that some further 400,000 people join the job market every year.²²

Over the last ten years, the international community has made substantial efforts towards progress in the development of the infrastructure, in the creation of legal certainty, which is of great relevance particularly for foreign investors in connection with the exploitation of raw materials, as well as the establishment of a vocational education system. However, due to the precarious security situation, the use of high-quality infrastructure is not feasible in some parts of the country,²³ and the adoption of important bills has been delayed by years in some cases. The new "Mining Law", which is considered a prerequisite for the development of the raw materials sector and the mining of metals, precious stones and rare earths, was not adopted until August 2014 after a delay of over two years. The "Law on Strengthening the Banking Sector" and a new "Tax Administration Law" have also been delayed. This means that while Afghanistan is making some progress in creating the

21 | According to the United Nations, Afghanistan's population will increase from currently around 32 million to almost 48 million by the end of the Transformation Decade, based on calculations involving the Constant Fertility Variant. Cf. Population Division UN Department of Social and Economic Affairs, <http://esa.un.org/unpd/wpp/unpp/p2k0data.asp> (accessed 24 Nov 2014).

22 | Cf. BMZ, "New Country Strategy for Afghanistan 2014 – 2017. Reliable Partnership in Times of Change", BMZ Strategy Paper 3/2014e, http://bmz.de/de/mediathek/publikationen/reihen/strategiepapiere/Strategiepapier342_03_2014.pdf (accessed 24 Nov 2014).

23 | One pertinent example is the Salma Dam in Chishti Sharif District in Herat Province. This hydroelectricity project, financed by India, would supply 42 megawatts of electricity upon completion and provide irrigation for cultivating an additional 40,000 hectares of land (Herat currently has some 35,000 hectares of farmland). Completion had originally been planned for September 2011, but has been delayed again and again because of the unstable security situation.

structural prerequisites for economic development, it lags behind the schedule set by the international community.



Dangerous top position: Afghanistan remains the largest producer of opiates and narcotics. More than two million people are involved in the business of growing, trafficking and selling of drugs. But also consumption is widespread. | Source: ISAF, Laura K. Smith, flickr ©.

The drug economy and the declining war economy are posing further problems for economic development. Afghanistan is still the largest global producer of cannabis, heroin and opium. At the same time, drug consumption is common among the population, which means that the country also leads the global statistics in that area.²⁴ Both of these, i.e. the cultivation of plants for manufacturing drugs and narcotics as well as consumption, have social consequences. Some 2.2 million people's livelihood depends on the cultivation, transportation and sale of drugs. The ISAF withdrawal is affecting the construction sector as well as the transport and services sectors particularly badly. The construction and maintenance of 850 foreign military bases, which were still operational in Afghanistan in 2012, as well as the required road links, the transport activities including the guarding of military transports and the

24 | Cf. United Nations Office on Drugs and Crime, *World Drug Report 2012*, http://unodc.org/documents/data-and-analysis/WDR2012/WDR_2012_web_small.pdf (accessed 4 Dec 2014).

running of military camps, which required cleaning staff, security staff, kitchen staff and craftsmen, had directly and indirectly created several hundred thousand jobs, most of which are now redundant. The decline in economic growth from 14.4 per cent in 2012 to 3.6 per cent in 2013 is attributed to a large extent directly to the withdrawal of the military as well as the uncertainties created by the end of the ISAF mission and the 2014 presidential elections.²⁵

PEACE PROCESS AND REGIONAL COOPERATION

None of the mediation initiatives of recent years has led to substantial negotiations between the central government and the leaderships of the insurgent groups to date. The probing efforts made so far are characterised by numerous partly independent, partly coordinated series of exploratory talks as well as a multitude of actors. Unfortunately, it has not proved possible to establish a structured peace process, such as that set up successfully in the Middle East through the Madrid Conference of 1991 and the subsequent secret talks in Oslo. In that case, there had at least been a negotiation framework, which determined who was going to negotiate with whom about which topics at certain intervals, who was a conflicting party and who had observer status, as well as which topics would initially be excluded.

There is no societal consensus on whether to seek a peace process predominantly between Afghanistan and Pakistan or between the Afghan government and the Afghan Taliban.

The conflicting parties also took the initial step of recognising each other as negotiating parties. Afghanistan is nowhere near this, which means that the term peace efforts is more fitting than the term peace process.

There is no societal consensus on whether to seek a peace process predominantly between Afghanistan and Pakistan or between the Afghan government and the Afghan Taliban; with respect to the second case, views on the role played by Pakistan also differ fundamentally.

The key demands of the Afghan government include the recognition of the constitution and the willingness of the insurgent groupings to give up the armed struggle as well as unconditionally renouncing their cooperation with

25 | Cf. The World Bank, "Afghanistan: Country Snapshot", Mar 2014, <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1398285132254/Afghanistan-Country-Snapshot-Spring-Meetings-2014.pdf> (accessed 24 Nov 2014).

transnational terrorist organisations (such as al-Qaida and the Islamic Movement of Uzbekistan). The Taliban neither recognise the constitution nor the central government, the latter not even as negotiating party. With reference to the signing of the BSA and the implementation of Resolute Support, the Taliban reaffirmed their demand for the withdrawal of all foreign troops as a condition for participating in peace negotiations. In the eyes of the Taliban, NATO and the USA are the main enemies, with whom they were prepared to negotiate about specific points. This resulted in the Taliban liaison office being set up in Qatar in June 2013 and in the captured U.S. soldier Bowe Bergdahl being exchanged for five high-ranking Taliban leaders held in Guantanamo in May 2014. Apart from these measures, the demands of the Kabul government and the Taliban currently appear irreconcilable, particularly with respect to the Afghan constitution. There have been suggestions from the circles around Ashraf Ghani and Abdullah Abdullah as well as from some members of the High Peace Council that the new government needs to initiate a restart of the peace process. Where the Taliban movement is concerned, there are currently as many indications that some relevant actors are seriously interested in a peace process as indications that the key Taliban figures are playing for time, are unwilling to compromise and are intent on making military gains after the withdrawal of the ISAF combat troops in order to enhance their political strength.

The Taliban neither recognise the constitution nor the central government, the latter not even as negotiating party.

The efforts to stabilise Afghanistan through regional cooperation have centered on the Istanbul Process (also referred to as Heart of Asia Process), which was initiated in November 2011. To date, four conferences of the fourteen participating countries have been held at a ministerial level, the last one on 31 October in Beijing. The choice of that venue was, in fact, significant as China is keen to assume a more active role as a conflict mediator. Despite a few steps in the right direction, the process is lagging far behind the ambitious goals and high expectations from 2011.²⁶ In the case of regional cooperation as well, the ver-

26 | Cf. S. Reza Kazemi, "Will the 'Heart of Asia' start beating? A review of the regional co-operation process", Afghanistan Analysts Network, 29 Aug 2014, <https://afghanistan-analysts.org/will-the-heart-of-asia-start-beating-a-review-of-the-regional-cooperation-process> (accessed 24 Nov 2014); ▶

dict is, therefore, that it cannot be judged a failure by any means, but will at least require more time.

There has hardly been any progress made to date in the efforts to involve Afghanistan's two most important neighbouring states, Iran and Pakistan, either. For years, the policies on Afghanistan pursued by Teheran and Islamabad have included the provision of support to armed non-state actors such as the Taliban, a point that has been picked up repeatedly in the Western debate about Afghanistan. Although there have been phases during which the two countries were put under great diplomatic and military pressure particularly from the USA, they never abandoned their policies. In view of the expected complete withdrawal of NATO armed forces from Afghanistan by 2016, it is not likely that Iran and Pakistan will change their stance.

SECURITY FORCES AND INSURGENCY

Since the resurgence of the insurgency movement (Taliban, Haqqani network and Hezb-e Islami) during the period from 2003 to 2005, Afghanistan has experienced a military conflict which the population perceives as a war and which is also referred to as such by the conflicting parties, particularly the government and the Taliban. So far, ISAF and the ANSF have been able to keep the foreign groupings in check. Consequently, the attacks and the fighting have mainly occurred in provinces in the east and south as well as a few insurgent strongholds in the north and northwest of the country. Because Afghan army and police units have gradually replaced the ISAF combat troops, the conflict has increasingly adopted the character of a civil war, which affects roughly a quarter to a third of the country's territory. Added to this are terrorist attacks in the urban centers, which are generally unaffected by open fighting. The insurgents target predominantly the large cities of Kabul and Kandahar, but also smaller towns such as Jalalabad and Kunduz.

Because Afghan army and police units have gradually replaced ISAF since 2011, the conflict has increasingly adopted the character of a civil war.

S. Reza Kazemi, "More bilateral than multilateral effects: The Afghanistan conference in China", Afghanistan Analysts Network, 7 Nov 2014, <https://afghanistan-analysts.org/more-bilateral-then-multilateral-effects-the-afghanistan-conference-in-china> (accessed 24 Nov 2014).

On 5 November 2014, the commander of the ISAF Joint Command, Lieutenant General Joseph Anderson, put the number of Afghan soldiers and police killed in action so far that year at 4,634; the total for the previous year had been 4,350.²⁷ Total annual losses suffered by the ANSF through death and injury in 2013 and 2014 are estimated at between 15,000 and 20,000. A UN report put the losses suffered by the Taliban in 2013 at between 10,000 and 12,000.²⁸ According to UNAMA, the number of civilian casualties for 2013 was 8,615 (2,959 killed and 5,656 injured).²⁹ According to reports by soldiers and members of the police, the fighting between the ANSF and the insurgents is being conducted with great ferocity on both sides. On the one hand, several high-ranking ANSF commanders admitted in the summer of 2014 that they had given instructions to take no prisoners.³⁰ On the other hand, there were over 1,000 documented cases in 2013 (743 killed and 333 injured) of reprisals against the families of ANSF members such as intimidation, revenge attacks and politically motivated executions, where insurgents had set out to kill or injure civilians.³¹

The security architecture in itself produces fundamental problems for the Afghan state. There are overlaps in competences and responsibilities between the three major security institutions, namely the army, the police and the

27 | Cf. David Alexander/Phil Stewart, "Afghan casualties on battlefield at unsustainably high level: U.S. general", Reuters, 5 Nov 2014, <http://reuters.com/article/2014/11/05/us-usa-afghanistan-idUSKBN0IP2MM20141105> (accessed 24 Nov 2014).

28 | Cf. UN Security Council, "Third report of the Analytical Support and Sanctions Monitoring Team, submitted pursuant to resolution 2082 (2012) concerning the Taliban and other associated individuals and entities constituting a threat to the peace, stability and security of Afghanistan", 11 Nov 2013, http://securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_656.pdf (accessed 24 Nov 2014).

29 | Cf. United Nations Assistance Mission in Afghanistan, "Afghanistan Annual Report 2013. Protection of civilians in armed conflicts", 2/2014, http://unama.unmissions.org/Portals/UNAMA/human%20rights/Feb_8_2014_PoC-report_2013-Full-report-ENG.pdf (accessed 24 Nov 2014).

30 | Cf. Hamid Shalizi, "As Taliban push quickens, Afghan troops ordered: take no prisoners", Reuters, 18 Aug 2014, <http://reuters.com/article/2014/08/18/us-afghanistan-violence-idUSKBN0GI1YM20140818> (accessed 24 Nov 2014).

31 | Cf. *ibid.*

intelligence agency. They all have units that were structured, trained and equipped for domestic deployment and for the fight against the insurgency. Besides combating the insurgency, all three also perform policing duties and have departments dedicated to intelligence operating within the country. This has caused considerable rivalries, which quickly developed into battles for resources, recognition and – against the backdrop of foreseeable budget cuts – the right to exist in the long term.

During the course of 2012, ISAF and the Afghan government completed a successful recruitment drive for the army and the police force, boosting the number of soldiers

The ANSF need to replace between a quarter and a third of their personnel each year due to losses, desertion and low re-enlistment.

and police to the target figure of approximately 352,000. However, this achievement is marred by the fact that the ANSF need to replace between a quarter and a third of their personnel each year due to losses, desertion

and low re-enlistment. This makes it difficult for a common identity and stronger internal cohesion to develop between the individual units in the newly constituted armed forces. It also hampers the efforts made by the international community to enhance the quality of the Afghan security personnel through basic and advanced training. The fact that the former President has repeatedly referred to the Taliban as “brothers” since 2009 has watered down the concept of the enemy for the ANSF. Given this situation, how can soldiers and members of the police, who have regularly witnessed corruption and abuse of office by their superiors and whose commander-in-chief refers to enemy fighters as “brothers”, identify with the state and its institutions? There are also financial aspects. The low pay did not compensate adequately for the risk of being killed or badly wounded or for the inadequate medical care, which meant that morale and motivation among many ANSF members, particularly in the lower ranks, remained poor for a long time. The new Kabul government under Ashraf Ghani and Abdullah Abdullah has already responded to this situation during several troop visits in the autumn of 2014 in order to strengthen the internal structures of the ANSF.

Having said all this, the quality of the Afghan security forces has improved steadily over the last few years, resulting in some successes in the fight against the insurgency,

which has in turn led to greater esteem for soldiers and the police among the civilian population. The fact that the government forces were able to provide security for the first and second round of the presidential elections while at the same time coping with a country-wide intensification of operations between February and November 2014 was seen as an achievement and a positive development. In conclusion, one can say that although the ANSF may be on a positive trajectory, they are not yet capable of mastering the challenges of logistics, medical supply, intelligence and reconnaissance, air transport and close air support as well as the training of commissioned and non-commissioned officers and specialists by themselves.



Competitors seek consensus: On 21 September 2014 the candidates for the presidency, Ashraf Ghani (3.f.r.) and Abdullah Abdullah (4.f.l.), here seen with U.S. Secretary of State John Kerry, agreed on building a government of unity. | Source: U.S. Department of State, flickr ©©©.

FIRST STEPS TAKEN BY THE NEW PRESIDENT AND THE RESOLUTE SUPPORT MISSION

Within hours of his inauguration, Ashraf Ghani appointed former Minister of the Interior Hanif Atmar to the post of National Security Advisor by presidential decree. During a ceremony led by the President, which was held on 30 September and attended by the new leadership, Atmar signed the Bilateral Security Agreement between the Afghan

and U.S. governments as well as the agreement on the stationing of troops with NATO. These agreements finally put to rest the long-standing disagreements between the Kabul and Washington governments. This also established the prerequisites for setting up the Resolute Support Mission (RSM) for 2015 and 2016 as well as for the continued financial support of Afghanistan by the international community.

The initial official actions taken by Ashraf Ghani included budget cuts involving the presidential palace and the presidential staff. This was complemented by directives and statements addressed at state officials and members of parliament, aimed at curbing the extensive wasting of state funds and abuse of office by top public officials. In addition, Ghani immediately announced that he would reopen the inquiry into the scandal around Kabul Bank, which involved the embezzlement of almost one billion dollars. His plans further include reforms in the justice and tax systems and in the top echelons of the security apparatus. Where the peace process is concerned, he appears to be intent on a new beginning and therefore a restructuring of the High Peace Council. Apart from indications that Ghani wants to give new impetus to the peace process particularly by creating economic incentives and enhancing regional cooperation – with much greater involvement of China – few details about the new government's future peace strategy have so far emerged.

Ghani wants to give new impetus to the peace process particularly by creating economic incentives and enhancing regional cooperation – with much greater involvement of China.

After the end of the ISAF Mission on 31 December 2014, the training and advisory mission Resolute Support, which is also conducted by NATO, began on 1 January 2015. With a contractually agreed upper limit of 15,000 soldiers, the actual number of personnel involved in the mission is between some 13,000 and 14,000, just under 11,000 U.S. soldiers and up to 850 members of the German Bundeswehr. The mandate is limited essentially to providing training and advice to the highest leadership echelon of the Afghan security forces. It does not include a combat remit. The NATO combat troops remaining in Afghanistan are there exclusively to protect the bases as well as trainers and military advisers. In 2015, the locations where RSM personnel will be stationed will include Kabul as well as

Bagram, Jalalabad, Herat, Mazar-e Sharif and Kandahar. From 2016, the deployment of personnel is to be restricted to the capital and Bagram. The announcement by the U.S. President that the mission is to terminate by the end of 2016 came at a time when it was difficult to gauge how the 2014 presidential elections and the ISAF withdrawal would affect Afghanistan's stability. For NATO and many allies, who had anticipated that the Resolute Support Mission would last longer, the announcement of the complete withdrawal of U.S. soldiers by the end of 2016 came out of the blue.³²



New mandate: Up to 850 Bundeswehr members will be stationed from 1 January 2015 in Afghanistan. They have no combat mission, but focus on education and consulting. | Source: Andrea Bienert, Bundeswehr, flickr ©©©.

CONCLUSIONS AND OUTLOOK

Thirteen years on from the overthrow of the Taliban, there is still hope for a permanent peace to be established in Afghanistan, for a democratisation process to take hold and for people's living conditions to be improved fundamentally and sustainably. Neither the end of the monarchy in 1973

32 | Cf. Matthias Gebauer, "Reaktion auf US-Abzug: Bundeswehr soll Afghanistan schneller verlassen", *Spiegel Online*, 5 Jun 2014, <http://spiegel.de/politik/ausland/a-973448.html> (accessed 24 Nov 2014).

nor the coup against the dictatorship in 1978, the downfall of the Communist regime in 1992 or the expulsion of the mujahedeen in 1996 had opened up similar prospects. The goals Western politicians had derived in this scenario, namely to stabilise Afghanistan for the long term, to develop its economy and to firmly establish the principles of democracy and of the rule of law, have been achieved to some extent. However, it will require further serious efforts by the Afghan government and the international community during the Transformation Decade to consolidate what has been achieved to date.

When comparing the conditions for the ISAF withdrawal defined in 2010 and 2011 with the reality at the close of 2014, one has to say that the efforts made by the Afghan government and the international community during the transformation phase will be hampered by a negative legacy from the transition phase if nothing else. This does not mean that the key objectives of the Afghanistan strategy of the international community, namely the pacification and long-term stabilisation of the country as well as the establishment of democratic structures, are unattainable. However, with the exception of governance thanks to the political new beginning, Afghanistan has clearly fallen short of the milestones set for 2014. This applies mainly to the peace process, cooperation with the neighbouring countries and economic development. Against this backdrop and in view of the impressive ability of the insurgency movement to regenerate, which it has proved repeatedly since 2009, it would make sense to revisit the decision about the withdrawal date for the Resolution Support Mission, which was made at such an early date.

Notwithstanding all the adversities and setbacks, the international community has achieved much. While the situation in Afghanistan is only comparable to that in Iraq to a limited extent, there are some very obvious parallels connected to the questions relating to the prolonged stationing of troops and the right time for a full withdrawal. Events in Iraq have shown that a war cannot be ended simply by declaring it to be so. This should not be Afghanistan's fate.

PROSPECTS FOR GERMAN FOREIGN POLICY

The current public discourse on questions of international politics in Germany is not commensurate with the colossal challenges that the country is facing. What do developments in the Middle East, in Africa as well as in Asia and in the Americas mean for Germany and Europe? In what areas should German foreign politics become engaged more strongly – which topics should the German public be exposed to more intensely?

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