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Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective

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CONCEPTUALIZING EU ENERGY SECURITY THROUGH AN EU CONSTITUTIONAL LAW PERSPECTIVE

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INTRODUCTION

The principal aim of this paper is to provide the reader with an overview of the key legal considerations at play in relation to European Union (EU) energy security. As part of that process we explore the complexities that contribute to the contentiousness of EU action in relation to certain aspects of energy. We also provide some background information on key facts and figures regarding energy in the EU.

While extensive literature exists on discrete aspects of the EU-energy nexus, there is a lack of research contextualizing EU energy security through a constitutional/public law prism. We therefore intentionally take a broad view of the subject. Such an approach is relevant because of the very nature, on the one hand, of the EU, and on the other, of energy, both of which are highly complex. For instance, the EU is a complex *sui generis* example of inter-state cooperation. For its part, energy—due to inherent and contingent reasons explored below—is highly politicized. Combining these two fields makes for potentially very contentious politics. It follows, therefore, that a public law approach in relation to the competences of the supranational aspects of the EU—in other words, a clear delineation of the competences of the EU and of its member states¹—would be highly pertinent towards understanding energy within the EU context.

We also aim to highlight in our present work the inescapable diplomatic overtones of energy in international relations. Although our focus is on the legal aspects of EU energy security, we consider it necessary to outline what may be the principal contours of the broader geostrategic dynamics at play, including EU efforts to secure its energy supply. In that respect, we support a view of international law as only an aspect—albeit an important one—of the international rules-

1. For a discussion of supranationalism and the European Union, see Rafael Leal-Arcas, *Theories of Supranationalism in the EU*, 8 J.L. SOC'Y 88 (2007).

based system that seeks to discipline inter-state relations to the extent that is politically acceptable to the state actors concerned. That is to say that international law and its normative effect ought not be seen as functioning in some geostrategic vacuum.

The EU extensively engages with the world that is external to it. We see its *sui juris* and observer-status participation in various international fora. This can encourage perceptions that overestimate the EU's actual competence to speak and act with one voice on all policy matters.² In that sense, the question as to the EU's actorness within the broader international environment is part of its complexity. Whilst the EU certainly possesses the institutional capacity to speak and act with one voice on behalf of its member states, it lacks the absolute discretion to do so in all fields of policy. What is more, a complex policy matter such as energy needs to be broken down into its various aspects in order for the EU to determine what action might be acceptable in relation to each aspect. This shall be explored more fully in this paper.

The EU is essentially about the common economic area between twenty-eight sovereign states.³ The main features of that common economic area are its customs union and internal market. In matters directly linked to the customs union and the competition rules of the internal market, EU members have expressly endowed the EU with powers to exclusively handle

2. There is a large amount of literature on the EU acting with one voice on the international stage. See generally RAFAEL LEAL-ARCAS, *THEORY AND PRACTICE OF EC EXTERNAL TRADE LAW AND POLICY* (2008); Rafael Leal-Arcas, *Unitary Character of EC External Trade Relations*, 7 COLUM. J. EUR. L. 355 (2001); Rafael Leal-Arcas, *United We Stand, Divided We Fall- The European Community and its Member States in the WTO Forum: Towards Greater Cooperation on Issues of Shared Competence?*, 1 EUR. POL. ECON. REV. 65 (2003), available at <http://www.ugbs.org/weru/cper/voll/no1/leal.pdf>; Rafael Leal-Arcas, *The EC in the GATT/WTO negotiations: From Rome to Nice- Have EC Trade Policy Reforms Been Good Enough for a Coherent EC Trade Policy in the WTO?*, 8 EUR. INTEGRATION ONLINE PAPERS 1(2004) available at <http://ciop.or.at/ciop/texte/2004-001.htm>; Rafael Leal-Arcas, *Polycephalous Anatomy of the EC in the WTO: An Analysis of Law and Practice*, 19 FLA. J. INT'L L. 569(2007).

3. The EU and the members (minus Switzerland) of the European Free Trade Association (EFTA) form the European Economic Area (EEA). As a consequence, this expanded free-trade area applies the entire EU internal market *acquis communautaire*—save for that on fisheries and agriculture. See Agreement on the European Economic Area, 1994 O.J. L1/3.

such matters on their behalf.⁴ In other words, the EU acts to the exclusion of member states. Member states foresaw that certain other matters—supplementary to the EU project—made it necessary for the EU to have a degree of competence to act. These are considered shared competence areas.⁵ Generally, any policy matter for which the treaties make no express provision remains the sovereign preserve of member states.⁶ That said,

4. See Consolidated Version of the Treaty on the Functioning of the European Union art. 3, 2010 O.J. C 83/47, at 51 [hereinafter TFEU]. Article 3 states: “1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.” *Id.* Article 6 similarly provides: “The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.” *Id.* art. 6, at 52–53.

5. Article 4 of the TFEU states: “1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty. 3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. 4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.” *Id.* art. 4, at 51–52 (emphasis added).

6. Also in accordance to the interpretative principle of *expressio unius est exclusio alterius*, that is to say that the express mention of a matter or circumstance has the effect of excluding those not mentioned. This is an interpretative principle to assist in deducing the scope of any given norm where textually this is unclear. The Vienna Convention on the Law of Treaties 1969 (VCLT)—drafted by the International Law Commission pursuant to Article 13 of the United Nations’ Charter to codify a complex area of international law—signed and ratified by most of the 28 EU member states, codifies norms concerned, amongst other things, with interpretative matters. See Vienna Convention on the Law of Treaties art. 26–38, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. However, the fact that France and Romania—both EU members

notably, the treaties foresee cases where, while no EU competences exist, EU institutions may have to act, albeit to the extent that member states unanimously consent to this.⁷ Of course, there are matters over which both sets of actors—namely, EU institutions and EU member states—may act. And in relation to such matters, there are treaty-based solutions that promote an efficient use of coexistent competences whilst discouraging the unjustifiable sidelining of member states by EU institutions.⁸

Returning to energy in its wide sense, what becomes evident is that it is a multidimensional matter. The centrality of energy—by which we mean its significance to almost every field of human endeavor in modern times—is what makes it multidimensional. For instance, the production, transport, distribution, sale, and consumption of energy engage several policy areas. It is possible,

and parties to EU constitutive treaties—have neither signed nor ratified the VCLT means that any interpretative dispute submitted to adjudication cannot be resolved on the basis of the VCLT. Rather it would need to be resolved on the basis of customary law. That said, for its most part, as expressed *passim* in the commentary to the draft version of the VCLT, the VCLT is deemed to mirror customary norms. In that respect, the customary norms that were thought to exist are mirrored in Articles 26–38 of the VCLT. Article 31, and its mirror norm in custom, focuses on the ordinary meaning of the wording in question. In that respect, to read broader powers into a treaty provision in dispute would be unjustifiable save for where some other legally significant event or circumstance permits for this to happen. An example would be subsequent state practice or international agreements that indicate that there is state consent to reading broader powers into a treaty. *See id.* at art.30, 31(3)(a)&(b) (providing rules for interpreting successive international agreements and subsequent agreement or practice on the part of the states concerned, respectively).

7. Article 352(1) of the TFEU provides: “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, *to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers*, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.” TFEU, *supra* note 4, art. 352(1), 2010 O.J. C 83, at 196 (emphasis added).

8. Article 5 of the Treaty on the European Union (TEU) limits the actions of the EU to the extent that the EU has been conferred express treaty-derived powers to act and to the extent that EU action is proportionate to the intended objective. In relation to shared competences, Article 5 TEU conditions EU action according to the subsidiarity principle—i.e., to the extent that action is more effective at the supranational level in order to achieve what cannot be similarly achieved at a local, regional, or national level. *See* The Treaty on European Union art. 5, 2010 O.J. C 83/13, at 18 [hereinafter TEU post-Lisbon].

therefore, that certain aspects of energy within the EU context are either a field where the EU has exclusive, shared or even no competence. This shall be explored further below. What is more, once a policy matter transcends the EU border, it becomes internationalized. Here, too, the question in relation to the EU's international activity—inextricable from that of its competences—comes sharply into focus. Most energy-related policy matters have become internationalized in the post-WWII era increasingly globalized world economy. In that respect, one could sensibly segregate aspects of EU energy-related policy matters into internal and external. This too shall be explored at greater length below.

In terms of the concept of *energy security*, the literature is diverse. Some regard this as an economic and even a security matter. From the EU perspective, unsurprising given the EU's energy-dependency, energy security is perceived from a *supply* security point of view. This is the notion we have espoused for the purposes of this paper.⁹ In relation to EU *energy security*, this seems to engender all that could make EU energy policy complex given that energy security is a matter that relies on several factors for it to be achieved.¹⁰ Firstly, however, we must be clear on what we mean by *energy security*. To answer this, we need to understand to whom the benefits of energy security accrue. For instance, if we were to answer this in connection to the EU, we would claim that energy security means the steady and secure access to energy supplies to meet the energy needs of all 28 EU member states.¹¹ It is also worth noting early on that

9. See DICLE KORKMAZ, INTERNAL AND EXTERNAL DYNAMICS OF EUROPEAN ENERGY SECURITY 5–6 (2010), available at <http://www.jhubc.it/ecpr-porto/virtualpaperroom/034.pdf> (discussing relevant theories and literature on European energy security).

10. See Florian Baumann, *Europe's Way to Energy Security: The Outer Dimensions of Energy Security: From Power Politics to Energy Governance*, 15 EUR. FOREIGN AFF. REV. 77, 87 (2010). Baumann states that: "The truth is that energy security includes multiple concerns, including economics, politics, geopolitics, and diplomacy. Trading resources, building pipelines, and investing in plants and infrastructures are absolutely economic ventures but only as long as business can function without political interference. When the means of producing energy are subordinated to economic and ecological targets or the access to energy is misused by international power politics, business alone will not solve the problem." *Id.*

11. In fact this is what the initial set of ministers from six European states (namely, the Federal Republic of Germany, Belgium, France, Italy, Luxembourg and the Netherlands) had in mind when they promulgated the Messina Declaration in 1955 in which they stated that: "*Putting more abundant energy at a cheaper price at the disposal of the*

the EU's origins partly lie in matters connected to energy security.¹² If we were then to supplement the question of what energy security is within the EU context by asking who might be a responsible or influential agent in fulfilling the objective of EU energy security, we enter the complexity of energy within the EU context. This is because to ask who is responsible engages the question of competences (e.g., who does what and to what extent), and to ask who is influential engages the question of competences *plus* who possesses the diplomatic clout. The latter becomes even more pronounced when we take into consideration the disparate levels of influence between EU member states. Again, these are issues we explore in the present paper. Furthermore, within the EU context, energy security has come to be heavily conditioned by environmental objectives with the addition of 'sustainable' to the notion of EU energy security.¹³

As stated above, energy security relies on a variety of factors—including efficient infrastructure and consumption, and diversity of primary energy mix and supply—that, again,

European economies constitutes a fundamental element of economic progress. That is why all arrangements should be made to develop sufficient exchanges of gas and electric power capable of increasing the profitability of investments and reducing the supply costs. Studies will be undertaken of methods to co-ordinate development prospects for the production and consumption of energy, and to draw up general guidelines for an overall policy" The 1955 Messina Declaration para. 5, June 3, 1955 (emphasis added), *available at* <http://www.eurotreaties.com/messina.pdf>. Clearly the initial set of European governments was well attuned to the importance of energy security to the economic reconstruction of European economies in the postwar period.

12. Let us be reminded that the initial instances of European inter-state cooperation which eventually resulted in the remarkable international entity that is the EU revolved around locking together French and German coal and steel resources. *See e.g.*, Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140; *see also* Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167. In 2007, the Commission reminded members and EU institutions to be faithful to the EU's roots: "Europe needs to act now, together, to deliver sustainable, secure and competitive energy. In doing so the EU would return to its roots...the founding Member States saw the need for a common approach to energy." Communication from the Commission to the European Council and the European Parliament: An Energy Policy for Europe, at 3, COM(2007) 1 final (Jan. 10, 2007) [hereinafter *An Energy Policy for Europe*].

13. This is a relatively novel development. *See* Communication from the Commission: Europe 2020—A European Strategy for Smart, Sustainable and Inclusive Growth, at 22-34, COM (2010) 2020 final (Mar. 3, 2010) [hereinafter *Europe 2020*] (presenting economic growth, climate change, and energy objectives as interlinked and mutually-conditional).

illustrate how EU energy security may rely on action across the EU policy spectrum and that engages the internal-external cleavage. As we shall explore below, much *has been done* at the intra-EU level to rationalize the energy market to the extent that the Internal Energy Market (IEM) is heading towards coherence.¹⁴ As we shall also explore below, much *has been said* to make possible more cohesive external energy action. We conclude however that so long as the constitutive treaties that spell out EU competence upon which the EU lies are not substantively amended, the furthest the EU could go in relation to EU energy security is to act to the extent that the treaties make possible—that is to say, to the extent that the EU has powers to address some, albeit not all, key factors upon which energy security relies. That said, it is our view that EU institutions appear to be making full and very competent use of the means at their disposal. For instance, the EU Commission makes good use of its capacity to make recommendations to the Council and the Parliament, and to also propose legislation focused on enhancing EU energy relations and ultimately energy security.

In sum, therefore, it is useful to conceptualize EU energy security primarily in relation to the structural challenges—namely, the question of *vires*—that the EU faces when compared to other prominent players on the international plane, e.g., sovereign actors such as China and the US. The energy markets of the 28 EU member states vary widely in terms of, amongst other things, infrastructure, investment, and pricing. The IEM is not fully integrated; however, it is not far from achieving this in relation to electricity and gas. What is more, the EU has

14. The EU is committed to fully integrating the electricity and gas markets of the 28 member states by 2014 into the Internal Energy Market (IEM). See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Energy Roadmap 2050*, at 19, COM(2011) 885 final (Dec. 15 2011) [hereinafter *Energy Roadmap 2050*]. For a useful historical analysis of the IEM and the integration of the US markets and an examination of the regulatory regimes in the EU and the US, see Giuseppe Bellantuono, *Contract Law, Regulation and Competition in Energy Markets*, 10 *COMPETITION & REGULATION IN NETWORK INDUS.* 159 (2009). According to Bellantuono, EU and US energy markets have shifted from monopolistic towards competitive. The EU energy markets started shifting towards integration in earnest from around the beginning of the 2000s whilst this happened around the 1980s in the United States.

strategically promoted the integration of energy markets and regulatory convergence with bordering third party states, through the medium of rational markets, to the end of its own energy security. This is also explored below. In that respect, perhaps what has so far been achieved in terms of the promotion of EU energy security is optimal, given the circumstances.

The paper is divided into six sections. After the introduction, Section II provides facts and figures to put EU energy consumption and production into context. Section III analyzes the legal aspects of EU energy policy, focusing on the changes brought by the Treaty of Lisbon and the challenges the EU faces when aiming for a common energy security policy, while Section IV provides an analysis of the Internal Energy Market and the Energy Community. Section V analyzes the nexus between EU energy policy and foreign policy. It explains the effects of shale gas extraction on EU energy security. It also explains EU external energy relations at large. Section VI concludes the paper.

II. ENERGY AND THE EU: FACTS AND FIGURES PUT INTO CONTEXT

A. Energy Consumption in the EU

In 2009, EU consumption stood at 1,703 Mtoe, 37% of which was produced from oil, 24% from gas, 16% from coal, 14% from nuclear energy and only 9% (almost a tenth) from renewable energy sources¹⁵. These figures indicate that 77% of EU energy consumption derives from traditional energy sources—namely, hydrocarbons/fossil fuels—that are highly polluting. This is a reality with significant implications as it poses dilemmas for the EU in terms of balancing its energy security objectives against its aspirations to robustly protect the environment.¹⁶ Although this figure (namely, 77%) is marginally

15. EUROPEAN COMM'N, *Key Figures*, Market Observatory for Energy, Directorate-General for Energy, at 11, (June 2011) [hereinafter *Key Figures*].

16. For an earlier study on the broader link between energy and the environment, see Lakshman Guruswamy, *Energy and Environment Security: The Need for Action*, 3 J ENV'TL L 209 (1991).

lower than the global figure¹⁷, it remains problematic given the urgency with which the degradation of the ecosystem ought to be handled by the international community including the EU. Currently, just 9% of EU energy consumption derives from renewable energy sources¹⁸. The EU has committed to increasing the share of renewables in the EU's final energy consumption to 20% by 2020¹⁹, and it is not clear whether it would be able to meet this goal within the timeframe. Given the pressing realities of climate change, and their implications for human populations²⁰ and the ecosystem at large, it would be most unfortunate for the EU to miss this target.²¹ Incidentally, in 2009 EU investments in renewables dropped by 10% whilst they rose by 50% in China. Still, the EU remains the investor *par excellence* in renewables given that during 2009 there were EU investments around USD 43 billion in renewables, whilst investments in China stood at around USD 24 billion.²² Currently, the EU renewable energy industry has a €20 billion

17. During 2011, c. 81% of global energy consumption came from hydrocarbons/fossil fuels. This figure represents 10,689 Mtoe out of a total 12,274 Mtoe. The actual breakdown is 4,059 Mtoe/c.33% from oil, 2905.6 Mtoe/c.24% from gas, and 2,724.3 Mtoe/c.30% from coal. See *BP Statistical Review of World Energy*, at 40-41 (June 2012) available at www.bp.com/statisticalreview.

18. *Key Figures*, *supra* note 15 at 11.

19. *Communication from the Commission: Europe 2020—A European Strategy for Smart, Sustainable and Inclusive Growth*, *supra* note 13 at 32; see also Council Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, 2009 O.J. (L 140), 16 (EC) [hereinafter *Energy from Renewable Sources Directive*] (repealing Directive 2001/77/EC) article 3 of which mandates minimum national targets that ought to be met in order for the EU to achieve its target; namely, to derive 20% of its final energy consumption from renewable energy sources (RES) by 2020. Annex I of Directive 2009/28/EC expressly states the national targets with regard to the energy realities that each member state faces. E.g., Belgium is bound to increase its RES from 2.2% in 2005 to 13% by 2020 whilst Sweden is bound to increase this from 39.8% to 49%.

20. See e.g., Rafael Leal-Arcas, *On Climate Migration and International Trade* 6 *Vienna Journal of International Constitutional Law* 410, issues 3-4, (2012).

21. On the role of the EU in climate change negotiations, see Rafael Leal-Arcas, *The Role of the EU, the US, and China in Addressing Climate Change*, in *THE EU AND THE POLITICAL ECONOMY OF TRANSATLANTIC RELATIONS* 221 (Finn Laursen ed., 2012); Rafael Leal-Arcas, *The Role of the European Union and China in Global Climate Change Negotiations: A Critical Analysis*, 18 *J. EUR. INTEGRATION HIST.* 67 (2012).

22. *Key Figures*, *supra* note 15, at 30.

turnover and employs about 300,000 people amounting to roughly 60% of the global market share.²³

Whilst the EU consumes about 1,703 Mtoe of energy, during 2009 only 48% (818 Mtoe) of its total energy needs was produced within the EU. Consequently, it relies on energy imports to meet 52% of its energy needs—in that respect it is *energy dependent* by 52%.²⁴ The specific realities of each member state's energy dependency are hugely disparate as we see below. What is more, EU energy dependency varies depending on the energy resource in question. For example the EU imports 83.5% of its oil, 64% of its gas, and circa 38% of its coal.²⁵ Furthermore, about 50% and 80% of EU oil and gas imports, respectively, come from only four countries: namely, Algeria, Libya, Norway and Russia.²⁶ One third of those gas imports—34%—comes from Russia.²⁷

Table 1. Origin of EU Oil and Gas Imports During 2009	
Oil	Gas
35% OPEC	34% Russia
33% Russia	31% Norway
15% Norway	14% Algeria
17% others (including Kazakhstan 5%, Azerbaijan 4%)	21% others (including Qatar 5%, Libya 3%)

Source: EUROPEAN COMMISSION, *Key Figures Market Observatory for Energy 7* (2014).

Also, it is helpful to understand EU energy consumption against the backdrop of global consumption figures. The EU has steadily consumed roughly circa 1,700 Mtoe of energy since 1990, and projections suggest that its annual consumption is likely to stay at that level over the next two decades.²⁸ EU energy

23. See *An Energy Policy for Europe*, *supra* note 12, at 4. For further details on funding renewable energy in the Euro-Mediterranean region, see generally SIMONE TAGLIAPIETRA, *THE GEOECONOMICS OF SOVEREIGN WEALTH FUNDS AND RENEWABLE ENERGY: TOWARDS A NEW ENERGY PARADIGM IN THE EURO-MEDITERRANEAN REGION* (2012).

24. *Key Figures*, *supra* note 15 at 5.

25. *Id.* at 6.

26. *Id.* at 7.

27. *See id.*

28. *See id.* at 3.

consumption composes about 14% of global consumption,²⁹ however, given that its rate of consumption is held to remain static over the next two decades whilst global demand is set to rise significantly, the share of EU consumption in relation to global energy consumption is set to drop to circa 10% by 2035.³⁰ The rest of the Organization for Economic Cooperation and Development (OECD)—that is to say, the other states in the OECD that are not EU members—is also set to consume at the same rate it has done historically, whilst the greatest increase in global energy demand between now and 2035 (namely, from circa 12,000 Mtoe to 18,000 Mtoe) will happen due to the increasing energy needs of China, India, and the rest of the world consequent to their further industrialization.³¹ Based on these figures, by 2035, the EU and the rest of its OECD peers are likely to collectively account for about 30% of global energy demand, whilst China and the rest of the world for about 70%.³² What these dwindling figures might also reflect is the waning influence of the EU over the coming decades in relation to its environmental agenda. To say the least, this would be unfortunate, given the EU's more robust approach to environmental protection.³³ If the EU's voice in the global arena

29. See *BP Statistical Review of World Energy June 2012*, BP, http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2012.pdf (last visited May 28, 2013) (calculating 12,274 Mtoe global total energy consumption, and 1690.7 Mtoe EU total energy consumption).

30. This is based on the assumption that global energy demand is set to rise to circa 18,000 Mtoe by 2035, by which time EU energy demand is likely to remain static to around the 1,700 Mtoe mark. See *Key Figures*, *supra* note 15 at 3.

31. *Id.* Further, in relation to China and India, the International Energy Agency (IEA) projects that India and China would account for roughly 45% of the anticipated increase in global energy consumption between 2005 and 2035. See INT'L ENERGY AGENCY, *WORLD ENERGY OUTLOOK 2007: EXECUTIVE SUMMARY: CHINA AND INDIA INSIGHTS 3* (2007), available at <http://www.ica.org/Textbase/npsum/WEO2007SUM.pdf>.

32. EU and rest of the OECD are likely to account for just under 6,000 Mtoe out of the global energy demand figure of 18,000 Mtoe by 2035. See *Key Figures*, *supra* note 15 at 3.

33. This shall be explored in a separate part of this paper; however, it is worth briefly mentioning the EU's Emissions Trading System and its expanding application over all major polluting industries within EU territory. Also, it is worth mentioning that the EU appears to constrain its pursuit of energy security by environmental objectives, which, when compared to other players internationally—namely, China, India, Japan, and the US—might in the long-run place the EU in an economically disadvantaged

were to be further weakened, it seems unlikely that any other state, or bloc of states,³⁴ would take on the responsibility in earnest to call for more robust action to protect the ecosystem.

As briefly mentioned above, whilst overall EU energy dependency across its primary energy mix stands at around 52%, the situation varies widely in relation to each EU member state. For instance, Denmark is entirely energy import independent whilst Malta is entirely energy import dependent.³⁵ In terms of oil, Denmark is entirely oil independent, given that it is the only EU member state that is a net oil exporter. The next comparatively better off EU member is the United Kingdom (UK) as it is 9% oil dependent, followed by a very distant third, Romania, which is circa 50% oil dependent. All other EU members' oil dependency ranges from circa 63% to 100%.³⁶ Predictably, such acute disparities, along with other differences between EU member states, have implications for cohesive EU action. This shall be explored more fully in Section V, where we explore the various attitudes of EU member states towards energy cooperation with partners such as Russia, and how differences affect chances for cohesive EU action regarding energy.³⁷

In terms of how total EU energy consumption is broken down, roughly, 33% goes on transport, 27% on households, 24% on industry, 12% on services, and 2% on agriculture.³⁸ From this

position. These concerns were echoed by Saryusz-Wolski, the European Parliament's Committee for Foreign Affairs (AFET) Rapporteur, in his concluding address during a November 2012 workshop on the EU's '2050 Energy Roadmap' organized by the European Parliament's Directorate-General for External Policies, in which he also stated that: "*Energy policy should be viewed as a policy on its own, and not as a by-product of climate policy.*" DIRECTORATE-GENERAL FOR EXTERNAL POLICIES, POL. DEP'T, *Energy Roadmap 2050: EU External Policies for Future Energy Security*, Workshop, at 15, EXPO/B/AFET/FWC/2009-01/Lot1/42 [hereinafter *Energy Roadmap Workshop*].

34. With the exception of the Alliance of Small Island States (AOSIS) and those other states especially affected by further environmental degradation such as desertification and so on. However, such States fail to garner the level of influence that the EU currently has and that it is likely to have in the future despite its potentially waning influence.

35. *Key Figures*, *supra* note 15, at 8.

36. *Id.* at 9.

37. See generally Richard A. Leibert, *The War on Energy: Why the United States and the International Community need Cohesive Energy Infrastructure Security Policy*, 29 HOUS. J. INT'L L. 453 (2007).

38. *Key Figures*, *supra* note 15, at 14.

breakdown we can deduce that energy price volatility coupled with weather-induced increased energy consumption could have considerable implications for the economy and human welfare. For instance, higher energy prices add to industry costs that, in turn, may lead to EU-produced services and goods becoming less competitive in relation to like products produced in economies where energy costs are lower.³⁹ Furthermore, as households account for 27% of EU energy consumption, price increases would eat into household disposable income that, in turn, could, potentially depress consumption rates and thus affect the entire EU economy.⁴⁰ In that respect, setting aside the environmental imperatives, promoting a paradigm shift from hydrocarbons—on which the EU is hugely externally dependent—to renewables could potentially immunize the EU considerably from such shocks.

It is interesting to read the above breakdown of EU energy consumption against the backdrop of overall EU CO₂ emissions. The energy industries produce 35% of EU CO₂ emissions, closely followed by transport at 30%, industry and construction at 18%, and residential use at 11% of EU CO₂ emissions.⁴¹ In that respect, one could argue that action be largely targeted at the most polluting sectors. However, as we shall see below, given that the situation is disparate between EU member states, a more variegated approach would be necessary when, for instance, we look at the energy industries across the EU. Electricity is produced in a more environmentally damaging way in Malta, Cyprus, Estonia, and Poland than it is, say, in Sweden and the Netherlands.

39. See, e.g., Vitaliy Pogorctskyy & Daniel Behn, *The Tension between Trade Liberalization and Resource Sovereignty: Russia—EU Energy Relations and the Problem of Natural Gas Dual Pricing*, 9 OIL, GAS & ENERGY L., no. 6 (2011) (analyzing Russia's dual pricing practice of gas against the strictures of the WTO and in relation to the tension between sovereignty prerogatives and trade liberalization objectives). In the article, the authors refer to EU commission countervailing action in response to what it considers to be energy subsidies on the part of the Russian state to its domestic industries.

40. Energy costs are likely to increase so that households end up spending up to 16% of income on energy—including transport related energy—by 2030. This figure is likely to drop to 15% by 2050. See Energy Roadmap 2050, *supra* note 14, at 7.

41. *Key Figures*, *supra* note 15, at 25.

B. Energy Production in the EU

As briefly mentioned above, during 2009 the EU met 48% of its energy needs from its own energy production. That is 818 Mtoe out of the 1,703 consumed that year. Sixty-six percent of EU energy production comes from just five EU members states: namely the UK, France, Germany, Poland, and the Netherlands.⁴² The breakdown in relation to the 818 Mtoe figure, which represents the amount of EU produced energy during 2009, is the following: 28% from nuclear power, 19% from gas, 13% from oil, 20% from coal, and 18% from renewables. When comparing these figures to those of 1990, we witness that the share of coal in EU energy production dropped from 39% to 20%, the share of nuclear power increased from 22% to 28%, and reliance on renewables also increased from 7% to 18%.⁴³ However, this should be understood against the fact that EU energy production in 1990 was higher—namely, 943 Mtoe—largely due to greater use of coal back then.⁴⁴ This illustrates the current trade-off between, on the one hand, environmental protection objectives and, on the other, the pursuit of energy security that, for the most part, relies on hydrocarbons.

As we have stated, the situation between EU members is disparate not least in relation to their reliance on renewable energy. For instance, the most exemplary are Austria, Latvia, and Sweden in that 68%, 65% and 58% of their respective electricity needs in 2009 came from renewables at a time that the EU average was circa 18%.⁴⁵

When it comes to nuclear power—which, whilst less polluting than hydrocarbons in terms of CO₂ and other greenhouse gas (GHG) emissions, is also harmful to the ecosystem—the situation is also disparate between EU members. France leads with 76% of its electricity derived from nuclear power, followed by Lithuania and Slovakia at 70% and 55% respectively, whilst the Netherlands derives less than 4% of its electricity from nuclear power.⁴⁶

42. *Id.* at 18.

43. *Id.* at 16.

44. *Id.*

45. *Id.* at 20.

46. *Id.* at 21.

Several EU states derive more than 50% of their electricity production from gas. For instance, Luxembourg produces 74% of its electricity from gas, the Netherlands about 63%, Ireland about 57%, and Italy about 53%, whilst Sweden, Slovenia, and Poland produce about 2%, 3%, and 4%, respectively.⁴⁷

At the most polluting end of the spectrum is electricity generated by coal and oil. Poland and Estonia derive about 87% and 86%, respectively, of their electricity from coal. The Czech Republic, Greece, Bulgaria, and Denmark derive approximately 57%, 56%, 48%, and 47%, of their respective electricity production from coal.⁴⁸ In terms of electricity produced by oil, Malta and Cyprus derive almost 100% of their electricity from oil, whilst the rest of the EU members deriving between circa 17% and 1% of their electricity needs from this energy source.⁴⁹

C. *Energy Pricing in the EU*

In terms of energy prices and taxation, again, the situation is quite uneven.⁵⁰ For instance, pricing and taxation may vary along several cleavages—e.g., according to energy source and from sector to sector within a national economy, and across the EU membership. For example, during the second semester of 2010 the highest electricity prices for households were in Austria, Belgium, Cyprus, the Czech Republic, Denmark, Germany, Italy, Luxembourg, the Netherlands, Spain, and Sweden, whilst the highest electricity prices for industry were in Denmark, Germany, Ireland, Italy, Spain, and Sweden.⁵¹ In terms of taxation for household-destined electricity, it is around the 15% mark in Ireland, Malta, and the UK, whilst it is around the 35% mark in Denmark, Germany, and Portugal. Taxation for industry-destined electricity is around the 15% mark in Ireland, Luxembourg, Malta, and Portugal, whilst it is around the 35% mark in Denmark and Germany.⁵²

47. *Id.* at 22.

48. *Id.* at 23.

49. *Id.* at 24.

50. See, e.g., EUROPE'S ENERGY PORTAL, <http://www.energy.eu> (last visited May 28, 2013) (providing energy facts and prices across the EU).

51. *Key Figures*, *supra* note 15, at 34–35.

52. *Id.* at 38.

D. Overall Energy Challenges in the EU

The purpose of this section has been to provide insights into how disparate energy realities are across the bloc of 28 states. These realities are important given that considerations specific to a particular EU member might be the driving factors behind the policies that member would want to promote at the EU level. It might be more difficult to persuade EU member states that heavily rely on energy sources other than gas and oil to support a common EU position aimed at more institutionalized relations with gas and oil behemoths such as Russia, other members of the Commonwealth of Independent States (CIS),⁵³ and of states across the Middle East and North Africa (MENA) region. For instance, states that derive a large share of their electricity from coal might be indifferent, or in some cases, opposed to deeper EU-Russia economic integration. In the case of Poland and the Baltic states, for example, this could be compounded by historic animosity towards whom they regard to be the successor to Imperial Russia and the Soviet Union rather than to be the most important EU energy partner. On the other hand, it might be in the national interest of those highly reliant on gas imports for their electricity, e.g., Luxembourg and the Netherlands, to promote a more strategic approach.⁵⁴

All the above instances of divergence between EU member states present a situation that makes cohesive policymaking more difficult than it would be in a fully confederated system charged with the external relations of the whole (e.g., Germany, Switzerland, and the United States), not simply due to EU structural/*vires* issues but also due to the highly divergent

53. The CIS is a loose, quasi-economic association of independent States following the dissolution of the USSR. Its membership includes Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Uzbekistan, and Ukraine. International agreements have been signed within its auspices towards the progressive development of a free-trade area between parts of, or its entire, membership. See INTERSTATE STATISTICAL COMMITTEE OF THE COMMONWEALTH OF INDEPENDENT STATES, <http://www.cisstal.com/eng/cis.htm> (last visited May 28, 2013).

54. See BENELUX ECONOMIC UNION, ENERGY SECURITY & FOREIGN POLICY 2 (2006). The tripartite bloc of EU states urges the European Council to provide the steer for more cohesive EU common external relations that enhance the EU's energy security through a multiplicity of approaches, including encouraging Russia to ratify the Energy Charter Treaty.

infrastructural, economic, regulatory, and diplomatic climates that exist from EU member state to member state.

In this respect, it may be helpful to think of the EU to be:

– a fully federated entity *solely* in relation to policy areas in which it has exclusive competence;⁵⁵

– a loosely federated entity for shared competence policy fields in which the central authority (the EU institutions) must ensure that it develops policy to the extent acceptable to the constituent elements (the member states) of the federated entity (the EU);⁵⁶

– an association of states for policy areas that fall outside both exclusive and shared competence EU remits.⁵⁷

This shall also be explored in Section III concerned with the legal aspects of the EU and its energy policy capacity.

An EU member's position essentially seeks to capture the interplay of considerations at the national level that arise in relation to each EU member's economic, political, and historical tradition. An EU member's position, in turn, interplays with those of its peers before, if ever, an EU common position is finally adopted.⁵⁸ All this makes a cohesive EU energy security policy particularly sticky to achieve.

55. See TFEU, *supra* note 4, art. 3, 2010 O.J. C 83, at C83/51 (listing areas where the EU has exclusive competence).

56. *Id.* art. 4, at C 83/51.

57. See RAFAEL LEAL-ARCAS, *supra* note 2, at 86–89. (discussing the anatomical structure of the EU).

58. Such *modus operandi* reminds us of EU trade policy-making in the pre-Lisbon Treaty era. See *id.* chs. 3–6; Rafael Leal-Arcas, *The EU Decision-Making Process in EC Trade Policy: The Three Internal Tensions*, in A CONSTITUTION FOR EUROPE? GOVERNANCE AND POLICY-MAKING IN THE EUROPEAN UNION, Vol. II, 132 (Francesca Astengo & Nanette Neuwahl eds., 2004); Rafael Leal-Arcas, *The EU Constitutional Treaty and International Trade*, in THE RISE AND FALL OF THE EU'S CONSTITUTIONAL TREATY 25 (Finn Laursen, ed., 2008); Rafael Leal-Arcas, *Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice*, 30 LEGAL ISSUES OF ECON. INTEGRATION 3 (2003); Rafael Leal-Arcas, *The State Of Play of the EC's Common Commercial Policy: A Legal And Policy Analysis*, 11 TILBURG FOREIGN L. REV. 537 (2003); Rafael Leal-Arcas, *The EC in the WTO: The Three-Level Game of Decision-Making. What Multilateralism Can Learn from Regionalism*, 8 EUR. INTEGRATION ONLINE PAPERS No. 14 (Sept. 2004), available at <http://eiop.or.at/ciop/texte/2004-014.htm>; Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 COLUM. J. EUR. L. 125 (2006); Rafael Leal-Arcas, *Is EC Trade Policy Up to Par?: A Legal Analysis Over Time—Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty*, 13 COLUM. J. EUR. L. 305 (2007); Rafael Leal-Arcas, *Will EU Member States Play Any Role at the WTO after the EU Reform Treaty*, 1 VIENNA J. INT'L CONST. L., 75 (2007); Rafael Leal-Arcas, *50 Years of Trade Policy: Good Enough or as*

In sum, the EU faces structural limitations in *sui juris* promulgating a comprehensive energy strategy, quite unlike how a sovereign actor would. This is due to the multifaceted nature of energy that leads to certain aspects of energy falling within the exclusive or shared competence remit of the EU whilst other aspects of energy sit squarely with member states. Even where matters sit with the EU, there are other issues—e.g., how a decision might be adopted—that are capable of complicating or even stalling the adoption of a common position.

III. LEGAL ASPECTS OF EU ENERGY POLICY

We have briefly referred to the *sui generis* character of the EU. Although apt historical precedents do not seem to exist,⁵⁹ some parallels have been drawn to Germany, Italy, and the US during, in the case of the first two, their unificatory/nationalist geneses, and in the case of the latter, its secessionist genesis.⁶⁰ Also, parallels have been drawn to the Canadian model in terms of how EU member states seem to interact with the overarching EU order.⁶¹ What the EU has achieved is to create a core of

Good as it Gets?, 15 IRISH J. EUR. L. 157(2008); Rafael Leal-Arcas, *Reflections on EU International Trade Law: An Introspective View*, 7 FRONTIERS L. CHINA 1 (2012).

59. The EU is quite unlike any other structure that historically has ever existed. See PHILIPPE SANDS, LAWLESS WORLD: THE WHISTLE BLOWING ACCOUNT OF HOW BUSH AND BLAIR ARE TAKING THE LAW INTO THEIR OWN HANDS 101 (2006). Philippe Sands informs us that: “The most highly integrated regional system is that between the EU’s twenty-five [at that time] members. [The EU] . . . originally intended to remove barriers to trade, it soon became clear that creating a common market necessarily meant addressing other standards which would affect flows of goods and services and the free movement of people. Gradually standards were developed on everything from labour to the environment, from agriculture to competition rules. The original six became the nine . . . the nine became ten and then twelve, and then fifteen [and so on].” *Id.*

60. See JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 5 (2005) (“Many scholars view European Union integration as a possible model for a more ambitious public international law. Although the EU project is in some respects constituted by international law, we think it is more usefully viewed as an example of multi-state unification akin to pre-twentieth century unification efforts in the United States (which, during its Articles of Confederation period, was viewed by some as a federation governed by international law), Germany, and Italy.”).

61. Within the EU context, states have been likened to Canadian Provinces vis-à-vis their relationship with the federal order. See e.g., SANDS, *supra* note 59, at 102 (deducing this view from the pleadings of the UK government in the 2003 Permanent Court of Arbitration ‘MOX PLANT’ case between Ireland and the UK).

states that had historically—in their previous configurations—been belligerent towards each other. This core, in turn, attracted the polities of smaller states at the periphery into an economic order within which it is unimaginable for armed conflict to break out. In that respect, this order of sovereign equals—deeply tied together economically through buy-in rather than military force—has been quite unlike any other historical precedents of empire, and comes the closest to the Kantian ideal of a peaceful universalism.⁶²

What ought to surely set the EU apart from all confederated examples is its limited capacity to represent—through its institutions—its member states across the entire policy spectrum. In other words, its limited *vires*—as opposed to institutional—capacity to handle the foreign relations of EU members to their exclusion. That said, the EU is endowed with powers to act in its own right and to the exclusion of EU members—including to contract with third party states and other international organizations⁶³—in matters that fall squarely within its exclusive, yet limited, competence remit.⁶⁴ However, it should be borne in mind that these powers derive from treaties contracted by sovereign actors who, at any time, may potentially withdraw in accordance with international law, and, consequently, re-assume full sovereign control over such aspects of policy that are currently within the EU's exclusive competence remit.

A. Debate on Competences in Energy Policy

Returning to the question of EU powers to handle external energy relations, it may be helpful to approach this through a series of assessments: firstly, it would be necessary to assess whether an energy-related proposal in question falls within the

62. Immanuel Kant laid out the case for an international league of democracies governed by the rule of law in his essays. See IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* (2003); IMMANUEL KANT, *IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN PURPOSE* (1970).

63. See generally J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999) (providing a full exposition of the legal position in relation to the possibility of the concurrent international treaty-making capacities of two different agents such as a central authority—e.g., the EU—and its constituent parts—e.g., EU member states).

64. TFEU, *supra* note 4, art. 3, 2010 O.J. C 83, at C83/51.

exclusive or the shared competence remit of the EU. Should it unequivocally fall within the former category, the EU would enjoy unbridled powers to pursue the external aspects of the energy-related policy proposal in question. Should the energy-related policy fall within the latter category, it would then be necessary to then assess how the proposal ought to be decided at the EU level—that is to say, whether it engages such matters that the Council of the European Union⁶⁵ may have to decide unanimously or by majority in order for an EU policy to be adopted.

Article 192§2(c) of the Treaty on the Functioning of the European Union (TFEU) refers to the *vires* of the Council to seek to legislate or take measures that *significantly affect* a member state's choice between different energy sources and the general structure of its energy supply. We witness a high degree of incursion by the supranational into the national sphere. However, Article 192§2 introduces safeguards by making clear that decision-making by the Council under Article 192§2(c) must be reached in the Council on the basis of unanimity and not by qualified majority.⁶⁶

What this might indicate is that, in the final analysis, crucial energy security related measures with strong diplomatic overtones such as measures that, if taken, affect rather significantly a member state's choice between what energy sources it may use, or how the general structure of its energy supply ought to be—remain firmly with member states given the

65. This is a key institution of the EU composed of 28 ministers whose composition alters according to the policy matter at hand. E.g., Ministers with responsibility for agriculture meet within the EU context to decide a particular EU-wide agricultural policy. This is an important institution in that, alongside the EU Parliament through a co-decision process, may adopt legislation. Hereinafter we shall refer to it as the 'Council'. It should not be confused with the European Council (i.e., the configuration of the 28 heads of State/government), which is the supreme political body within the EU. The European Council—technically, in its *alter ego*, namely, the *ad hoc* summit gathering of heads of state/government—is the body that contracts the treaties upon which the EU rests.

66. Council decision-making based on the qualified majority voting procedure is the norm, unless stated to the contrary, under Article 238 of the TFEU. See TFEU, *supra* note 4, art. 238, 2010 O.J. C 83, at C 83/153–54. See also TEU post-Lisbon, *supra* note 8, art. 16, 2010 O.J. C 83/13, at 24. From November 2014, qualified majority shall mean at least 55% of Council members representing at least 65% of the EU population or 72% of Council members representing at least 65% depending on circumstances. *Id.*

unanimity requirement in such cases. In effect, this preserves certain sovereign prerogatives of member states.

If we take as an example Directive 2009/28/EC,⁶⁷ we note in its preamble that this instrument was adopted in accordance with Articles 95, 175§1, and 251 of the Treaty Establishing the European Economic Community (EEC Treaty).⁶⁸ Having regard to Articles 175 § 1 and 251, which are cited in this Directive, decisions were adopted within the Council on the qualified majority decision-making procedure. This is interesting, given that Directive 2009/28/EC sets, amongst other things, mandatory national targets for the overall share of renewables in a member state's final consumption⁶⁹ which could be interpreted as *significantly affecting* a member state's choice of energy sources. However, it might have been the view of Council members that the interference was not so significant as to invoke the unanimity-based decision-making process.⁷⁰

As we shall see further down, EU energy policy is multifaceted. Its introspective aspects have been adopted to, amongst other things, integrate the IEM in terms of gas and electricity, and to promote energy efficiency and the use of renewables. There is sufficient legal basis within the treaties—namely, the TFEU—for the EU to take action, e.g., by promulgating policy, to handle aspects of the IEM. Conceivably, creating an effective IEM also rests on a degree of regulatory convergence across the EU. Under the TFEU,⁷¹ the EU may

67. Energy from Renewable Sources Directive, *supra* note 19.

68. The Treaty Establishing the European Economic Community ("EEC Treaty") was amended by the Treaty of Lisbon, which was signed on December 13, 2007, in Lisbon and which entered into force on December 1, 2009, embracing a revised Treaty on European Union (TEU) and a revised Treaty Establishing the European Economic Community, which would be called a Treaty on the Functioning of the European Union (TFEU). Consequently, Articles 95, 175, and 251 of the EEC Treaty became Articles 114, 192, and 294 TFEU. Do note, however, that when Directive 2009/28/EC was concluded (April 2009), it was done on the basis of the EEC Treaty, which was applicable at the time. Furthermore, this Directive also cites the Kyoto Protocol to the UNFCCC in relation to the EU's international obligations, and those of its member states, under that instrument.

69. Energy from Renewable Sources Directive, *supra* note 19 art. 1.

70. This seems to be the case when one notices that the national targets are calculated on factors that take into account national figures around energy consumption thus applying a variegated regime rather than seeking to enforce a uniform target on all members alike. *See id.* art. 5.

71. *See* TFEU, *supra* note 4, art. 114, 2010 O.J. C 83, at C 83/51.

legislate to such an end. However, whether either the qualified majority vote or the unanimity-based Council decision-making process applies depends on which matters are being considered for convergence. The language of the relevant provisions do not make it an easy task to ascertain which decision-making process applies, given how nuanced it appears to be. To make this clear, let us look at Articles 114 and 115 TFEU. Article 115 states that the Council in unanimity may adopt such measures for the approximation of laws across the EU in relation to matters that *directly affect* the establishment or functioning of the internal market, whilst, under Article 114, the Council may decide on the qualified-majority basis for measures for the approximation of laws that *have as their object* the establishment or functioning of the internal market. Here we witness the cleavage in EU law and policy making in relation to Council decision-making procedures. Furthermore, the TFEU contains the legal basis for the integration of energy infrastructure and the development of EU-wide energy infrastructure.⁷²

The evolution of the EU involves two directions: the widening (enlargement) and the deepening (greater integration) of the Union. The institutional challenges that this phenomenon engenders have eventually pushed EU member states to seriously consider ways of consolidating and rationalizing the EU processes. To that end, the Treaty Establishing a Constitution for Europe⁷³ was proposed but eventually defeated in France and the Netherlands by popular *referenda* in 2005, despite having been ratified by more than 15 EU member states.

The Treaty of Lisbon (ToL)⁷⁴ is a replacement for the EU Constitutional Treaty,⁷⁵ since the latter failed ratification.

72. See TFEU, *supra* note 4 art. 170, 2010 O.J. C 83, at C 83/124–25 (dealing with the trans-European networks (TEN), including for energy (TEN-E)).

73. This proposed Treaty, commonly referred to as European Constitution, is an unimplemented Treaty which was signed in Rome in 2004 by the representatives of the 25 (at the time) EU Member States, but failed to be unanimously ratified as the populations of France and the Netherlands rejected the Treaty in *referenda*. Following a period of reflection given this initial defeat, the European Council met again in June 2007 and initiated negotiations on a draft to replace the failed form of the Constitutional Treaty. A revised and substantially reduced version of that Treaty (from then on referred to as the Reform Treaty or Lisbon Treaty) was signed in Lisbon in December 2007 and entered into force on 1 December 2009.

74. The Treaty of Lisbon, 2007 O.J. C 306 [hereinafter Lisbon Treaty].

Because the EU Constitutional Treaty did not enter into force,⁷⁶ and after a political agreement was reached at the European Council meeting of June 2007, the Portuguese Presidency of the EU launched an intergovernmental conference for the negotiation of a fall-back revision treaty, i.e., the Treaty of Lisbon, on 23 July 2007, embracing a revised Treaty on European Union (TEU) and a revised European Community Treaty, which would be called a Treaty on the Functioning of the European Union (TFEU).⁷⁷ Much if not all of the content of the new Treaties was agreed at the European Council meeting in Brussels in June 2007. In theory therefore, this intergovernmental conference was meant to be less controversial than its predecessors, which led to the Single European Act and the Maastricht, Amsterdam, and Nice Treaties,⁷⁸ as well as the

75. Draft Treaty Establishing a Constitution for Europe, 2004 O.J. C 310/1 (never ratified) [hereinafter Draft Constitutional Treaty].

76. Before the European Council of June 2007, the idea was that when the EU Constitutional Treaty would enter into force, the EC Treaty, the EU Treaty, as well as acts and Treaties which have supplemented or amended them, would have been repealed, as laid down in the general and final provisions in Part IV of the EU Constitutional Treaty. The EU Constitutional Treaty was supposed to enter into force after ratification by all EU Member States. It was also provided for that the Union would succeed to all the rights and obligations, whether internal or resulting from international agreements, which arose before the entry into force of the EU Constitutional Treaty. The case law of the European Court of Justice (ECJ) would have been maintained as a source of Union law interpretation. *See id.*, art I-6, at 12 (stating that the Constitution and law adopted by the Union's institutions in exercising competences conferred on it would have had primacy over the law of the Member States).

77. The intergovernmental conference (IGC) mandate also provided in its paragraph 22 that "a Protocol annexed to the Reform Treaty will amend the existing Protocols, as agreed in the 2004 IGC" (including the deletion of 10 of them). *See* Brussels European Council, Presidency Conclusions, Concl. 2, 11177/1/07 Rev. 1, Annex I, para. 22 (June 21–22, 2007).

78. At present, the EU is founded on big and complex treaties that lay down the rules by which it has to operate. EU leaders intended to replace the EU's basic treaties with a single, shorter, simpler document spelling out the EU's purposes and aims and stating clearly who does what. This document (technically known as the Constitutional Treaty) would have been rather similar to the constitution of a country—even though the EU is not, and does not aim to be, a single country. The text of the EU Constitution was agreed in June 2004 and signed by all the Member State governments in October 2004 in Rome. It was due to come into force in 2006, but it failed to be ratified by all the national parliaments and, in some countries, be approved by referendum. Vernon Bogdanor, however, argues that it would make more sense to have a Europe-wide referendum with a double and qualified majority of Member States and population required in order to ratify any proposed Treaty amendment.

abandoned EU Constitutional Treaty. The European Council decided that the intergovernmental conference would conclude before the end of 2007, so that the ToL could be ratified by all 28 EU member states before the European Parliament elections in June 2009, which did not happen.

Unlike the abandoned EU Constitutional Treaty—which would have replaced all previous Treaties with a single text—the Treaty of Lisbon adds to but does not replace or consolidate the TEU and EC Treaty, including the Acts of Accession. This means that there is now another layer of Treaty law with the ToL. On the positive side however, the ToL is a substantive legal document, introducing significant legal, procedural, and institutional changes. It draws heavily on the EU Constitutional Treaty, confirms much of the substance of the EU Constitutional Treaty, and includes, *inter alia*, provisions relating to the EU's capacity to formulate a common foreign policy and to enjoy a single legal personality⁷⁹ for it to conclude international agreements and to join international organizations. It is somewhat paradoxical that, in the period since the collapse of the Berlin Wall, at precisely the time in which there were few credible alternatives to liberal democracy, there have been growing doubts about the capacity of the structures and institutions of liberal democracy to respond to contemporary problems.⁸⁰

The advent of the Lisbon Treaty did not affect EU competences in any *substantive* way. In relation to the EU's external relations, including those linked to its external energy policy, the impact of the Lisbon Treaty has been to streamline and rationalize existing processes and competences that are linked to the various EU institutional actors.⁸¹ Most ostensibly,

79. See TEU post-Lisbon, *supra* note 8, art. 47, 2010 O.J. C 83/13, at 41. See also Rafael Leal-Arcas, *EU Legal Personality in Foreign Policy?*, 24 B. U. INT'L L.J. 165 (2006).

80. Finn Laursen, *The Post-Nice Agenda: Towards a New 'Constitutional' Treaty?*, in THE TREATY OF NICE: ACTOR PREFERENCES, BARGAINING AND INSTITUTIONAL CHOICE 543 (Finn Laursen, ed., 2006).

81. In some cases, the Lisbon Treaty has enhanced the role of existing office holders—e.g., of what had previously been the High Representative of the Common Foreign and Security Policy (now the High Representative for Foreign Affairs and Security Policy)—to be involved in more EU processes with the aim of promoting cohesion across the EU external policy spectrum. This office has not been granted competences to take decisions on behalf of the 28 member states. Rather, its competences focus on executing EU decisions and representing EU common positions

the Lisbon Treaty streamlines processes related to the EU's common foreign and security policy.⁸² It has amended the role of the High Representative of the EU of the Common Foreign and Security Policy to now become the High Representative of the EU for Foreign Affairs and Security Policy⁸³ (High Representative). The High Representative is supported in their work by the EU's External Action Service.

How decisions at the EU level might be taken on the basis of the TEU has remained unaffected by the Lisbon Treaty. Article 16§3 TEU stipulates that the Council may adopt measures on the basis of the qualified majority decision-making procedure. However, as is the case with Article 192§2(c) TFEU,⁸⁴ this is without prejudice to specific provisions in EU treaties, which stipulate that Council decisions be based on the unanimity decision-making procedure.

The Lisbon Treaty amended the Treaty on European Union (TEU)⁸⁵ and the Treaty Establishing the European Economic Community⁸⁶ ("EEC Treaty"), the latter consequently becoming the TFEU. Title V, Chapter I (Article 21) of the TEU stipulates in very clear terms how the EU's external action might be conducted. From a public law point of view, Article 21 TEU heavily constrains how EU external relations may be conducted. The language is enlightened in that it makes EU external action subject to such guiding principles as: "democracy, the rule of

that have already been reached by the Council and other bodies of the EU. For further details, see Rafael Leal-Arcas, *The European Union's New Common Commercial Policy after the Treaty of Lisbon*, in *THE TREATY OF LISBON AND THE FUTURE OF EUROPEAN LAW AND POLICY* 262 (Martin Trybus & Luca Rubini eds., 2012).

82. Amongst other things, the Lisbon Treaty has created the office of the President of the European Council who is a high level official of the EU, carrying out essentially an administrative role in relation to the work of the European Council and also representing the EU on the world stage alongside other EU officials (namely the High Representative and the President of the EU Commission).

83. See generally TEU post-Lisbon, *supra* note 8, arts. 17–24, 2010 O.J. C 83, at 25–31 (discussing the High Representative's role and powers).

84. See TFEU, *supra* note 4, art. 192(2)(c), 2010 O.J. C 83, at 133 (Excc. art. 175) (stipulating that measures that, if adopted, would significantly affect member states' choice between different energy sources and the general structure of their energy supply, ought to be taken on the basis of the unanimity decision-making procedure).

85. Also known as the Maastricht Treaty, 1992 O.J. C 191/1, signed on 7 February 1992 and in force since 1 November 1993.

86. Also known as the Treaty of Rome, 298 U.N.T.S. 11, signed on 25 March 1957 and in force since 1 January 1958.

law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.

B. *Energy and the Treaty of Lisbon*

An innovation of the Lisbon Treaty is the introduction of Title XXI TFEU on energy. This is effectively one provision—namely Article 194 TFEU—that sets out the proclaimed objectives of EU energy policy and their principal procedural aspects.⁸⁷ Notably, under Title XXI, EU energy policy is unequivocally linked to the EU’s environmental objectives. Namely, Article 194 TFEU expressly refers to the need for EU energy policy to preserve and improve the environment and to promote energy efficiency and the development of renewable sources. However, Article 194§2 states that EU measures “shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)”.⁸⁸

In that respect, the impact of the Lisbon Treaty—whilst significant in that it has streamlined and clarified EU processes—most importantly, has been to craftily preserve member states’ prerogatives over sensitive policy areas such as

87. Article 194 reads: “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 [Author’s note: NB., i.e., on the qualified majority decision-making procedure], shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. *Such measures shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).* 3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.” TFEU, *supra* note 4, art. 194, 2010 O.J. C 83, at 134–35 (emphasis added).

88. *Id.*

energy security. Article 194 TFEU also refers to one of the prescribed aims of EU energy policy as being to ensure security of energy supplies in the EU.⁸⁹ Naturally, an objective such as that could be effectively pursued with the appropriate legislative support, which in this case seems to be lacking. Whilst Article 194 proclaims EU energy security as an EU objective for the first time, it does not supplement the supranational EU bodies with further competences to facilitate the pursuit of a common EU energy security policy. Again, this is not surprising given how sensitive this policy area is, and given the challenges of garnering the requisite political will amongst member states to endow the EU with powers to act to their exclusion in energy security matters. However, Article 352 TFEU makes it possible for the Council to make decisions necessary to attain treaty objectives even when the treaties grant no express powers. However, action pursuant to Article 352 TFEU can only be based on unanimity in the Council.

Article 21§2 TEU provides another example of the impact of the Treaty of Lisbon on EU external relations, including those that engage energy resources. It states that the EU shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to, amongst other things, help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development (at Article 21§2(f)).⁹⁰ This is relevant to the EU's external

89. See TFEU, *supra* note 4, art. 194§1(b).

90. Literature on the link between governance and sustainable development is abundant. See, e.g., Matt Andrews, *Good Government Means Different Things in Different Countries*, 23 *GOVERNANCE* 7 (2010); Arthur A. Goldsmith, *Is Governance Reform a Catalyst for Development?*, 20 *GOVERNANCE* 165 (2007); Merilee S. Grindle, *Good Enough Governance: Poverty Reduction and Reform in Developing Countries*, 17 *GOVERNANCE* 525 (2004); Kempe Ronald Hope, Jr., *Toward Good Governance and Sustainable Development: The African Peer Review Mechanism*, 18 *GOVERNANCE* 283 (2005); Daniel Kaufmann et al, *Governance Matters: From Measurement to Action*, 37 *FIN. AND DEV.* 10 (2000); Kees van Kersbergen & Frans van Waarden, *'Governance' as a Bridge between Disciplines: Cross-Disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy*, 43 *EUR. J. OF POL. RES.* 143 (2004); Nalin Kishor & Arati Belle, *Does Improved Governance Contribute to Sustainable Forest Management?*, 19 *J. OF SUSTAINABLE FORESTRY* 55 (2004); Francisco L. Rivera-Batiz, *Democracy, Governance, and Economic Growth: Theory and Evidence*, 6 *REV. OF DEV. ECON.* 225 (2002); Joseph E.

relations that engage, amongst other things, energy resources. What we may conclude from the above is that, constitutionally, EU external action, including in relation to its energy policy, is heavily constrained by Article 21 and the enlightened principles enshrined therein.

However, under Article 4§1(i) TFEU, ‘energy’, in its wide sense, is expressly referred to as a matter of shared competence. Let us be reminded that shared competence matters may be handled by the EU in accordance to the ‘subsidiarity’ and proportionality principles,⁹¹ that is to say, should action be considered more effective at the supranational level, EU action may justifiably take precedence over member states.

Certain energy-related matters, though, are deemed exclusive to the EU under Article 3 TFEU. For instance, the competitive conditions of energy trade within the internal market, or the question of tariffs when third country energy commodities cross an EU border (in other words a common commercial policy when commodities enter the customs union) appear to fall squarely within the exclusive competence of the EU.⁹²

It is worth noting that for matters that do not fall within the EU competence remit, it is still possible for the EU to act in that the Council may make decisions in order to attain the objectives of the EU as set out in EU treaties.⁹³

Stiglitz, *Participation and Development: Perspectives from the Comprehensive Development Paradigm*, 6 REV. OF DEV. ECON.163 (2002).

91. See TEU post-Lisbon, *supra* note 8, art. 5(3), O.J. C 83, at 18.

92. See Rafael Leal-Arcas, *Is Lisbon the Answer or the Anathema to EC Trade Law and Policy?*, 2 INT'L J. OF LIABILITY & SCL. ENQUIRY 125 (2009) (discussing the trade policy front).

93. Article 352(1) of the TFEU reads: “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.” TFEU, *supra* note 4, art. 352(1), 2010 O.J. C 83, at 196 (emphasis added).

C. *Challenges Towards Achieving a Common EU Energy Security Policy*

As we shall examine in Section V, the geostrategic context and the disparate energy security capabilities of each member state appear to explain why it might be unrealistic to have a common EU energy security as a matter of exclusive EU competence. Furthermore, achieving a common position on matters of EU external action has never been easy.⁹⁴ That said, there is scope for the EU to enhance its members' energy security in a number of smaller yet significant ways. For instance, by streamlining and rationalizing EU processes, and thus removing any inconsistencies or contradictions in EU action, the EU becomes a better, more efficient, actor. Also, Article 122 TFEU refers to the possibility of cross-EU solidarity in cases where a member state is facing *severe difficulties* in, amongst other things, the energy supply.

Article 21 TEU places major obstacles towards achieving EU energy security that are not encountered by other sizeable energy consumers such as China, India, Japan, and the United States, who are free to pursue an energy security policy they find most expedient.⁹⁵ Again, this illustrates the challenges faced by groups of states that are not fully federalized across the policy spectrum. However, Article 21 TEU places no constraints on how EU member states might in their own right, pursue their respective energy security needs for which they could conceivably pursue such *realpolitik* as any other state.

Article 22 TEU makes it clear that the European Council⁹⁶—in its capacity as the highest agenda-setting EU

94. See RAFAEL LEAL-ARCAS, *THEORY AND PRACTICE OF EC EXTERNAL TRADE LAW AND POLICY* 85 (2008).

95. Note that the Gulf Cooperation Council (GCC) refused EU overtures for energy cooperation on account that the latter wanted energy relations with GCC on a pro-market regulatory basis whereas the GCC wanted relations on the basis of strategic partnerships. The GCC saw with suspicion EU calls for GCC market liberalization as potentially disruptive of the social order in those States. See KORKMAZ, *supra* note 9, at 25.

96. An EU institution comprised of the heads of government or state of the 28 EU member states.

institution⁹⁷—may identify the EU's strategic interests on the basis of the principles of Article 21 TEU and on the basis of unanimity (as per Article 22§1 TEU). Again, Articles 21 and 22 TEU make clear that there is no legally endorsed scope for *realpolitik* within the EU.

However, it is worth noting that the EU extensively engages with third-party states—namely those of MENA, Russia, Central Asia, and the Caspian states—some of whose respect for the humanist principles under Article 21 TEU is, at best, doubtful. In such cases, we should be asking: to which extent does EU external energy policy necessitated by the EU's economic imperatives contradict the dictates of Articles 21 and 22 TEU, and how are any such contradictions resolved?

Energy is multidimensional in that it cuts across several fields of policy, including foreign policy, international trade, human rights, security issues, and economics among others. This complicates matters, given that EU competences are uneven, depending on what is at issue. When we discuss energy within the context of the EU and its external relations with third-party states, a multiplicity of EU offices and institutions may be at play, namely, the EU Commissioner for Energy; the European Council's President; the High Representative—who is also a vice-president of the Commission—assisted by the EU External Action Service; and the Foreign Affairs Council—which is a sub-committee of the Council. Numerous provisions across the TEU and TFEU spell out their powers and duties.

For instance, the European Council's President's role is, *inter alia*, to ensure the external representation of the EU's common foreign and security policy without prejudice to the High Representative's mandate of representing the EU abroad in foreign and security policy.⁹⁸ The High Representative's role is more comprehensive in order to promote cohesion of EU external action.⁹⁹ To that end, the High Representative has

97. As opposed to an ad hoc summit of heads of state/government who are otherwise only bound by general international law and their own respective constitutions in how they behave.

98. See TEU post-Lisbon, *supra* note 8, art. 15(6), 2010 O.J. C 83, at 23.

99. See *id.* arts. 21, 22, 24, 26 (discussing the Union's role in ensuring consistency); see also TFEU, *supra* note 4, art. 329, 2010 O.J. C 83, at 190 (providing the High Representative with the ability to make pronouncements on consistency of EU action).

access to relevant Council sessions and to those of the Commission. The role of the EU's Foreign Affairs Council—a subcommittee of the Council—is to develop EU external action in line with strategic guidance provided beforehand by the European Council.¹⁰⁰ In that respect we witness how external relations, given their sensitive nature, are deferred to the EU institutions in which member states participate in their own right and are thus able to fully defend their interests, rather than to supranational institutions such as the EU Commission. Article 15§4 TEU emphasizes that a consensus decision-making process applies, unless there is express provision in the treaties for decisions to be taken differently. Also, Article 31(1-3) TEU makes clear that proposals by the High Representative in relation to the common foreign and security policy put to the European Council and the Council are subject to the unanimity decision-making procedure in those intergovernmental fora.¹⁰¹ However, as the European Council is an EU body—albeit an inter-governmental rather than supranational one—all action flowing from it must be in compliance with the guiding principles of the EU mentioned above.¹⁰² Therefore, whilst warmer or fully institutionalized relations with authoritarian energy-rich third-party states are clearly matters of strategic interest for the EU, their potential conflict with Article 21 TEU could potentially present complications for cohesive action.

Furthermore, Article 22(1) TEU promotes consistency and conditions the decision-making capacity of the European Council by stating that European Council decisions on the EU's strategic interests and objectives must be in accordance with its common foreign and security policy and with other areas of EU external action.¹⁰³ In that respect, the European Council—in its

100. The European Council is charged with identifying the EU's strategic interests, along with determining the objectives of and defining the general guidelines for the common foreign and security policy, including for matters with defense implications. *See* TEU post-Lisbon, *supra* note 8, art. 26, 2010 O.J. C 83, at 31.

101. *See id.* art. 31(2), at 33–34 (requiring unanimity with regard to the Union's strategic interests and objectives, as referred to in art. 22(1)).

102. *See id.* art. 21(1), at 28.

103. *See id.* art. 22(1), at 29 (“EC Decisions on the strategic interests and objectives of the Union shall relate to the CFSP and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach.”).

capacity as an EU institution—does not have free reign to promulgate policy in a manner that is inconsistent with the entire EU project. Thus, as the treaties stand, even the most supreme political body of the EU—the European Council¹⁰⁴—cannot sanction EU energy policy that contradicts Article 21 TEU. Of course, this obstacle could be overcome were member states to take the necessary legislative steps to remove the Article 21 TEU constraints, such as concluding a subsequent treaty that amends or supersedes its effect, or, more controversially, were they to condone Article 21 TEU non-compliant EU action by not opposing or challenging it in the relevant EU fora. Naturally, these are politically difficult options that are unlikely to be supported by member states other than those willing to accept the trade-offs between enlightened ideals and economic exigencies. Conceivably, member states with strong liberal traditions and a politically active civil society might be less likely to support such significant ontological changes to the EU. Again, law follows political changes, and shifts in the political direction are good portends of the legislative changes that may potentially follow.

Whilst the EU lacks the powers of a sovereign actor in relation to diplomatically pursuing its energy security, it does possess a comprehensive energy policy that is multifaceted and that makes the most of the powers that lie within its remit of competences. Moreover, whilst its energy policy focuses mainly on the IEM, it strategically contains outward aspects that focus on promoting the EU's energy interests regionally and globally. Again, this happens to the extent that the EU may act in unison in such matters. Whilst it cannot *sui juris* assume EU member states' competences over the entire diplomatic policy spectrum,

104. Throughout the EU treaties we witness a logical deference towards the European Council. Under Article 15 TEU, the European Council is charged with: "provid[ing] the impetus and general political direction and priorities". *Id.* art. 15, at 23. It also makes clear at 15§1 that the European Council does not exercise legislative functions. Strictly speaking therefore, any subsequent treaties contracted between the 28 heads of State/government are done so outside the context of the EU institution of the European Council. In that respect, although it is the same configuration of individual national office holders, they do not function within the public law aspects of EU, rather, in their capacity to conclude international conventions, they function within the context of the area of public international law relating to the law of treaties and to the extent permitted by their respective national laws.

it is not prohibited from taking action globally that, as a consequence, enhances the EU's energy security. As we shall see, this may take the form of the EU promoting greater energy-market liberalization in the belief that more fluid energy markets would benefit energy consumers such as itself that are reliant on regional and international markets for their energy needs. It may also take the form of promoting regional integration in that the EU has set up and promoted the Energy Community (EnC) that involves several neighboring states with a view to integrating their energy markets to the IEM.¹⁰⁵ These actions, while soft approaches, may potentially have a cumulative effect towards achieving energy security.

IV. *DIVERSITY OF EU ENERGY POLICY*

As we have briefly discussed above, EU energy policy is a composite affair that reflects the complexities of energy in its wide sense. To be more precise, EU energy policy is essentially a bundle of policies that target or engage various aspects of energy, both internal and external. For instance, several EU policies aim at the progressive integration chiefly of the gas and electricity energy landscapes of member states and the consequent formation of the IEM. There is a raft of EU legislation to this end.¹⁰⁶ In that respect, such policies are internally focused. However, many of these policies also contain externally focused aspects. For instance, policies linked to the IEM also seek to draw third-party states into the IEM through the creation and development of the Energy Community. In that respect, the IEM itself contains internal and external aspects that are inherent to it.

105. *About Us*, ENERGY COMTY. (May 24, 2013), http://www.energy-community.org/portal/page/portal/ENC_HOME.

106. *See Summaries of EU Legislation: Energy*, EUROPA, http://europa.eu/legislation_summaries/energy/index_en.htm (last visited May 28, 2013) (summarizing EU legislation in relation to energy). The purpose of the present paper is to highlight the comprehensive nature of EU energy policy rather than provide an account of its finer aspects. In that respect, we do not intend to list and discuss all legislation. Section III of this paper (on the legal aspects of EU energy policy) aims at providing an overview of the constitutional aspects of energy policy within the EU by highlighting the complexities of energy in terms of how it may engage separate spheres of competences.

Other instances of EU policy aim at promoting greater liquidity of energy markets on the assumption that more voluminous trade flows towards global markets are ultimately in the interests of net energy consumers—such as the EU—who depend on the outside world for their energy security, chiefly on markets.¹⁰⁷ This aim (greater liquidity of energy markets), in turn, is pursued through a variety of strategies (e.g., through the promotion of the Energy Charter Treaty and of pro-market practices abroad).

A. *Types of EU Energy Policy*

It might be helpful, therefore, to regard EU energy policy as actually being a wide range of policies that could broadly be aggregated into the following two categories:

- policies that relate to energy markets and energy use within the EU; and
- policies that promote EU energy security interests with third-party states and in international organizations.

Policies that seek to draw third-party neighboring states into the IEM—e.g., through the EnC—although concerned with the IEM, clearly sit in the second category in that their ultimate aim is the promotion of EU energy interests abroad. Policies that set targets for more efficient and sustainable use of energy within the EU fall within the first category, whilst policies that seek to promote efficient use of energy abroad sit in the second category, as, arguably, it is ultimately in the EU's energy security interests to promote energy efficiency abroad. There may also be policies that relate to energy markets and energy use in the EU which make it necessary for the EU to engage with the outside world; such policies also fall within the second category, given that they are ultimately connected with furthering EU energy interests. What is also becoming increasingly clear is that there is little point to a fully integrated IEM and Trans-European Network for energy (TEN-EN) when there are insufficient energy supplies flowing into it.

107. Naturally, this does not preclude the EU from seeking closer, strategic, relations with energy producers in the MENA and Caspian regions and with Russia. This illustrates the diversified approach to energy security that the EU pursues.

In that sense, a fully integrated IEM and TEN-EN risks becoming somewhat redundant when there are insufficient inward energy flows.¹⁰⁸ In that sense, a fully integrated and functional yet energy-starved TEN-EN might end up a tragic reminder—such as ghost towns or decommissioned rail-tracks—of what might have been. A weak long-term EU external energy strategy that is not integrated and unified could lead to EU failure to address its security needs. Again, as we mention throughout this paper, the EU is 52% energy dependent on the outside world. If too much effort and resource on the part of the EU is being diverted into the development of the IEM and TEN-EN without there being proportionately effective EU action to address the external aspects of EU security, the EU may have squandered precious resources that could have been usefully diverted into making the EU less hydrocarbon dependent by, amongst other things, greater promotion and subsidization of low-carbon and renewable energy research and development. However, again, as we have analyzed above, the treaties upon which the EU rests, in their current form, present structural constraints that restrict the deployment of a more effective comprehensive EU external energy policy.¹⁰⁹

As discussed above, the integration of the IEM is considered an important element of EU energy policy in that a more

108. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, On security of energy supply and international cooperation—“The EU Energy Policy: Engaging with Partners beyond Our Borders”, COM (2011) 539 Final, at 4 (Sept. 2011) [hereinafter On Security of Energy Supply]. The Commission stated that: “*The EU energy market depends on high levels of imports to function, and therefore depends on free and transparent markets. In their absence, the EU is vulnerable to political and price volatility. Supply security in one part depends on security across the market as a whole. External energy policy needs to reflect the interconnectedness of the internal market and the interdependence of the EU Member States.*” *Id.* (emphasis added).

109. See *id.* at 2. In this document, the Commission cites the EU’s heavy energy dependency on imports (c. 60% gas and c. 80% oil) and the growing competition it faces in connection to rising future energy demand. All these matters necessitate a comprehensive external energy policy. The Commission emphasizes how an EU external energy policy is crucial to the completion of the IEM. It also cautions about how the impact of energy bilaterals between EU member states and third-party states may potentially have a fragmenting effect on the IEM. Aware that increase in global energy demand will not be coming from the old world, the Commission recommends that the EU actively support developing economies to access sustainable energy and adopt more sustainable processes to ensure that global energy use becomes more prudent.

efficient internal system enhances energy security. To that end, there is regulatory convergence that is taking place across the EU. Currently, the regulatory situation across the EU is not fully harmonized.¹¹⁰ The IEM has also been promoted through the Energy Community (EnC) in order to also achieve regulatory convergence with a view to integrating the electricity and gas markets of neighboring states with the IEM.

The EnC was set up further to the Energy Community Treaty between the EU and several third-party states. It currently involves 10 parties—the EU, Albania, Bosnia & Herzegovina, Croatia, Kosovo, Macedonia, Moldova, Montenegro, Serbia, and Ukraine.¹¹¹ It has been promoted by the EU to engage its neighbors on the basis that energy market and network integration is in the EU's energy security interests.¹¹²

The EnC could be seen as a uni-sectoral 'integration without membership'¹¹³ arrangement. The effect of the EnC is that parties are legally obligated to apply the EU energy *acquis*¹¹⁴ with the aim of creating a legal and economic framework in relation to the EU's *Network Energy*¹¹⁵ in order to: "create a stable regulatory and market framework capable of attracting investment in gas networks, power generation, and transmission and distributions networks, create a single regulatory space for trade . . . , enhance the security of supply of the single regulatory space, improve the environmental situation, . . . and energy efficiency, foster the use of renewables and set out the

110. Nikolay Mizulin, *EC Experience in Creating an Internal Energy Market: Lessons for the WTO*, in GLOBAL CHALLENGES AT THE INTERSECTION OF TRADE, ENERGY AND THE ENVIRONMENT 67, 67–71 (Joost Pauwelyn, ed., 2010).

111. *Parties*, ENERGY CMTY. (May 24, 2013), http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Stakeholders/Parties.

112. Note that the Commission states that the EnC should be promoted with third-party States who are negotiating or concluding an FTA with the EU. See *On Security of Energy Supply*, *supra* note 108, at 7.

113. See Roman Petrov, *Energy Community as a Promoter of the European Union's 'Energy Acquis' to Its Neighbourhood*, 38 LEGAL ISSUES OF ECON. INTEGRATION 331, 331 (2012).

114. However, it does allow for staggered implementation. For instance, Moldova is doing so in four successive waves, whilst Ukraine is doing so in five.

115. See The Energy Community Treaty art. 2(2), 2006 O.J. L 198/18, at 19 ("Network Energy shall include the electricity and gas sectors falling within the scope of the European Community Directives 2003/54/EC and 2003/55/EC").

energy trade conditions in the single regulatory space, and develop market competition and exploit economies of scale.”¹¹⁶

The key features of the EnC could be understood as regulatory convergence towards achieving a common regulatory and more predictable investment space as means towards more integrated energy markets.¹¹⁷ Georgia, Turkey, Armenia, and Norway have observer status.¹¹⁸

Many EU member states engage in other fora to promote their energy interests. For instance through, amongst others, the Energy Charter Treaty (ECT), the EnC, the North Atlantic Treaty Organization (NATO)¹¹⁹ and the Organization for

116. *Id.* art. 2, at 19.

117. The EnC is governed by a Ministerial Council which is the supreme political forum within its structures. There is a dispute settlement body that legal persons affected by some EnC measure may petition.

118. This is possible under Article 96 of the Energy Community Treaty, though all EnC members must consent to this through the Ministerial Council which governs the EnC. *Id.* art. 96, at 28. It is also possible for EU member states to participate in this organization as ‘participants’ rather than members (as is the EU) as per Articles 182 and 95 of the Energy Community Treaty. Presently, Austria, Bulgaria, Cyprus, Greece, and the UK, conceivably due to their bordering and energy-transit significant geographic positioning, participate in EnC meetings with this status.

119. NATO is not concerned with energy security *per se*. It is concerned with the collective defense interests of its members. That said, there have been suggestions that it could expand its remit to address the defense of its members’ key energy infrastructures and the security of their energy supply chain against ‘terrorist’ acts. In that sense, its work could potentially enhance its members’ energy security from potential shocks linked to hostilities. How exactly this could take form in relation to installations that are outside the territories of NATO members in a manner consistent with international law and the principle of non-intervention is far from clear. See Florian Baumann, *Europe’s Way to Energy Security: The Outer Dimensions of Energy Security: From Power Politics to Energy Governance*, 15 EUR. FOREIGN AFF. REV. 77, 84 (2010); SENATE MINORITY STAFF REPORT, 112TH CONG., ENERGY AND SECURITY FROM THE CASPIAN TO EUROPE 55, S. PRT. 112-42 (Comm. Print 2012), available at <http://www.foreign.senate.gov/publications/download/energy-and-security-from-the-caspian-to-europe>. The Senate Committee Print contains a series of recommendations for the US Government to implement to ensure the energy security of NATO members and their progressive energy independence from Russia. The Committee goes on to call for NATO involvement, given that the decades to come are likely to involve armed conflict over scarcity of energy resources and related disputes. See also Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 *Okla. L. Rev.* 193, 276–77 (2011) (analyzing the geopolitics at play around national security anxieties that in the post-Cold War world have mutated into anxieties around energy security). We are inclined to agree with Bejesky’s conclusions: “If consumption reduces due to technological progress, then demand and global market prices drop *ceteris paribus*. So, too, should the ‘national security’ anxiety, articulated by some as manifesting into a post-Cold War Pentagon mission to “protect” global oil supply, dissipate. The argument

Economic Cooperation and Development's (OECD) International Energy Agency (IEA)¹²⁰. Consequently, the benefits of multilateralism might also accrue at the EU collective level.

B. *Factors Affecting EU Energy Policy*

In listing a few aspects of EU energy policy, we want to illustrate how multifaceted EU energy policy is:

- it focuses on integrating the domestic gas and electricity markets of EU member states into the IEM;
- it promotes the IEM's integration with the energy markets and networks of neighboring third-party states;
- it sets minimum targets in relation to energy efficiency, GHG emissions reduction, and energy source diversification for member states to implement; and
- it outlines the general features of the EU's approach to external energy relations.

In relation to the last, the EU's external energy policy is itself a highly composite affair given that there are several policy objectives to be promoted. Amongst others, such objectives are:

- the promotion of emissions reduction abroad to ensure that the EU's industries operate competitively against foreign industries;
- a more efficient use of energy abroad to ensure that energy consumers such as the EU benefit from lasting supplies; and
- further liberalization and integration of energy markets abroad to ensure that more energy flows reach global markets on which large consumers such as the EU rely,

that global military hegemony breeds stability-including for markets-out of what would otherwise be chaos, lacks substantial foundation." *Id.*

120. Note that the IEA obligates its members to hold oil reserves worth 90 days of their oil consumption under its Coordinated Emergency Response Mechanism. *See* Energy Security, INT'L ENERGY AGENCY, <http://www.iea.org/topics/energysecurity/> (last visited May 28, 2013). The EU however also has similar energy reserve requirements to those of the IEA. *See* Council Directive 98/93/EC, art. 1, 1998 O.J. L 358/100 (mandating EU member states to hold ninety days' worth of their average consumption of petroleum products). In effect, this Directive inducts the IEA requirement into EU law by mandating that all EU member states—not just IEA members—hold ninety days' worth of internal consumption of petroleum products.

in order to meet a considerable part of their energy needs.

Successive EU Commission communications highlight the purported desire to achieve cohesion and consistency across the EU policy spectrum. We have also seen how the post of High Representative has been amended to, amongst other things, ensure cohesion and consistency in the EU's external action. This leads us to conclude that EU energy policy may not only be conditioned by the multiplicity of energy-related EU policy objectives but may further be conditioned by EU objectives in policy fields other than energy. This means that the development of EU energy policy is contingent upon seemingly extraneous objectives, such as those concerned with environmental protection and economic growth. We witness this in energy policies aimed at containing CO₂ emissions, e.g., the EU's policy that sets targets for 20% of its overall energy consumption to come from renewable energy. Let us take Directive 2009/28/EC¹²¹ (briefly mentioned earlier) as an example: it is concerned with the promotion of renewables. According to Article 1 (subject matter and scope), the directive establishes:

[A] common framework for the promotion of energy from renewable energy sources. It sets mandatory national targets for the overall share of energy from renewable energy sources in gross final energy consumption and for the share of renewable energy for transport. It lays down rules relating to statistical transfers between member states, joint projects between member states and third countries, guarantees of origin, administrative procedures, information and training, and access to the electricity grid for energy from RES. It also establishes sustainability criteria for biofuels and bio-liquids.¹²²

It is clear that this legislative instrument promotes policies that impact a number of other EU policy fields and fields of action, including the internal market, investment, external

121. Energy from Renewable Sources Directive, *supra* note 19. Both repealed instruments established definitions for different types of energy from renewable energy sources.

122. *Id.*

relations, energy, environmental protection, and trade. Clearly, policy fields do not exist in isolation from one another. What is more, in this sense, ‘external relations’ is no stand-alone field of action; rather, it is one that could potentially engage any policy field of the EU in so far it has an ultra-EU dimension.¹²³ For instance, to promote joint-projects between member states and third-party states that take place outside the EU, the EU must engage in the promotion of investment protection outside the EU.

In another example, the EU Commission’s ‘Energy Roadmap 2050’¹²⁴, the Commission—an EU institution with executive powers tasked with defending the entire EU project and the general EU interest in line with the treaties¹²⁵—proposes a comprehensive strategy for the EU’s energy needs. In this policy document, the EU’s energy security and environmental protection objectives are inextricably linked. The proposals focus on promoting renewables, energy efficiency, and the decarbonization of the EU economy at the EU, national, and regional levels.¹²⁶

123. The EU already has a series of complementary and targeted frameworks ranging from specific energy provisions in bilateral agreements with third countries (Free Trade Agreements (FTAs), Partnership and Cooperation Agreements (PCAs), Association Agreements (AAs) et cetera) and Memoranda of Understanding on energy cooperation, to multilateral treaties such as the Energy Community Treaty (which sets up the EnC), and participation in the Energy Charter Treaty (ECT). It is currently negotiating new agreements with several countries including important energy provisions. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Energy 2020: A Strategy For Competitive, Sustainable and Secure Energy, COM (2010) 639 Final, at 19 (Oct. 2010); see also *Treaties Office Database*, EUR. UNION EXTERNAL ACTION, <http://ec.europa.eu/world/agreements/searchByActivity.do?parent=8512&xmlname=751&actName=Energy&printActivity> (listing energy-related treaties concluded between the EU and third-party states).

124. Energy Roadmap 2050, *supra* note 14.

125. TEU post-Lisbon, *supra* note 8, art. 17, 2010 O.J. C 83, at 25. Also note that under Article 17§2, the EU Commission has the exclusive right, save for where the treaties provide for otherwise, to propose EU legislation for adoption. *Id.* In relation to EU energy policy, the Commission has been heralded as a progressive force ready to take on strong German and French interests in pushing for the unbundling of the energy markets of Germany and France and of the EU in order to allow more market actors to participate in the belief that this leads to better conditions of competition, that, in turn, would benefit EU consumers. See KORKMAZ, *supra* note 9, at 19.

126. Key features of the Roadmap are the diversification of the primary energy mix through supportive policies so that 55–75% energy consumption comes from renewable sources, with about 97% of electricity from renewables. These are very

Also, the Commission acknowledges that the more interdependent and globalized the energy market becomes, the more the EU energy situation becomes vulnerable to global trends such as supply shocks and price fluctuations. Whilst therefore it may be in the EU's interests to pursue strategic bilateral and regional relations with energy producers in order to lock energy flows towards the EU, it is also in its interests to promote energy market liberalization for all energy flows outside its strategic relationships in the hope that more energy on global markets will ultimately serve the interests of energy importers such as the EU.¹²⁷

The Commission sees in Russia an important partner, despite EU objectives to move towards a low-carbon economy and away from hydrocarbons. For instance, Russia and Ukraine are important regional producers of biofuels that could assist the EU in its move towards a low-carbon economy. What is more, conventionally extracted natural gas¹²⁸ is less polluting than coal and oil; so access to a secure supply of Russian gas, through Ukraine¹²⁹ or other routes, also contributes to the EU's

ambitious targets to be met within the next 38 years. It contains the goal of reducing CO₂ emissions by 80-95% of pre-1990 levels by 2050. Given that 35% of CO₂ emissions in the EU arise from the production of energy, achieving this goal will put the energy industries under considerable pressure. Energy Roadmap 2050, *supra* 14, at 2, 4-5, 7. See also EU ENERGY INNOVATION POLICY TOWARDS 2050 (Jean-Michel Glachant, Nicole Ahner & Leonardo Mccus eds., 2012).

127. Note for instance that roughly 50% of global oil supplies are made available on global markets with no restrictions on who ends up being the purchaser. See GLOBAL ENERGY GOVERNANCE: THE NEW RULES OF THE GAME 4-5, (Andreas Goldthau & Jan Martin Witte eds., 2010). Whilst the EU would want to preserve its strategic relationships with energy suppliers, it would be in EU interests to promote energy market liberalization for the rest of the world, hoping that more energy commodities would reach the market for it—along with the other energy consumers—to meet needs not met by preferential deals. See GIACOMO LUCIANI, SECURITY OF OIL SUPPLIES: ISSUES & REMEDIES, (2013).

128. We draw a distinction between conventionally extracted gas and that through fracking, given that shale gas extracted through fracking is environmentally harmful. See *Environmental impacts of shale gas extraction*, BRITISH GEO. SURV., <http://www.bgs.ac.uk/research/energy/shaleGas/environmentalImpacts.html> (last visited Apr. 8, 2013) (listing concerns including degradation of water bodies, methane leakage, increasing seismic volatility, etc. in relation to shale gas extraction).

129. According to the EU webpage on EU—Ukraine relations: “The EU has negotiated a Deep and Comprehensive Free Trade Agreement (DCFTA). The negotiations were launched in 2008 and they have now been concluded. The DCFTA will be part of a future Association Agreement, which will replace the present Partnership and Cooperation Agreement between the EU and Ukraine (which dates

efforts to produce energy in a less polluting way than energy derived from coal and oil.

The Energy Roadmap 2050 acknowledges the importance of international cooperation in the pursuit of EU energy interests abroad. For example, the EU must also ensure that it pushes for greater environmental protection abroad for economic reasons alongside environmental concerns: namely, to ensure that EU-based industries do not become uncompetitive in relation to goods and services produced by industries based in other economies which are not under similar constraints.¹³⁰

However, the fusion of environmental and energy security objectives within the EU's energy policy in the Energy Roadmap 2050 has attracted criticism for harming the EU's energy security by making it conditional, rather than unfettered by, environmental objectives.¹³¹ Successive Commission communications emphasize the need to shift the energy mix composition to one that is more *sustainable* in terms of supply but also in terms of less harmful environmental impacts.

Renewables provide the obvious solution, however, the financial cost of developing such energy resources makes them less economically competitive than hydrocarbons. This has important implications for investments. The EU Commission places great expectations on markets to provide the necessary solutions, not least because the capital amounts necessary would place great strain on member states' and the EU's budgets.¹³²

from 1998). The initialing of the EU-Ukraine Association Agreement took place in Brussels in March 2012, except for the DCFTA which was initialed on 19th July 2012. Since the entire Agreement has now been initialed, the next step will be the signature of the Agreement by the Council when the conditions are met." *Ukraine*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/ukraine> (last visited Apr. 8, 2013).

130. See Energy Roadmap 2050, *supra* note 14, at 16.

131. See *Energy Roadmap Workshop*, *supra* note 33. At the recent workshop organized by the European Parliament's external policy committee to discuss the implications of the Energy Roadmap 2050, various criticisms were raised on the assumption that the EU's quest for energy security that is simultaneously environmentally friendly places the EU at a disadvantage when compared to other energy consumers—e.g., China and India—which pursue a harder energy security.

132. The EU would have to invest €900 billion on new electricity generation alone over the next 25 years or so. See *An Energy Policy for Europe*, *supra* note 12, at 9; see also Commission of the European Communities, Communication from the Commission to the European Council: A European Economic Recovery Plan, COM(2008) 800 Final, at 14 (Nov. 2008) [hereinafter *Economic Recovery*] (stating that the European

What remains feasible at the EU and member state policy-development levels is the use of various policy tools to encourage investments in the renewable energy sector.

On the other hand, we should also point out that the EU is not shifting towards a more *sustainable* or low-carbon energy mix anytime soon, or at least, is doing so at a slower rate than what circumstances demand. Scientists have overwhelmingly agreed that natural and anthropogenic climate change is a reality, and that it may be irreversible. In its Synthesis Report of 2007,¹³³ the Intergovernmental Panel on Climate Change (IPCC)¹³⁴ stated that: “Anthropogenic warming could lead to some impacts that are *abrupt or irreversible*, depending upon the rate and magnitude of the climate change.”¹³⁵

At the global level, colossal capital investments are necessary to upgrade and expand the extraction and

Investment Bank (EIB) will significantly increase its financing of climate change, energy security and infrastructure investments by up to €6 bn per year).

133. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf [hereinafter CLIMATE CHANGE 2007]. This document consists of the underlying report, adopted section by section at IPCC Plenary XXVII (Valencia, Spain, 12-17 November 2007) that represents the formally agreed statement of the IPCC concerning key findings and uncertainties contained in the Working Group contributions to the Fourth Assessment Report. Also in the Fourth Assessment Report the IPCC has referred to the “unequivocal heating of the planet”. *Id.*

134. The Intergovernmental Panel on Climate Change is the international corpus of scientists *par excellence* formed, ultimately, under the auspices of the United Nations. According to its web site: “The Intergovernmental Panel on Climate Change (IPCC) is the leading international body for the assessment of climate change. It was established . . . to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts. . . . The IPCC is a scientific body It reviews and assesses the most recent scientific, technical and socio-economic information produced worldwide relevant to the understanding of climate change. *It does not conduct any research nor does it monitor climate related data or parameters.* . . . Currently 195 countries are members of the IPCC. *Governments participate in the review process* and the plenary Sessions, where main decisions about the IPCC work programme are taken and reports are accepted, adopted and approved. The IPCC Bureau Members, including the Chair, are also elected during the plenary Sessions. Because of its scientific and intergovernmental nature, the IPCC embodies a unique opportunity to provide rigorous and balanced scientific information to decision makers. By endorsing the IPCC reports, governments acknowledge the authority of their scientific content. *The work of the organization is therefore policy-relevant and yet policy-neutral, never policy-prescriptive.*” INT’L PANEL ON CLIMATE CHANGE, <http://www.ipcc.ch/organization/organization.shtml> (last visited Apr. 8, 2013) (emphasis added).

135. CLIMATE CHANGE 2007, *supra* note 133, at 53 (emphasis added).

distribution infrastructure for hydrocarbons.¹³⁶ Such upgrading must also happen to EU-based or -linked infrastructure, and the cost of that is likely to be high. However, investments do not materialize when all costs alongside projected profits cannot be recouped for a certain period of time. Investing such vast sums towards hydrocarbon-related infrastructure seems to, if not pull in the opposite direction of sustainability, have a disincentivizing effect on efforts to shift economies towards more ‘*sustainable*’ and low-carbon energy mixes any time soon.

V. GEOSTRATEGIC CONTEXT IN RELATION TO THE NEXUS OF EU AND ENERGY SECURITY

As we have alluded to so far, the EU is quite unlike other actors in the international arena in that it is neither a sovereign state—entailing the legal consequences stemming from such a status—nor is it merely an international organization. In that respect, there are structural obstacles in the EU’s path towards energy security that are not met by sovereign states that are fully federated, where the central/federal authority has fewer or no obstacles in deploying a comprehensive external energy security strategy. These obstacles have implications for an *optimum* EU energy security. That is not to say that that EU efforts undermine EU member states’ efforts, nor do we mean to suggest that the combined effect of the *individual* energy security efforts of each EU member would have amounted to a more enhanced collective EU energy security. Rather, that it is more probable that each member state’s individual energy

136. This is not to be dismissed lightly given that IEA projections call for investments of at least US\$6.3 *trillion* by 2030 for the oil sector alone to meet growing global energy demand. OFFICE OF THE CHIEF ECONOMIST, INT’L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2008 89 (2008). For the entire energy sector, the IEA calls for investments of USD 33 trillion by 2035. In the International Energy Agency’s 2010 World Energy Outlook report, it is stated that: “Cumulative investment of [US]\$33 trillion (year-2009 dollars) over 2010-2035 is needed in energy-supply infrastructure This investment enables the replacement of reserves and production facilities that are retired, as well as the expansion of production and transport capacity to meet demand growth”). OFFICE OF THE CHIEF ECONOMIST, INT’L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2010, at 93 (2010). Also note that the IEA projects that on a global level, for each USD 1 not spent on such infrastructure before 2020 an additional USD 4.3 would need to be spent after 2020 so as to compensate for the increased costs associated with emissions. Energy Roadmap 2050, *supra* note 14, at 16 (citing the international energy agency’s world energy outlook 2011 report).

security may be better addressed were action to be orchestrated by some central supranational authority.¹³⁷ Even more so were the EU to be a fully federalized entity with an unrestrained remit for external action on all aspects—including diplomatic—of energy.

In certain policy areas (including the customs union between its 28 members), the EU is fully federalized, whereas in others, no *sui juris* EU competence exists.¹³⁸ Energy itself is no unitary policy matter; rather, it is a multi-dimensional composite matter that cuts across numerous policy fields, some of which sit chiefly with the EU—e.g., the IEM in electricity and gas—whilst others are the sovereign preserve of member states—e.g., the hard diplomatic aspects of energy.

137. Naturally, this is an assumption contingent on the *doxa* that integration leads to economies of scale and that there are inherent benefits to such a phenomenon. See Economic Recovery, *supra* note 132, at 4. The Commission states that: “Member States should again take advantage of the strengths of the EU—effective coordination, credible frameworks offered by the Stability and Growth Pact and the Lisbon Strategy, as well as the benefits of scale offered by the euro and the largest single market in the world. The interplay of national and EU action can help all Member States weather the worst of the global economic storms and emerge stronger from the crisis.” *Id.*

138. See KORKMAZ, *supra* note 9, at 8–11. Korkmaz provides an interesting taxonomy of inter-state collective energy security arrangements based on international relations theory. For instance inter-state energy relations could be based on energy societies that are: *asocial*—that is to say, ones in which State X forcefully occupies State Y and exploits, amongst other things, its energy resources (hence the ‘asocial’ tag); *coexistent*, in that sovereign actors are each after their own needs through peaceful means; *cooperative*, by cooperation through bilateral and multilateral means; *converging*, in that parties seek to harmonize aspects of their energy landscapes; *confederative*, in that parties pool some sovereignty together on specific internal and external aspects of energy to address some—not all—aspects of their collective energy needs; or, lastly, *federative*, where there is total integration whereby each party becomes a province of the federal system and all competence in relation to energy is pooled at the federal level. Korkmaz concludes that there is no transfer of competence from EU member states to the EU over external energy matters. Member states preserve this aspect of their sovereignty. What is more, the lack of absolute convergence between their internal energy markets means that the EU is disqualified from being considered a *convergence* energy security society. (Note that the IEM is restricted to predominantly the regulatory aspects of the internal gas and electricity EU member state markets). In that respect, it remains a *cooperative* one. Notably, Korkmaz states that the EU: “lacks the ability to guarantee companies the right to sell electricity and gas in member states on equal terms with national companies.” *Id.* at 28.

A. *Nexus of EU Energy Policy and Foreign Policy*

In the case of the nexus between energy and foreign policy, what we witness is the watershed between hard sovereignty matters and other, softer, matters that are more amenable to being assigned to the EU. It would be misleading to regard energy as a strict economic matter that may be assigned to some supranational body when, actually, a sovereign actor—in this case, any EU member state—may consider itself better placed than some supranational body to pursue its energy needs. To make this clearer, let us imagine that Germany's energy relations with Russia are more privileged than, say, Latvian relations with Russia. German energy interests might therefore be better served in that its energy industry and national economy benefits from the consequent energy trade to a greater extent than that of another member state. Conceivably, preserving that specific energy reality within the EU would be in Germany's national interests.¹³⁹ Let us look at a more concrete example: the *Nord Stream* is a pipeline installation that goes under the North Sea and, therefore, bypasses the most geographically straightforward route—that is to say, the territories of EU member states whose relations with Russia are somewhat strained (namely, the Baltic states and Poland).¹⁴⁰ Other EU states—namely, Hungary and Italy—may want to

139. Note the German Chancellor, Angela Merkel's call, at a 2007 European Parliament session, for more 'institutionalized energy relations' with Russia in order to discipline Russian energy relations which she felt, after citing some controversial incidents, were too susceptible to the whims of the Kremlin. The EU meets some competition by, amongst others, China and India for access to Russia's abundant energy resources. This places Russia in a particularly strong position. Germany has been promoting a strong EU-Russia energy partnership. Petra Dolata-Kreutzkamp, *Canada-Germany-EU: Energy security and climate change*, 63 INT'L J. 665, 669 (2008). It is also interesting to note Dolata-Kreutzkamp's views on changing perceptions on energy policy in Germany. Since the late 1950s, energy policy was an economics rather than strategic matter for western Germany's government; a matter for the ministry for the economy rather than for defense or foreign affairs. This led to the historical development of energy policy along the lines of the promotion of markets and market regulation. This approach was inadequate in the face of the geostrategic realities at play. In that sense, energy had been somewhat depoliticized for Germany which consequently suffered the consequences of few energy strategic relationships. However, Germany seems to have made up for lost time recently.

140. See Korkmaz, *supra* 9, at 14–15 (discussing German-Russian bilateralism in energy matters and Germany's pledge to underwrite the Nord Stream project to the tune of 1 billion Euros).

promote the Nabucco pipeline,¹⁴¹ in the case of Italy, possibly, on account of its energy industry's interests, and in the case of Hungary, as a means towards decreased EU gas dependence on Russia.¹⁴² In this example we see the disparity between interests, or rather between the rationales that may underpin the external energy strategy that each member state may want to promote to be adopted at the EU level.¹⁴³

As we have alluded to so far, the EU faces geostrategic challenges quite unlike its comparatively similar economic peer—the United States. There are geological and geostrategic, along with structural reasons for this—geological and geostrategic in that the United States is likely to become energy independent by 2030¹⁴⁴; structural in that whilst the United States is a fully federalized entity in certain respects, the EU is constrained by competence issues when it comes to pursuing external energy relations. Whilst the United States is 20% energy dependent and moving closer to energy independence,¹⁴⁵ the

141. The natural gas pipeline called Nabucco is supposed to bring gas from the Middle East and Central Asia to Europe via Turkey, Bulgaria, Romania, Hungary, and Austria. The project is geopolitically significant on energy-security grounds because it will bypass Russia.

142. See *Hungary considers Azerbaijan as guarantor of Europe's energy security*, TREND, <http://en.trend.az/capital/energy/2095611.html> (last visited Apr. 8, 2013); see also *A NEW ARCHITECTURE FOR EU GAS SECURITY OF SUPPLY*, (Jean-Michel Glachant et al. eds., 2012).

143. As a previous EU Commissioner for trade, Peter Mandelson rather tellingly has said: "No one country reveals our differences as does Russia." *INT'L HERALD TRIBUNE*, Apr. 21–22, 2007, at 3.

144. "Energy developments in the United States are profound and their effect will be felt well beyond North America—and the energy sector. The recent rebound in US oil and gas production, driven by upstream technologies that are unlocking light tight oil and shale gas resources, is spurring economic activity—with less expensive gas and electricity prices giving industry a competitive edge—and steadily changing the role of North America in global energy trade. By around 2020, the United States is projected to become the largest global oil producer (overtaking Saudi Arabia until the mid-2020s) and starts to see the impact of new fuel-efficiency measures in transport. The result is a continued fall in US oil imports, to the extent that North America becomes a net oil exporter around 2030. This accelerates the switch in direction of international oil trade towards Asia, putting a focus on the security of the strategic routes that bring Middle East oil to Asian markets. The United States, which currently imports around 20% of its total energy needs, becomes all but self-sufficient in net terms—a dramatic reversal of the trend seen in most other energy-importing countries." *INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2012: EXECUTIVE SUMMARY 1-2*(2012) available at <http://www.ica.org/Textbase/npsum/wco2012sum.pdf>.

145. *Id.*

EU is far from ever reaching such a privileged position. As we mentioned earlier, the EU is 52% energy dependent.¹⁴⁶ In other words, it relies for just over half of its entire energy needs on the outside world. This relative weakness is compounded by the fact that the largest part of its primary energy mix comes from just four providers (Norway, Russia, Algeria, and Libya).¹⁴⁷ It also competes for energy with the rest of the world, including with those energy-poor behemoths of energy consumption that are the ‘emerging’ economies of China and India,¹⁴⁸ that are likely to amount for more than 45% of the increase in global energy consumption by 2035.¹⁴⁹ However, the EU’s total energy needs are only a fragment of global energy needs. As we mentioned earlier, the EU’s energy consumption has been fairly static since 1990 and is projected to be so till 2035 at an annual figure not exceeding 2,000 Mtoe.¹⁵⁰ And it may be that competition from China and India alongside other net consumers such as Japan is not too great a concern given that: a. the EU is shifting towards a lower carbon and a more energy efficient economy—a fact that, logically, could lead to reduced energy consumption—and b. the existing suppliers of the EU—particularly, Russia—are endowed with sufficient energy reserves to continue to meet the needs of multiple consumers.¹⁵¹

146. Key Figures, *supra* note 15, at 5.

147. Serious concerns were raised when attacks on oil and gas facilities took place in Algeria in January 2013. See, e.g., Benoît Faucon, *BP Report Warned of Risks in Algeria*, WALL ST. J., Feb. 14, 2013, <http://online.wsj.com/article/SB10001424127887324162304578301982286838010.html>.

148. Brazil, Indonesia, and Russia possess their own energy supply and so we have not listed them along with China and India in relation to consumer competitors of the EU. Brazil, Russia, India, and China are commonly aggregated and referred to as the ‘BRIC’ countries—a term coined by Jim O’Neill, an economist at Goldman Sachs. The expansion of this term has been witnessed as ‘BRIICS’ as to include Indonesia and South Africa. For an exposition of trade relations between the EU and major emerging economies, see generally Rafacel Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas*, 32 FORDHAM INT’L L.J. 345 (2009); Rafacel Leal-Arcas, *The European Union and the BRIC Countries: Unilateralism, Bilateralism, and Multilateralism*, in THE EU IN THE GLOBAL POLITICAL ECONOMY 91 (Finn Laursen ed., 2009).

149. The IEA projects that India and China are likely to be responsible for roughly forty-five percent of the increase in global energy consumption between 2007 and 2030. See INT’L ENERGY AGENCY, *supra* note 31, at 3.

150. Key Figures, *supra* note 15, at 3.

151. In relation to this point, see an interview with Professor Jonathan Stern where, in relation to EU-Asian competition for Russian gas, he states that: “I’ve never

As it currently stands, the EU is surrounded by energy significant states—Russia, Norway, those in the MENA region, the Caspian region, and the CIS—that all, presumably, see a lucrative energy export market in the EU. Also, developments in the storage and transportation of natural gas—namely, its conversion into liquefied form (LNG)—could potentially lead to the globalization of the gas markets that are currently highly regionalized due to the challenges around storage and transportation.¹⁵² The implications of this for EU energy security could be positive, as a more globalized gas market may lead to greater energy flows becoming available on global markets.

What is more, the EU—through Denmark (specifically, its control over Greenland), Finland, and Sweden—borders an increasingly energy significant region, i.e., the Arctic. Denmark, Finland and Sweden—rather than the EU in any *sui juris* capacity—are involved in ongoing negotiations between the group of states with interests in that region. However, energy exploration and exploitation is far from straightforward given the presence of competing claims in the region. The five states with immediate borders who could potentially claim exclusive economic zone interests up to 200 miles from their coastlines—namely, Canada, Denmark, Norway, Russia, and the US—have not reached any resolution so far. What the Arctic issue also brings to the surface are questions as to what ought to be the EU's stance. Whilst the EU does not participate *sui juris* in the Arctic Council—unlike the above five states—developing a common approach is complicated not least because not all 28 member states are affected in the same way.¹⁵³ Should EU

thought that was an argument worth talking about. Russia has vast amounts of gas in Asia, very far away from Europe that wouldn't be economic to transport to Europe. At the same time, they've got a huge amount of gas in eastern Siberia and far east provinces which is stranded and not going anywhere, so for me there's no real competition between Europe and Asia for Russian gas." Interview with Professor Jonathan Stern, Chairman and Senior Research Fellow, Oxford Inst. for Energy Studies, Natural Gas Programme, in Vienna, Austria (Dec. 3, 2012), available at http://www.naturalgaseurope.com/europes-biggest-gas-supplier-no-bluffing?goback=%2Egdc_1808658_member_191862754.

152. See Dick de Jong *et al.*, *The Evolving Role of LNG in the Gas Market*, in *GLOBAL ENERGY GOVERNANCE: THE NEW RULES OF THE GAME* 221 (Andreas Goldthau and Jan Martin Witte, eds., 2010).

153. See Hylke Dijkstra, *The European Union as an Actor in Arctic Governance*, 16 *EUR. FOREIGN AFFAIRS REV.* 227 (2011) (providing a full exposition of EU action in

resources be pursued to represent an EU common position when it is a handful of member states that are likely to benefit? Should the EU espouse Denmark's interests in the Arctic region and potentially come into opposition with what has been a reliable energy partner, i.e., Russia? Is it accurate to say that this would be in the energy interests of the entire EU? These are the types of questions that EU policy-makers are possibly examining in considering how to approach this matter. Once the EU resolves to take a common position, it is then confronted with questions around competences. Conceivably, different aspects of the Arctic question would have to be examined to ascertain the level of EU competences. A hard diplomatic matter such as this seems to fall outside the competence remit of the EU. However, as we have seen earlier, even in such cases where there is no EU competence, it is possible for the EU to take a common position so long as it is done on a unanimity basis between member states in the most potent EU intergovernmental forum i.e., the Council.¹⁵⁴

Again, setting aside the structural obstacles—that is to say, the competence issues—to the EU pursuing a unified external energy security policy, the EU further faces inherent restrictions to whatever competences exist for it to pursue such a policy on behalf of the collective EU interest. Namely, as we discussed above, the guiding principles of the EU as enshrined in Article

relation to the Arctic). The EU is unlike traditional Arctic actors—namely, Canada, Denmark, Russia, Norway, Sweden, Iceland, Finland and the US—which are States with rights and obligations that flow from that status. They all have Arctic strategies. The Arctic has been on the agenda for the EU since 2008. It is relevant to the EU's energy security, environmental protection, and maritime policy objectives. *See also* Commission of the European Communities, Communication to the European Parliament and the Council, The European Union and the Arctic Region COM(2008) 763 Final (Nov. 2008).

154. TFEU, *supra* note 4, art. 352, 2010 O.J. C 83, at 196 (“If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures”) (emphasis added). In this respect, the Council is the final arbiter on whether to espouse a Commission recommendation thus preserving the primacy of the inter-governmental/diplomatic EU institutions (e.g., the Council) over that of EU supranational institutions (e.g., the Commission) in matters where no express powers have been granted to EU institutions by the treaties.

21 TEU.¹⁵⁵ These principles form the broader normative parameters outside which, all EU external action, consequently, appears *ultra vires*.

Let us take as an example cited by Korkmaz¹⁵⁶ the relations between the Gulf Cooperation Council (GCC) and the EU. The EU sought closer energy relations through the promotion of pro-market regulatory norms. The GCC, however, preferred strategic partnerships rather than energy relations that were conditional on market liberalization. Presumably, third-party states—such as the GCC—would be loath to contract such international agreements with the EU that, incidentally or intentionally, seek to depoliticize energy and promote integrated or more rational market models. Korkmaz also cites further instances where the inescapable politics of energy at the inter-state level impact EU interests.¹⁵⁷ For instance, Central Asian states have shunned the EU ‘neighborhood’ like integration of energy markets and prefer hard contracts. Also, see how Spanish support of Moroccan interests in Western Sahara¹⁵⁸ led to the cancelation of concessions for Spain’s Repsol by Algeria, the latter being a long-term supporter of the independence movement for Western Sahara. Also, the Algerian regime relies on oil deals with local tribes as a means of remaining in power.¹⁵⁹

These are just a few instances where political and diplomatic considerations—which some might view or even dismiss as externalities—may actually drive third-party states’ attitudes towards pursuing energy relations with the EU or any other partner. In short, energy-related national strategies are

155. Article 21 of the TEU mandates that all EU external action comply with the following ‘guiding principles’: “democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”. TEU post-Lisbon, *supra* note 8, art. 21, 2010 O.J. C 83, at 28–29.

156. KORKMAZ, *supra* note 9, at 25.

157. *Id.* at 25–26.

158. Currently, largely under Moroccan administration. See generally *The World Factbook*, CENT. INTELLIGENCE AGENCY (Mar. 21, 2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html>.

159. See *La rente pétrolière ne garantit plus la paix sociale*, LE MONDE ECONOMIE, Mar. 15 2011, <http://lemonde-emploi.blog.lemonde.fr/2011/03/15/«-la-rente-petroliere-ne-garantit-plus-la-paix-sociale-»-dans-«-le-monde-economie-»/>.

developed against complex backdrops, rather than solely within market/regulatory contexts. While energy-poor state actors and groups of states (e.g., the EU) cannot use energy as a diplomacy tool or weapon to either encourage or coerce behavior of other states, they can, however, use their tariffs, and generally, their trade policies as a stick or a carrot in their external relations with third-party states in a manner that may not be available to energy-rich states. This is particularly the case for energy-rich exporter states, whose economies rely principally on energy revenues due to their being insufficiently diversified or due to their lack of any other comparative advantage on account of geological and other factors relevant to their economies. Such states instead capitalize on their energy relevance, using it as either a stick or carrot in their foreign relations. This is at odds with the agenda of the EU and conceivably other significant energy consumer economies who wish to promote the de-politicization of energy. The ‘international community’ is thus made up of sovereign actors who, whilst legally equal *vis-à-vis* one another within the context of Westphalian sovereignty and the post-WW II international legal order,¹⁶⁰ actually amount to an aggregation of disparate parties rather than a cohesive community *per se*. Internationally, state actors possess interests, strengths, and levels of influence that are highly disparate *inter se*.

We have seen some of the matters that may push third party states to prefer strategic partnerships with hard contracts, rather than regulatory and market convergence with the EU. On the other hand, as we have also mentioned, the EU is restricted in its external actions not only by competence issues but also by inherent limitations on how it may pursue external relations for matters where competence exists. To be more precise, a proper application of Article 21 TEU on all instances of EU external relations—including all consequent EU energy-related

160. Namely, of the United Nations (UN) and of any other legal orders based on multilateral arrangements to which states are parties and to the extent that such agreements provide. With the exception of those states that have a privileged position within the UN by having a *sui juris* seat in the UN Security Council which places them apart from the overwhelming majority of sovereign States. Also, inequality between sovereign States exists within other fora—e.g., the International Monetary Fund (IMF), where influence is linked to the extent of a State’s voting rights which, in turn, are determined by its fiscal contributions to the IMF.

agreements with third-party states that have poor human rights records, such as some states in the Caspian and MENA—must comply with, if not promote, the EU’s guiding principles. In that respect, whilst the EU’s strategic energy partners may want a straightforward partner in their energy dealings with the EU, the EU is inherently constrained in meeting such expectations. That is not to say that EU member states’ energy needs remain unaddressed; EU member states continue to engage with the outside world through their strategic partnerships and through the operation of regional and global energy markets. At the general international law level, a plethora of agreements exists between various configurations of state parties—including EU states in their own right—e.g., the ECT, bilateral and multilateral investment treaties (BITs/MITs)¹⁶¹—that establish the fundamental conditions that facilitate inter-state investment, trade, and the operation of markets. As we mentioned earlier, Article 21 TEU does not, on its own strength, restrict external action pursued by EU member states *qua* sovereign entities in their own right.¹⁶²

161. Note that BITs form the bulk of international investment agreements (IIAs), namely, 2,833 out of 3,164 IIAs. Thirty-three out of the 47 IIAs signed in 2011 are BITs. Sixty-nine BITs were signed in 2010. The number of BITs may be decreasing annually; however, regionalism (through regional trade agreements/free trade agreements and customs unions) is on the increase. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES*, at xx, U.N. Doc. UNCTAD/WIR/2012, U.N. Sales No. E.12.II.D.3 (2012); see also RAFAEL LEAL-ARCAS, *INTERNATIONAL TRADE AND INVESTMENT LAW: MULTILATERAL, REGIONAL AND BILATERAL GOVERNANCE* 163–268 (2010); Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?* 11 *CHI. J. INT’L L.*, 597, 600 (2011); Rafael Leal-Arcas, *The Multilateralization of International Investment Law* 35 *N.C. J. INT’L L. & COMM. REG.* 33 (2009); Rafael Leal-Arcas, *The Fragmentation of International Trade Law: Is Now the Time for Variable Geometry?*, 12 *J. WORLD INV. & TRADE* 145 (2011).

162. That said, under international law (namely, under rules of customary international law on state responsibility), EU member states in their capacity *qua* subjects of international law with treaty-making capacity may be committing an international wrong by breaching or otherwise not honoring any of their international obligations owed to other subjects of international law, including to international organizations. This is a complex field of customary law that, amongst other things, is concerned with aspects of an obligation at issue—e.g. whether it flows from *jus cogens* or from elsewhere, to whom it is owed, and so on in order to establish who may raise legal complaints, what action is legally feasible, and what form such action may take. For the purposes of the present paper, we do not intend to analyze this in any further detail. However, EU member states have freely consented to be bound by the TEU. At Article 24§3 TEU it is stated that: “The Member States shall support the Union’s external and

Another element to take into account in relation to EU preference for market liberalization over strategic relations based on hard contracts of supply is the EU's commitment to competitive markets. For instance, the Commission—as we said earlier, theoretically the vanguard of the EU collective interest—has been critical of long-term energy contracts in the EU and their implications for competition.¹⁶³ Contracts often tied prices and energy trade volumes, and often excluded other players from the market by placing conditions on final use. For the Commission, and undoubtedly, for many others, such matters have distortive effects on trade and competition. Although long-term contracts are not on their face illegal within the EU

security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. *They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations*" TEU post-Lisbon, *supra* note 8, art. 24, 2010 O.J. C 83 at 30(emphasis added). The implication of this provision is that, potentially, any *sui juris* activity on the part of an EU member state that is deemed 'contrary to the interests' of the EU could be the subject of objections including legal proceedings instigated by the Commission in its role as vanguard of EU collective interest. In effect, Article 24 TEU becomes a further—supranational—limitation to each member state's capacity to engage in external affairs. Setting aside whether a member state's legal system is monist or dualist in terms of its international agreements, in that sense, Article 24 TEU could be regarded a restriction present in all EU member states' constitutional landscape by way of their adoption of the TEU.

163. According to Bellantuono, the Commission found that the IEM was structurally characterized by long-term contracts that foreclosed supply and with other restrictions or distribution clauses. The Commission scrutinized contracts for their effects on the IEM. The Commission then took a dim view of these practices and became more interventionist on account of its remit to promote/restore competitive conditions in the IEM. This was intensified when it was granted powers by Council Regulation No. 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. L1/1. There had also been EU determinations on alleged anti-competitive practices in the energy markets of EU member states. For instance, the 2007 Commission's Hearing Officer's determination in the *Distrigas* case where a dominant Belgian gas operator had made certain contractual commitments that disfavored other operators in Belgian markets. See COMMISSION OF THE EUROPEAN COMMUNITIES, FINAL REPORT OF THE HEARING OFFICER IN CASE COMP/B-1/37.966-DISTRIGAZ (2007), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37966/37966_594_7.pdf; see also *Vereniging voor Energie, Milieu en Water and Others v. Directeur van de Dienst uitvoering en toezicht energie*, Case C-17/03 [2005] E.C.R. I-4983 (analyzing priority rights for reserving transport capacity for energy goods). Again, an energy actor was forced to make changes to allow other actors a share of the market. See Giuseppe Bellantuono, *Contract Law, Regulation, and Competition in Energy Markets*, 10 COMPETITION & REG. NETWORK INDUS. 159, 167-75 (2009).

context, they are to be scrutinized on a case-by-case basis to assess their impact on the overall market context. The implications of this is that provisions in long-term contracts between energy actors based in an EU member state and third-party supplier states may be set aside if found to be in breach of EU competition rules. This may affect how desirable long-term contracts with EU member states might be to third-party supplier states.

B. Rise in Shale Gas Extraction and its Effect on EU Energy Security

There are also other developments internationally that have implications for EU energy security. A fairly recent one is the rise in shale gas extraction that could potentially translate into larger volumes of gas becoming available on gas markets.¹⁶⁴ This development has assisted the US on its path towards energy independence and makes it a potential competitor of Russia as a supplier of gas to the EU. In what has been lauded as a positive consequence of the rise of shale gas fracking, gas reserves that had been too difficult to extract now reach markets. This is a development that could lead to reduction or even displacement of coal as a primary input resource for the production of energy.

This is important, given the need to lower the GHG footprint of energy production. Whilst gas is not emissions-free, it is less polluting than coal. That said, shale gas, due to the intensiveness of fracking—the extraction process used—is environmentally harmful in other ways.¹⁶⁵ In that respect, the evangelism that surrounds shale gas may be unjustified given that this energy source is not in the final analysis necessarily ‘greener’.¹⁶⁶ The geostrategic implications are that greater use of

164. It is worth noting that gas is chiefly traded regionally. Gas markets are largely more regional than global. That said, the prospect of more gas reserves—be it through shale fracking or conventional extraction processes—becoming accessible and exploitable, alongside technological developments around gas storage and transfer, may pave the way towards the integration of gas markets into a global gas market. See Dick de Jong, *supra* note 149, at 221–45 (discussing developments in gas markets globally).

165. See BRITISH GEO. SURV., *supra* note 128.

166. Most astonishing has been Professor Riley’s evangelism of shale gas in his address at the November 2012 workshop on the EU’s ‘Energy Roadmap 2050’ organized by the European Parliament’s Directorate-General for External Policies, in which he asserted that the US moved from a position where in 2005 it was using coal

shale gas could potentially undermine the environmental objectives of the EU and of the international community, whilst also leading to environmental—including geological—deterioration in the regions where extraction is taking place.

Naturally, environmental degradation is indifferent towards territorial boundaries. Often, environmental disasters transcend boundaries and wreck havoc on adjacent territory—e.g., oil spills, land subsidence, and so on—or even on territory considerably further afield, as is the case with rising sea levels, tsunami reverberations, and other climatic disasters. This is important to bear in mind when risk-assessing and also establishing obligations owed to other rights holders under general and particular international law. For instance trade-related measures taken by the EU to discourage highly polluting processes elsewhere in the globe,¹⁶⁷ could be justified under general international law, and under particular international law (e.g., within the justifications possible to invoke within the World Trade Organization (WTO) system).

Despite the warm reception that the rise of shale gas may meet with, other projections indicate that there may be a regression towards greater coal reliance. Rising consumption rates, inadequate investment in upstream and downstream oil

for 50% of energy production to the current 30% due to shale gas, and that the US was set on becoming energy self-sufficient. In the US, gas now costs as low as US\$3 per British Thermal Units (BTUs) whereas the EU price is around US\$10–14 per BTU. What is more, the US has or may have overtaken Russia in gas and could compete with it for gas sales. Professor Riley ended by advising that the EU ought to adopt policies that de-link its energy security from its environmental protection commitments. See Energy Roadmap Workshop, *supra* note 33, at 7.

167. A case in point is an earlier dispute between Canada and the EU in relation to oil extracted from the tar sand-fields in Alberta, Canada. This tar oil is highly polluting when compared to conventionally extracted crude oil. The EU Commission had proposed to the EU membership to agree on labeling such oil 'highly polluting' as a first step towards introducing measures to discourage its importation and therefore use of this extraction process. This appears to have not been unanimously endorsed by EU member states and therefore the proposal was abandoned. Canada's earlier response is telling however, as it threatened action within the WTO. See Int'l Centre for Trade and Sustainable Dev. ("ICTSD"), *Trade Tensions Soar as EU Prepares to Vote on Canadian Oil*, 16 BRIDGES WEEKLY TRADE NEWS DIGEST No. 7, 1, 8 (Feb. 22, 2012), <http://ictsd.org/downloads/bridgesweekly/bridgesweekly16-7.pdf>; see also Alex Hobbs, *Tar Sands Threaten to Pollute EU-Canada Relationship*, ST. ANDREWS FOREIGN AFFAIRS REV. (Oct. 8, 2012), <http://foreignaffairsreview.co.uk/2012/10/oil-eu-canada/> (suggesting that Canada thought of acting proactively, given that it does not export such oil to the EU).

and gas infrastructure, wildly inadequate investment in renewables, diminishing peak oil and peak gas reserves, and energy security concerns may all coalesce to push economies back to coal. Energy production may get a lot dirtier.¹⁶⁸ Also, the IEA considers it likely that by 2017 global coal consumption is to stand at 4.32 billion tons of oil equivalent (btoe), versus around 4.40 btoe for oil.¹⁶⁹ Naturally, this is most disconcerting given that more meaningful action is needed to avert the likelihood of climate change that is both irreversible and catastrophic. In this respect, how can the EU take meaningful action globally?¹⁷⁰

C. Impact of the EU Emissions Trading System

In relation to its environmental protection efforts, the EU has, amongst other things, set up a sophisticated intra-EU emissions trading system (EU ETS) within which it is progressively drawing in all major polluting industries, including aviation and prospectively the shipping industry.¹⁷¹ In the case of aviation, this has rattled many a third-party state, given that the

168. See International Institute for Asian Studies (“IIAS”), *Chinese and EU Energy Security*, IIAS NEWSLETTER No. 62, 21 (2012), http://www.iias.nl/sites/default/files/IIAS_NI.62_FULL.pdf.

169. *Coal's Share of Global Energy Mix to Continue Rising, with Coal Closing in on Oil as World's Top Energy Source by 2017*, IEA (Dec. 17, 2012), <http://www.iea.org/newsroomandevents/pressreleases/2012/december/name,34441,en.html>. Nineteen per cent of the current global energy mix derives from alternative and renewable energy sources however only 3% comes from renewables, presumably the balance comes from nuclear and other alternatives that are neither renewable nor environmentally safe. By 2030, no significant changes are anticipated to take place. Renewables are likely to remain marginal to the global energy mix.

170. There are alternative views to the current system on how to tackle climate change from the bottom up. See RAFAEL LEAL-ARCAS, *CLIMATE CHANGE AND INTERNATIONAL TRADE* (2013); Rafael Leal-Arcas, *Kyoto and the COPs: Lessons Learned and Looking Ahead*, 23 HAGUE YEARBOOK OF INT'L L. 17 (2011); Rafael Leal-Arcas, *A Bottom-up Approach for Climate Change: The Trade Experience*, 2 ASIAN J. OF L. & ECON. 1, (2011); Rafael Leal-Arcas, *Top-down versus Bottom-up Approaches for Climate Change Negotiations: An Analysis*, 6 THE IUP J. OF GOVERNANCE AND PUB. POL'Y No. 4, 7 (2011); Rafael Leal-Arcas, *Alternative Architecture for Climate Change: Major Economies*, 4 EUR. J. OF LEGAL STUD. NO. 1, 25 (2011); Rafael Leal-Arcas, *Is the Kyoto Protocol an Adequate Environmental Agreement to Solve the Climate Change Problem?*, 10 EUR. ENVTL. L. REV. 282 (2001); Rafael Leal-Arcas, *Combining Top-down and Bottom-up Approaches for Climate Change Negotiations*, OUTREACH, <http://www.stakeholderforum.org/sf/outreach/index.php/cop17day4home/490-cop> (last visited May 30, 2013).

171. See *The EU Emissions Trading System*, EUR. COMM. (Jan. 4, 2013), http://ec.europa.eu/clima/policies/ets/index_en.htm. See also Rafael Leal-Arcas, *Unilateral Trade-related Climate Change Measures*, 13 J. WORLD INV. & TRADE 875, (2012).

EU ETS regime had been extended to all airline operators with flights that enter or depart from EU territory.¹⁷² What is more, the inclusion of aviation was also opposed by the EU aviation industry. Following sustained opposition, the EU caved in and announced a year-long moratorium on 12 November 2012 that suspends the application of the EU ETS on flights that are not entirely limited to EU territory.¹⁷³ Whilst, rather self-servingly, various industries would want the EU ETS to fail, it is an example of environmentally minded action that ought to be supported and replicated globally. We say this because the EU ETS goes way beyond any other instance of inter-state cooperation on the protection of the environment within the context of the UNFCCC, the WTO, or elsewhere.¹⁷⁴ The EU ETS has proven worthwhile in that during 2011, of the 8,081 million tons of CO₂e that were globally traded through emission credits, 7,853 were traded through the EU ETS—in other words, the value of EU ETS transactions stood at US\$147.8 billion whilst the value of global transactions stood at US\$148.8 billion.¹⁷⁵

In this respect, the EU ETS is an example of EU action that has implications for third-party states. Conceivably, discontent on the part of third-party states in relation to what they may regard as EU unilateral action could lead to their taking hostile action against the EU's interests abroad, including in connection with its energy security efforts. Whether this is a risk worth taking really depends on the effect of EU action. Whilst measures aimed at the protection of the environment—such as the EU ETS, whose inherent value is that it seeks to contain emissions within EU territory—are always worth encouragement in the grander scheme of things, it may be that their benefit is disproportionate to the consequential cost—e.g., to the

172. China, India, and Saudi Arabia, amongst others, have instructed their airlines not to comply. See Energy related—the proposed extension of the EU emissions trading system to aviation, TRADING POWERS (Apr. 14, 2012), <http://lawonglobaltradeinenergyandfoodcommodities.wordpress.com/2012/04/14/cu-ets/>.

173. See *EU, Aviation Industry Clash over Emissions Scheme*, 16 BRIDGES WEEKLY TRADE NEWS DIGEST No. 21, INT'L CENTRE FOR TRADE AND SUSTAINABLE DEV., (May 30, 2012), <http://ictsd.org/i/news/bridgesweekly/134007>.

174. See THE WORLD BANK, STATE AND TRENDS OF THE CARBON MARKET REPORT 2012, at 73–104 (2012) (discussing initiatives elsewhere including Australia, South Korea, and the United States).

175. *Id.* at 10.

economic damage by likely retaliatory responses on the part of third-party states. To make this clear, let us list some figures around global emitters: The greatest GHG emitting economies globally, in terms of absolute volumes of emissions during 2007 were: China (c. 6,538 million tons of CO₂), the US (c. 6,094 mtCO₂), the EU (c. 4,200 mtCO₂), India (c. 1,610 mtCO₂), Russia (c. 1,580 mtCO₂), Japan (c. 1,303 mtCO₂), Canada (c. 590 mtCO₂), South Korea (c. 503 mtCO₂), Iran (c. 495 mtCO₂), Mexico (c. 471.46 mtCO₂) Saudi Arabia (c. 402 mtCO₂), Indonesia (c. 397 mtCO₂), Australia (c. 396 mtCO₂), and Brazil (368.32 mtCO₂).¹⁷⁶ In terms of CO₂ emissions per capita or per territorial span (measured in square kilometers), a different picture emerges.¹⁷⁷ However, the point we wish to make is this: whilst it is a laudable move on the part of the EU to act responsibly in terms of its highly polluting global impact in implementing the EU ETS territorially, it is less clear how proportionate it is for the EU to seek to extend the scope of the EU ETS to foreign industries—in the way that the EU had attempted to do so regarding foreign aviation industries that operated flights with portions within EU territory—when,

176. These figures are based on 2007 data available on the United Nations Statistics Division. In the case of the EU, the global figure cited by the authors is based on the individual figures for all 27 EU member states (before the accession of Croatia to the EU on 1 July 2013 as the 28th member of the EU) excluding their overseas territories. We have done this in order to get a figure regarding man-made emissions that would correspond to the territorial reach of the EU ETS. See *Environmental Indicators: Greenhouse Gas Emissions*, UNITED NATIONS STAT. DIV. (July 2010), http://unstats.un.org/unsd/ENVIRONMENT/air_co2_emissions.htm.

177. The highest polluting economies in terms of tons of CO₂ per capita during 2007 were: Qatar (c. 55.4 tCO₂), Dutch Antilles (c. 32 tCO₂), the United Arab Emirates (c. 31 tCO₂), Kuwait (c. 30 tCO₂), Bahrain (c. 29 tCO₂), Luxembourg (c. c. 25 tCO₂), Aruba (c. 23 tCO₂), Brunei (c. 19.8 tCO₂), the US (c. 19.7 tCO₂), the Falkland Islands (c. 19.6 tCO₂), Australia (c. 19 tCO₂), and Canada (c. 18 tCO₂). We have no global figure for the EU average given that the figure per EU member state would have a different weighting on the EU average due to the disparate population sizes. However, if we were to discount the highest EU member state figure—namely, Luxembourg (c. 25 tCO₂ per capita)—the next offenders in the EU are: Estonia (c. 14 tCO₂), the Czech Republic (c. 12.6 tCO₂), and Finland (c. 12.5 tCO₂). The remaining EU member states vary from around 3.7 to 11.4 tCO₂ per capita. *Id.* Eurostat figures from 2009 suggest that the EU figure per capita for CO₂ emissions from fuel combustion stood at around c. 7 tCO₂ per capita. Also according to this set of figures, whereas Russia stood at 10.8 tCO₂, China at circa 5 tCO₂, India at 1.3 tCO₂, and Brazil at 1.7 tCO₂ per capita. See EUROSTAT POCKETBOOKS, THE EUROPEAN UNION AND THE BRIC COUNTRIES 108 (2012 ED.), available at http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-31-11-414/EN/KS-31-11-414-EN.PDF.

potentially, it could have to face retaliatory action on the part of third-party states.

Looking at the geostrategic context in relation to the energy needs of the EU, let us briefly examine some aspects of the EU external relations with the outside world.

D. *EU External Energy Relations*

The EU has strategic partnerships with all BRIC countries.¹⁷⁸ Whilst the EU does not deal with the BRICs as a single group, it does so bilaterally.¹⁷⁹ Whilst the BRIC countries have certain aspects in common—including large populations, wide territorial span, and rapid economic growth—they are also separated from each other, and from the EU, by significant economic, social and political differences. Brazil and Russia are major energy significant economies in that they are net exporters *par excellence*, whilst the opposite is the case for China and India. Out of the BRICs, they are the ones that rely on energy imports for their economic growth. However, the emergence of the BRICs has been powered by the prodigious use of highly polluting hydrocarbons. The fast pace of development has caused unprecedented environmental impacts in those economies, and globally, in terms of hydrocarbon combustion-related emission increases. However, whilst China remains the highest emitting economy in absolute terms, it is taking a lead in investment in renewables and reforestation. In that respect, China appears to be an environmentally responsible energy consumer.¹⁸⁰

178. This is the case beyond the field of energy. See, e.g., Rafael Leal-Arcas, *The European Union and New Leading Powers*, *supra* note 145; Rafael Leal-Arcas, *How Will the EU Approach the BRIC Countries? Future Trade Challenges*, 2 VIENNA J. INT'L CONST. L. 235 (2008).

179. See, e.g., Rafael Leal-Arcas, *The European Union vis-à-vis Brazil and India: Future Avenues in Selected Trade Policy Areas*, 2 INT'L J. OF PRIVATE L. 109 (2009); Rafael Leal-Arcas, *The EU and Brazil: Trading Partners in Different Fora*, 8 THE JEAN MONNET/ROBERT SCHUMAN PAPER SERIES I (2008).

180. However, this is not the case in terms of the implications that Chinese energy diplomacy has on global human security. China is involved in aid-for-oil relations with African States. This is problematic when it involves States such as Sudan (before the secession of South Sudan) and Zimbabwe, and has implications for human security in those States. For instance, China may have opposed UN Security Council action in relation to the massacre in Sudan possibly due to its energy interests in the region. This sort of horse-trading is sadly the order of the day in diplomatic circles. It is not specific

In relation to Chinese and EU relations, there has been bilateral activity.¹⁸¹ The EU and China currently amount to about a third of global energy consumption, with the share of China projected to rise over the next two decades.¹⁸² In May 2012 the EU and China issued joint declarations in relation to energy, including energy security.¹⁸³ In December 2012 a high-level conference was held in Beijing in connection to one of those declarations—namely, the EU-China *Joint Declaration on Energy Security*—to look at ways to cooperate on energy-related matters. Areas of cooperation include nuclear safety (in light of Fukushima), energy security, and the promotion of environmental policies including greater use of renewables.¹⁸⁴ What is more, the EU and China have shared interests in the MENA region given that energy transit states such as Yemen and Egypt are of critical importance to their security of supply. Again, to whatever extent EU competences permit, the EU and

to China. Taking the post-WWII era alone, the United States and other Western states have also promoted their economic—including their energy—interests at a great human cost to their societies and to the societies of other states—e.g., in relation to the two Iraq wars, support for the 1953 Iranian *coup d'état* in the aftermath of oil nationalizations, and so on. Western geostrategic interests in various regions—including MENA, Caspian, Latin American, and Sub-Saharan regions—have aided, and consequently benefited from installing, repressive regimes.

181. See *The European Union and China: A Maturing Partnership*, DELEGATION OF THE EUR. UNION TO CHINA, http://eeas.europa.eu/delegations/china/eu_china/political_relations/index_en.htm (last visited May 31, 2013) (discussing the EU's breadth of external action with China); see also, *Energy from Abroad: China*, EUROPEAN COMMISSION, http://ec.europa.eu/energy/international/bilateral_cooperation/china/china_en.htm (last visited May 31, 2013) (discussing EU-China energy relations). On EU-China trade relations, see Rafael Leal-Arcas, *European Union-China Trade Relations*, 2 TRADE, L. & DEV. 224 (2010).

182. *Key Figures*, *supra* note 15, at 3.

183. The three Joint Declarations signed on 3 May 2012 in Brussels are the Joint Statement for Enhanced Cooperation on Electricity Markets between the European Commission and the State Electricity Regulatory Commission of China, the EU-China Partnership on Urbanisation, and the EU-China Joint Declaration on Energy Security. See *Cooperation on Energy Security: China*, DELEGATION OF THE EUROPEAN UNION TO CHINA, http://eeas.europa.eu/delegations/china/press_corner/all_news/news/2012/20121213_01_en.htm (last visited May 31, 2013).

184. See *Cooperation on Energy Security: China-EU Government and Business Perspectives*, EUR-CHINA CLEAN ENERGY CENTRE (DEC. 12, 2012), http://ec.europa.eu/euraxcss/links/china/docs/20121213_Cooperation_on_energy_security_background.pdf.

China could coordinate responses to events that disrupt their energy supplies.¹⁸⁵

In relation to Russia, we have briefly referred to aspects of its energy relations with the EU.¹⁸⁶ Russia is a key EU energy partner in terms of its oil, gas, and biofuels exports.¹⁸⁷ As mentioned earlier, a steady supply of gas—which is less polluting than oil and coal for the production of energy—alongside biofuel imports could considerably enhance EU efforts towards a low-carbon economy.

Also as mentioned earlier, the fact that there may be rising demand competition for the EU by China and India is perhaps less of a concern when one considers the vast Russian reserves and their wide distribution across Russian territory. The implication of this is that Russia needs a healthy EU energy market as much as the EU needs a steady supply of energy from Russia. However, as we have also alluded to, relations are complicated in that EU member states, due to historical and

185. China and EU member states currently cooperate in various fora. For instance, in the Major Economies Forum on Energy and Climate Change (MEF), which is a recent development that brings together 17 major economies—namely Australia, Brazil, Canada, China, the EU, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, South Africa, the UK, and the US—with net energy importer economies such as the EU, India, China and the United States, alongside net energy exporters such as Brazil, Russia, and Mexico. It was set up at the instance of the US—as the ‘Major Economies Meeting on Energy Security and Climate Change’—to act as a negotiations’ anteroom for the most emissions-significant economies in relation to wider UN negotiations on climate change that were taking place. Purportedly, the MEF is also concerned with: “... *advanc[ing] the exploration of concrete initiatives and joint ventures that increase the supply of clean energy while cutting greenhouse gas emissions*”. See *About, MAJOR ECON. FORUM ON ENERGY & CLIMATE*, <http://www.majoreconomiesforum.org/about.html> (last visited Apr. 8, 2013). Also, China participates in the International Energy Forum—which brings together OPEC and IEA members—in the G8+5 forum, the G20, and also on a more informal footing directly with the IEA. See *Non-member Countries*, INT’L. ENERGY AGENCY, <http://www.iea.org/countries/non-membercountries> (last visited Apr. 8, 2013).

186. See *Russia*, EUR. COMM’N, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia> (last visited Apr. 8, 2013) (providing a run-down on EU-Russia trade relations). The Commission states: “Russia is the third trading partner of the EU and the EU the first trading partner of Russia [...] The main EU imports from Russia are oil (crude and refined: €130 billion) and gas (€24 billion). For these products, as well as for other important raw materials, Russia has committed to limit its export duties. The EU is the largest foreign investor in Russia, with investments worth around €120 billion in 2010. Russian investments in the EU amounted to €42 billion in 2010.” *Id.*

187. See generally DYNAMICS OF ENERGY GOVERNANCE IN EUROPE AND RUSSIA (Caroline Kuzemko et al. eds., 2012).

economic reasons, have very different attitudes towards EU energy dependence on Russia. The much publicized, and perhaps somewhat misunderstood, recent gas disputes between Russia and Ukraine also compounded these attitudes when several EU states consequently experienced energy shortages.¹⁸⁸

We have also referred to the constitutionally entrenched need for EU external action to be consistent across the EU policy spectrum. Often this means that bilateral legal relations between the EU and third-party states, including Russia, are not strictly *realpolitik* in that they involve enlightened conditionalities (e.g., in relation to the promotion of the rule of law, human rights, and civil liberties).¹⁸⁹ This can be problematic as, understandably, the Kremlin may balk at what may appear to it as hypocritical lecturing on the part of the West. However, it is helpful for Russian policy-makers to understand that in its dealings with the outside world, EU institutions *per se* do not have a free hand in how they engage, but must do so within the existing competence parameters. Again, as we have said, this leaves EU member states largely able to pursue closer bilateral/multilateral relations outside the EU context. That said, the EU and Russia have had a Partnership and

188. Ukraine has historically enjoyed prices for Russian gas exports that were lower than the prices for gas exports destined for EU markets. It appears that some sort of agreement had been in place between Russian and Ukrainian energy operators, and the respective governments, that involved transit for subsidized gas prices. Presumably, the pro-western stance of a section of the Ukrainian political establishment, which had previously sought NATO membership, antagonized Russia into using its energy advantage as a political tool by announcing increases to the subsidized gas prices destined for Ukraine for domestic consumption. Consequently, Ukraine attempted to reserve gas for its own needs at the previous prices, which meant that Russian gas intended for EU markets was held in Ukraine. This resulted in several EU states experiencing energy shortages. See *Q&A: Russia-Ukraine gas row*, BBC NEWS (Jan. 20, 2009), <http://news.bbc.co.uk/1/hi/world/europe/7240462.stm>. Tension between Russian gas company Gazprom and Ukraine continues because Ukraine failed to import agreed natural-gas in 2012, which, in turn, has meant disruption of gas supply to the EU in the past. Anna Shiryacvskaia & Daryna Krasnolutska, *Gazprom Sends Ukraine \$7 Billion Bill as Gas Dispute Deepens*, BLOOMBERG, Jan. 28, 2013, <http://www.bloomberg.com/news/2013-01-27/gazprom-sends-7-billion-bill-to-naftogaz-as-gas-dispute-deepens.html>. For background information on Ukraine-NATO relations, see *NATO's Relations with Ukraine*, NORTH ATLANTIC TREATY Org., http://www.nato.int/cps/en/SID-E2280ADF-B6517611/natolive/topics_37750.htm (last visited Apr. 8, 2013).

189. For a fuller exposition of EU-Russia trade relations, see Rafael Leal-Arcas, *The EU and Russia as Energy Trading Partners: Friends or Foes?*, 14 EFA REV. 337(2009).

Cooperation Agreement (PCA) in place since 1994. Whilst this PCA has expired (namely in 2007, 10 years after being ratified in 1997), this has not inhibited mutual trade and investment flows.¹⁹⁰ However a new PCA has yet to be concluded.¹⁹¹ Conceivably, energy and social reform matters might have made for complicated negotiations.

Furthermore, the exceptionally large energy resource endowments of Russia mean that its interests in energy-related multilateralism, and, consequently, its stance towards it, can be very different to those of energy net importing states. For instance, Russia, whilst initially having signed, never ratified the Energy Charter Treaty (“ECT”) when it informed the ECT Secretariat of its decision to withdraw.¹⁹² It is helpful to think of the ECT as Plan B to what had been Plan A of Western net energy importing states—namely, to conclude an energy-specific agreement within the context of the General Agreement on Tariffs and Trade (GATT)/WTO system.¹⁹³ Whilst the ECT

190. On EU-Russia trade relations, see Rafael Leal-Arcas, *EU Relations with China and Russia: How to Approach new Superpowers in Trade Matters*, 4 J. INT’L COM. LAW & TECH. 22 (2009).

191. See *EU Relations with Russia*, EUR. UNION EXTERNAL ACTION, http://eeas.europa.eu/russia/index_en.htm (last visited Apr. 8, 2013). It is stated that: “Negotiations on a New EU-Russia Agreement were launched at the Khanty-Mansiysk Summit in June 2008. The New Agreement should update and replace the existing Partnership and Cooperation Agreement. It should provide a comprehensive framework for EU-Russia relations, and include substantive, legally binding commitments in all areas of the partnership, including political dialogue, JLS issues, economic cooperation, research, education and culture, as well as solid provisions on trade, investment and energy. The negotiations were started in July 2008, and by the end of 2010, 12 full negotiating rounds will have taken place.” *Id.*

192. The Energy Charter Treaty (“ECT”) currently has 54 Members of which 49 have ratified. See *Members & Observers*, ENERGY CHARTER, <http://www.encharter.org/index.php?id=61&L=0> (last visited Apr. 8, 2013). Parties that have ratified may withdraw after the conclusion of the first five years after ratification. What is more, parties remain bound by ECT investment protection obligations for 20 years post-withdrawal. See Energy Charter Treaty (“ECT”), art. 47, 34 ILM 373 (1995), at 91 [hereinafter ECT]. For those parties who have signed but not ratified, it is possible to withdraw with effect within a shorter timeframe—namely 60 calendar days, as was the case of Russia, which had not ratified the ECT before its notification to withdraw. See *id.* at 90. We mentioned in a previous footnote that the Belenux states, in their March 2006 common ‘Position Paper on Energy Security and Foreign Policy’ addressed to the European Council, had recommended that the EU should push Russia to ratify the ECT.

193. See THOMAS W. WÄLDE, *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE* (1996) (providing a fuller analysis on the ECT, its history, and for a more critical perspective).

expressly enshrines sovereignty over natural resources¹⁹⁴—a truism under international law as well¹⁹⁵—it also protects investor interests in the jurisdictions of ECT members in that it entrenches the legal right to compensation when expropriations are carried out on the part of the ECT party that is the host state.¹⁹⁶ As an aside, it is worth pointing out that the ECT does not obligate its parties to liberalize their energy markets, to permit inward flows of foreign investment, nor to provide energy exploitation contracts to all ECT parties on a non-discriminatory basis. Broadly, what it does is provide disciplines for energy-sector foreign investment once this has been welcomed in the territory of an ECT party.

In sum, once investments take place within ECT party territories, ECT parties must provide indiscriminate treatment between foreign investors, and among foreign investors and domestic investors (on the Most-Favored-Nation (MFN) and National Treatment bases). Incidentally, on 23 November 2012, the ECT parties agreed to begin the process of updating the ECT during successive rounds of negotiations—known as the *Warsaw Process*—to take place in Warsaw, Poland. This has been argued as necessary to meet current demands and to also draw in membership from other regions.¹⁹⁷ Despite the situation

194. See ECT, *supra* note 192, art. 18, at 62.

195. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 43 (2nd ed. 2004). Sornarajah refers to the notion of permanent sovereignty over natural resources (PSNR) as: “[merely] assert[ing] a truism in international law that the sovereignty of a State includes control over all persons, incidents, and substances within a State unless such control has been removed by treaty” *Id.* (emphasis added). In other words, there must be previous State consent for any erosion of PSNR.

196. See ECT, *supra* note 192, art. 10–17, at 53–61. The ECT exclusively deals with obligations to protect foreign investment, thus elevating investor *interests* to legally protected *rights* flowing from the ECT. These include the right to compensation, which embeds the *Hull formula* of compensation,—i.e., that it be ‘prompt, adequate, and efficient’, named after Cordell Hull, the US Secretary of State in 1938, who articulated the US’s position in relation to the expropriations carried out by the Mexican state during the Mexican Revolution of 1910. *Id.* art. 12(2), at 56. The ECT also heavily restricts sovereign rights of expropriation so that expropriations may be permissible to the extent they are ECT-compliant. *Id.* art. 13, at 57.

197. See *Member Countries Give Green Light to the Modernisation of the 1991 Energy Charter*, ENERGY CHARTER (Nov. 27, 2012), http://www.encharter.org/index.php?id=21&id_article=334&I=0. The article states that: “Today the Energy Charter Conference at its 23rd Meeting adopted a historic decision to proceed with the modernization of the 1991 Energy Charter, the founding document of the Energy Charter Process. Fully supporting the fundamental principles contained in the 1991

concerning Russia's withdrawal from the ECT, it is interesting to note that the EU is the largest foreign investor in Russia, with investments worth around €120 billion in 2010. Russian investments in the EU amounted to €42 billion in 2010.¹⁹⁸

E. *Role of the World Trade Organization*

The WTO system handles the trade aspects of energy to the extent that its norms extend to energy commodities—be they goods or services—that are traded between WTO members. It is important to note that these norms do not extend to the pre-extraction stage. In that sense, they too preserve the notion of sovereignty over natural resources.¹⁹⁹ However, once natural resources have been extracted and are being traded, WTO members must comply with WTO norms including the prohibition of quantitative restrictions²⁰⁰ on trade flows that are otherwise inconsistent with the specific commitments each WTO member had, at the time of accession, contracted with the WTO. This has important implications, say, for energy resource endowed WTO members who may want to restrict energy or other types of exports or imports in ways that the various WTO agreements do not allow.²⁰¹ For instance, Russia, which became a WTO Member in August 2012, might conceivably have views on the WTO implications for its energy endowments that are at odds with those of energy net importing WTO members.

Charter, under which they have all put their signatures over the years, Charter member countries agreed that this important document required updating. The realities of the world of energy of the 21st century need to be addressed by the Energy Charter Process, as does the changing focus of the Charter, which now goes beyond the traditional link between Western Europe and Former Soviet countries and on to new regions of the globe.”

198. See *Russia*, *supra* note 186.

199. For further details on the link between the WTO and natural resources, see Ehab Abu-Gosh and Rafael Leal-Arcas, *The Conservation of Exhaustible Natural Resources in the GATT and WTO: Implications for the Conservation of Oil Resources*, 14 J. OF WORLD INV. & TRADE, Vol. 14, No. 3, 480–531, 2013.

200. See General Agreement on Tariffs and Trade, art. XI, 33 ILM 1153 (1994), at 17-18 [hereinafter GATT].

201. There had been three complaints (namely complaints WT/DS431/6, WT/DS432/6 and WT/DS433/6) against China and a measure that restricted exports of rare earth minerals. See *Panel established on China's rare earths exports*, WORLD TRADE ORG. (July 23, 2012), http://www.wto.org/english/news_c/news12_c/dsb_23jul12_e.htm (last visited Apr. 8, 2013).

One measure that has been a source of contention is Russia's practice of maintaining different prices for gas sold domestically and that destined for foreign markets. This issue has concerned the Commission to the extent that it took unilateral action, irrespective of whether it was proven that any WTO norms had been breached. The Commission did this by raising duties on imports that it had deemed had benefited from cheaper production costs due to lower domestic gas prices.²⁰²

The recent gas disputes between Ukraine and Russia, which led to EU energy flow disruptions, had negative implications for EU energy security. About 20% of the EU gas supply transits through Ukraine²⁰³. EU member states acted unilaterally—in this case with German Chancellor Angela Merkel holding discussions with Russian President, Vladimir Putin. This approach has been criticized as another missed opportunity for the EU to speak with one voice²⁰⁴. In 2011, the EU Commission made a series of policy recommendations to the EU Council and Parliament that included measures to speed up the integration of the Ukraine into the EnC, by instituting political and administrative tri-partite cooperation involving the EU, Russia, and Ukraine to ensure steady gas supplies from Russia through

202. See POGORETSKY & BEHN, *supra* note 39, at 10 (analyzing of the relationship between Russia's dual pricing practice and the various WTO provisions that may be engaged). Pogoretsky and Behn inform us that the International Bank for Reconstruction and Development (i.e., the World Bank) advised that Russian domestic gas prices ought to rise at least to a level that meets production costs. This is incrementally happening. Also, Pogoretsky and Behn believe that Russia is likely to reach a point where there would be total harmony between both gas prices by 2014. They also feel that this will not be due to external pressure, rather, due to economic reasons—namely so that the Russian State would be able to fund the enormous capital investments necessary to modernize and further develop its energy infrastructure. See also YULIA SELIVANOVA, *ENERGY DUAL PRICING IN WTO LAW: ANALYSIS AND PROSPECTS IN THE CONTEXT OF RUSSIA'S ACCESSION TO THE WTO*, Ch. 2 (2008).

203. See *On Security of Energy Supply*, *supra* note 108, at 5.

204. See Florian Baumann, *supra* note 10, at 15. Baumann states that: “[I]t took the EU quite some time to understand what was really happening. Soon after Brussels recognized that this was not simply a trade dispute, a common EU approach was challenged by several bilateral moves, including Germany's Chancellor Angela Merkel meeting independently with Russian Prime Minister Vladimir Putin. Thus, the Union had once again missed an opportunity to ‘speak with one voice’. NATO, for its part, did not show any public reaction at all. However, this crisis in particular revealed not only how import-dependent countries suffer from such a dispute but also how exporters who are reliant on the revenue from energy trade are negatively affected.” *Id.* at 78.

Ukraine.²⁰⁵ Evidence shows that tension between Russia and Ukraine remains as recently as January 2013 over gas transit disputes, where Ukraine received US\$7 billion bill from Gazprom for taking less gas than originally contracted²⁰⁶ and Russia's Gazprom rejected an appeal by Ukraine to renegotiate its gas supply contract.²⁰⁷

This is an example where it becomes evident how reliant the functioning of the IEM is on external action aimed at supply security. The Russia-Ukraine gas dispute brought to the fore energy transit issues.²⁰⁸ The EU, its constituent members, Russia, and Ukraine are all WTO members. GATT Article V relates to goods that temporarily enter the territory of a member and that are destined for consumption outside that territory. Article V mandates that such goods be exempt from customs duties and other encumbrances. In that respect, it enshrines the *freedom of transit* of commodities across the territories of the WTO membership.²⁰⁹ This duty requires that the most convenient route be made available to such traffic and that transit be free from unjustified restrictions.²¹⁰ There is debate as to whether

205. See On Security of Energy Supply, *supra* note 108, at 5.

206. See Roman Olearchyk, *Russia and Ukraine Adopt Poker Faces as Questions Loom Over USD7bn Gas Bill*, FIN. TIMES (Feb. 8, 2013, 6:09 PM), <http://blogs.ft.com/beyond-brics/2013/02/08/russia-and-ukraine-adopt-poker-faces-as-questions-loom-over-7bn-gas-bill/#axzz2Kxsfj9im>.

207. Guy Chazan, *Gazprom Rejects Kiev Gas Contract Plea*, FIN. TIMES (Feb. 14, 2013, 4:43 PM), <http://www.ft.com/intl/cms/s/0/49f8c61c-75d8-11e2-9891-00144feabdc0.html>.

208. For further analysis on energy transit issues, see Vladimir Rakhmanin, *Transportation and Transit of Energy and Multilateral Trade Rules: WTO and Energy Charter*, in GLOBAL CHALLENGES AT THE INTERSECTION OF TRADE, ENERGY AND THE ENVIRONMENT 123–27 (Joost Pauwelyn ed., 2010).

209. GATT, *supra* 200, art. 5(2), at 9.

210. What is more, Article V:2 expressly requires that the “most convenient” route for international transit be made available to such goods. See Report of the Panel, *Colombia—Indicative Prices and Restrictions on Ports of Entry*, ¶ 7.275, WTO/DS366/R (Apr. 29, 2009) (holding that restrictions on the number of Colombian ports permitted to receive certain imports amounted to a restriction unjustified under Article XI given that it had had a ‘limiting effect’ on trade). What is ‘most convenient’ under Article V:2 is far from clear. Presumably this means whatever route is most convenient to the interests of international trade actors rather than to the interests of the host-transit State. See Danac Azaria, *Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade*, 27 J. ENERGY & NAT. RESOURCES L. 559, 570–74 (2009) (highlighting this ambiguity). Azaria—quoting Lauterpacht—refers to the notion of *freedom to transit*—be it found in treaty or custom—as part of a broader *law of peace*/public international law concept relating to freedom of transit and to

this right extends to transit through infrastructures that are fixed to the territory of WTO members.²¹¹ Russian gas imports into the EU flow principally through fixed infrastructure in Ukraine. Fixed infrastructure is quite unlike mobile means of transportation for obvious reasons and we consider that, on balance, it is currently outside the scope of GATT Article V. Freedom of transit under ECT Article 7, however, includes transit through fixed infrastructures.²¹² The EU and its members along with Ukraine are parties to the ECT, while Russia had signed—but not ratified—and has now withdrawn from the ECT. A transit state is obligated to facilitate transit of commodities originating from and/or destined to its WTO and ECT peers, including, in the case of ECT peers, through fixed infrastructure. However, whilst it is one thing to assert that Ukraine—or any other state under ECT obligations—is legally

communication. *Id.* at 561. Lothar Ehring and Yulia Selivanova in *REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW: WTO, NAFTA, AND ENERGY CHARTER* (Yulia Selivanova ed., 2012), refer to freedom of transit as a controversial notion that cannot be held to reflect customary law. They argue this is because States have frequently included transit provisions in their bilateral treaties, which suggests the absence of a freedom of transit provision in customary law. *Id.* at 51–52.

211. Cossy argues that there is nothing in the wording to suggest that transportation via fixed structures is excluded under Article V. She refers to the express exclusion in Article V of aircraft in transit and therefore seeks to argue—presumably, along the lines of the interpretative notion of *expressio unius est exclusio alterius*, that transit through fixed structures is within the scope of Article V. See Mireille Cossy, *Energy Transport and Transit in the WTO*, in *GLOBAL CHALLENGES AT THE INTERSECTION OF TRADE, ENERGY, AND THE ENVIRONMENT* 113, 115 (Joost Pauwelyn ed., 2010). However, Azaria argues more persuasively that, whilst Article 7 ECT applies to such structures, Article V GATT does not. Azaria, *supra* note 210, at 560. ECT Article 7, on its own strength, mandates ECT contracting parties—who incidentally are also GATT/WTO parties—to facilitate transit including via fixed pipes. See ECT, *supra* note 189, art. 7§10(b). The fact that all ECT parties are also WTO members does not mean that the later ECT is capable alone in influencing the interpretation of the earlier GATT; nor does it mean that the interpretation of GATT Article V is static: the law of treaties governs interpretation of legal obligations flowing from inter-State agreements, and there is an elaborate set of applicable rules and principles that may be at play. See Vienna Convention on the Law of Treaties, art.31, May 23, 1969, 1155 U.N.T.S. 331 (largely codifying customary law relating to treaty interpretation). Conversely, the earlier GATT influences the interpretation of the later ECT given that there is express systemic reference in ECT (ECT Article 4 and *passim*) mandating non-derogation from GATT. Incidentally, there are 100 mentions of the GATT in the ECT.

212. See ECT, *supra* note 192, art.7§10(b). The ECT's more detailed approach to energy transit than that in the WTO system is not surprising as the ECT could be viewed as the energy-specific agreement that arose out of the aborted attempt to get an energy-specific agreement concluded within the auspices of the WTO.

obligated to facilitate transit and to refrain from placing restrictions, it is quite another, to say that transit/transportation operators—e.g., fixed infrastructure private operators—are obligated to perform their contractual duties and to continue facilitating energy flows in cases where a dispute arises between the private actors involved and where their contractual agreements do not otherwise mandate.²¹³

The Kremlin clearly views the exploration of its energy endowments as beneficial for Russia on its path to its development²¹⁴ and possibly as a means to its return to being a *machtropolitik* global player. In this respect, put simply, the EU's interests lie in getting more goods to markets. It does this by, amongst other things, promoting measures to that end such as promoting market liberalization, foreign investment protection globally and regionally, by supporting calls for energy subsidies²¹⁵ to be rolled back (given that these could be seen as potentially encouraging inefficient energy use and as creating anticompetitive conditions). On the other hand, Russia's interests lie in retaining as much control over all aspects of its enormous energy endowments as possible, whilst also securing

213. We make this point because we feel it is important to bear in mind that many operators in the global energy markets are also private law subjects, be they private international energy companies or State energy companies. And that price and service-related disputes, whilst potentially harmful to energy security of States by causing energy supply disruptions, could originate in disputes between private actors.

214. An interesting fact cited Pogoretsky and Behn is that Putin's doctoral thesis mentioned the importance of using the energy sector as a State monopoly with a view to fueling the economic development of Russia and returning it to the position of a global superpower. POGORETSKY & BEHN, *supra* note 39, at 7-8.

215. In terms of energy subsidies in the EU and abroad, the Commission recommends that EU action, including external action, also seek to discourage energy subsidies which it deems as contributing to inefficient energy use. See Energy Supply, *supra* note 108, at 2. This is consistent with the efforts of G-8 and the G-20 that have set energy policy priorities, including in relation to hydrocarbon subsidies. See G20 Los Cabos Summit, June 18–19, 2010, *Policy Commitments by G20 Members 1* (2012), available at http://www.g20.org/images/stories/docs/g20/conclu/Policy_Commitments_By_G20_Members.pdf (listing commitments, where, amongst others, Argentina pledges to reduce household energy subsidies, presumably to make more oil available on global markets). See IEA, OPEC, OECD, World Bank Joint Report, *Analysis of the Scope of Energy Subsidies and Suggestions for the G-20 Initiative Prepared for Submission to the G-20 Summit Meeting, Toronto (Canada), 26-27 June 2010*, at 6 (June 16, 2010), available at <http://www.oecd.org/env/45575666.pdf>; see also Pittsburgh Summit, Sept. 24–25, 2009, *Leaders' Statement*, ¶ 24 (Sept. 25, 2009) (suggesting their desire to rationalize and phase out *inefficient* fossil fuel subsidies).

the export markets it relies on to obtain the constant flow of hard currency necessary to update and develop further its upstream and downstream infrastructure and capacity.²¹⁶

We have discussed the polarizing effect that the prospect of closer—more institutionalized—relations between the EU and Russia has on the EU membership. Some EU members may see in Russia a capricious partner, while others see a reliable energy supplier. As mentioned above, about a third of EU gas comes from Russia. The Nord Stream pipeline would allow for this to come under the North Sea whilst the South Stream would allow this to come under the Black Sea to Bulgaria and beyond. Other gas pipelines are being constructed to establish the EU's southern gas corridor—including the trans-Anatolian (TANAP) pipeline crossing Turkey, and pipelines between Turkey and Austria (Nabucco),²¹⁷ and Greece and Italy (ITIG)—to support EU security of supply and to increase import volumes. However, in spite of diversifying supply, it is unlikely that EU dependency on Russian gas imports will lessen.²¹⁸

216. At an EU-Russia summit (Dec. 21, 2012), the Russian President, Putin, defended Russia's practice of linking the price of gas to oil, and its opposition to extending market liberalization norms to its fixed infrastructure through the inclusion of specific terms in the renewed EU-Russia Partnership and Cooperation Agreement. See *Putin Slams Barroso: "You know you are wrong, you're guilty,"* EURACTIV (Dec. 21, 2012), http://www.euractiv.com/energy/putin-barroso-right-guilty-news-516827?utm_source=EurActiv%20Newsletter&utm_campaign=bc497cc398-newsletter_energy&utm_medium=email; see also Press Statement by the President of the European Council Herman van Rompuy Following the 30th EU-Russia Summit, Brussels European Council (Dec. 21, 2012), available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/cc/134546.pdf (summarizing statement of the President of the European Council on the EU-Russia Summit of 21 December 2012).

217. A slight variation of the Nabucco project excludes Turkey. It is called Nabucco-West and connects to TANAP. See Vladimir Socor, *Nabucco-West in Synergy with Trans-Anatolia Project*, EURASIA DAILY MONITOR (May 11, 2012, 5:17 PM), http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=39364.

218. See excerpts from an interview with Professor Jonathan Stern with analyses in relation to EU and Russia gas relations that seem to support this view. On the South Stream, Stern states that: "Across much of Europe, including the European Commission, the South Stream [i.e., the pipeline constructed by Russia to bring gas into the EU market via the Black Sea and Bulgaria] was always regarded as a bluff in order to keep the Nabucco [the pipeline intended to carry Caspian State gas imports into the EU to also weaken EU dependence on Russia] from being built. I've never regarded it as a bluff, because the Russians do not play poker, they play chess." *Europe's Biggest Gas Supplier: No Bluffing*, NAT. GAS EUROPE (Dec. 3, 2012), <http://www.naturalgaseurope.com/europes-biggest-gas-supplier-no-bluffing>. On the reliability of Russia, Stern stated that: "There are many reasons why these pipelines

The geostrategic considerations in relation to the global energy economy, its governance, and global energy security are complex.²¹⁹ We have neither attempted nor intended to provide a full rundown of these considerations. However, what we have sought to do is provide some insights into the sort of considerations and realities that impact the energy interests and security of the EU and its member states.

CONCLUSION

In modern times, energy impacts almost every field of human endeavor. This ‘centrality’ has implications for policy-making given that it cuts across a range of matters. Developing an energy policy that is cohesive and sympathetic to a wide range of policy objectives is hard enough for unitary actors, let alone for the EU that must mediate between the interests of its 28 member states. As energy cuts across a numerous policy fields—some of which fall within the existing EU competence remit—the complexities of EU energy policy-making become ever more apparent. Setting aside questions of EU competence, energy within the EU context complicates EU policy development due to the hugely disparate energy realities between member states. These differences, as alluded to in

[i.e., those built to bring non-Russian gas into the EU market] have taken a long time to happen and haven’t happened yet, but if you’re in Central & Eastern Europe, your question is ‘Look, I’m tired of talking about this—I want something to happen’. By contrast the Russians are going to build their pipeline and it looks like they’re going to build it now.” *Id.* On the non-feasibility of a Southern Corridor, Stern states that: “The problem that all the Caspian Southern Corridor pipelines have had is, there is not enough gas for those pipelines. There are huge gas reserves in a range of Caspian and Central Asian countries and we know all about them, but reserves don’t make deliverable gas. The only deliverable gas we have from the Southern Corridor before 2020 is 10 billion cubic metres (and maybe less) of Shah Deniz gas from Azerbaijan—that’s not enough to build a brand new, large scale pipeline. It’s enough for the scaled down Nabucco or the TAP lines, but it’s not enough gas on which to base a major new pipeline system.” *Id.*

219. For a thorough analysis, see generally SUBHES C. BHATTACHARYYA, *ENERGY ECONOMICS: CONCEPTS, ISSUES, MARKETS, AND GOVERNANCE* (2011); Ann Florini, & Benjamin K. Sovacool, *Who Governs Energy? The Challenges Facing Global Energy Governance*, 37 *ENERGY POL’Y* 5239 (2009); Ann Florini & Benjamin K. Sovacool, *Bridging the Gaps in Global Energy Governance*, 17 *GLOBAL GOVERNANCE* 57 (2011); Arunabha Ghosh, *Seeking Coherence in Complexity? The Governance of Energy by Trade & Investment Institutions*, 2 *GLOBAL POL’Y* 106–19 (2011); Benjamin Sovacool & Ann Florini, *Examining the Complications of Global Energy Governance*, 30 *J. ENERGY & NAT. RESOURCES L.* 235 (2012).

section II of this paper, make the adoption of common positions and policies particularly sticky.

A further factor that comes to compound EU energy policy development is the inescapable politics of energy. Energy resources are highly desirable due to their scarcity, exhaustibility, and highly patchy global distribution. Scarcity coupled with desirability leads to intense competition, and armed conflict even, for control. All economies rely on a steady and secure supply of energy, and disruptions can have considerable human and economic implications. In that sense, the very nature of energy resources politicizes energy and energy relations. In the case of the EU, the legacy of the past has also compounded the difficulties surrounding consensus building. For instance, whilst some states regard more integrated relations with an important energy partner such as Russia to be desirable, others would balk at this prospect.

As we have said, certain matters that energy engages currently fall within the EU competence remit. Others do not. Again, even for matters that fall within the EU competence remit, some may be matters on which the EU is exclusively competent, whilst others are matters on which the EU shares competence with its member states. Other energy related matters outside the EU competence remit are the sole preserve of EU member states *qua* sovereign entities. This arrangement seems to preserve the most acute political/diplomatic aspects of energy within the discretion of EU member states, to delegate the less acute political aspects of energy to a process which involves intensified systematized cooperation between the EU member states through EU institutions, and to entirely assign the least acute political aspects of energy to the EU institutions to the exclusion of EU member states. We have also seen that where there is sufficient political will between the 28 members to legislate or otherwise develop policy that engages matters outside the EU competence framework, this must be done on the basis of unanimity. What is more, as we have seen in section III of this paper, the more acute a matter for which the EU has competence (be it shared or exclusive), the more likely it is that related decisions must be reached on the basis of unanimity between the EU member states in the EU institutions.

Whilst some might tend to view the EU—in terms of the size of its economy, its energy needs, and its industrialization levels—as similar to comparable net energy importing economies, e.g., the US, in reality, the EU is geologically, structurally, and geostrategically quite unlike the US and other economies. The EU lacks what the other actors might take for granted: namely, actorship flowing from sovereign state status. That is to say, whilst it possesses the necessary international legal personality²²⁰ to contract certain international agreements²²¹ and pursue certain external relations, it can only do so to the extent that it has expressly been granted powers by EU member states to do so.²²² That said, however, we have also seen that in the absence of such powers, the EU may take action so long as there is sufficient political will between its entire membership to unanimously sanction use of Article 352 TFEU to pursue some common approach that is not otherwise expressly sanctioned by the treaties upon which the EU rests.

A further factor that conditions EU energy-related action is the requirement that action be in line with the guiding principles contained in Article 21§1 TEU. We have briefly referred to calls to delink EU energy security from other considerations including those relating to environmental and human rights. Conceivably, hard economic matters could push the respective economic and political elites in EU member states to consider what we deem to be regressive steps such as reforming the EU to focus on the hard economic matters of cooperation and to shed its more enlightened aspects underpinned by the EU's humanist ideals. A 2010 Commission communication included three scenarios for economic growth

220. TEU post-Lisbon, *supra* note 8, art. 47, 2010 O.J. C 83at 41 (endowing the EU with legal personality); *see also* Rafael Leal-Arcas, *EU Legal Personality in Foreign Policy?*, 24 B.U. INT'L L.J. 165 (2006).

221. Title V (Articles 216–19) of TFEU provisions delineate general EU capacity to contract international agreements. TFEU, *supra* note 4, art. 216–19, 2010 O.J. C 83 at 144–47. Article 8 TEU relates to international agreements between the EU and third-party States aimed at 'establishing an area of prosperity and good neighborliness', and TEU Article 37 relates to international agreements between the EU and third-party States in relation to TEU Chapter 2 matters (regarding the Common Foreign and Security Policy of the EU). TEU post-Lisbon, *supra* note 8, art 8, 37, 2010 O.J. C 83 at 20, 36.

222. Namely, by Articles 3 and 4 TFEU. *See* TFEU, *supra* note 4, arts. 3–4, 2010 O.J. C 83 at 51–52.

by 2020, two of which made less sanguine predictions: the second scenario foresaw a sluggish recovery, whilst the third scenario foresaw or a lost decade for economic growth.²²³ The prospect of these scenarios could give rise to anti-EU sentiments and harden anti-EU attitudes on the assumption that ‘Brussels’s red tape’ economically stifles the EU. Foreseeably, this could lead to all sorts of developments such as the weakening or, even, the collapse of the Eurozone,²²⁴ and the downgrading or abandonment of more humanist and idealistic aspects, so that the EU is stripped down to its EEA fundamentals. We have seen calls from high-profile UK politicians for the UK to seek a relationship with the EU similar to that of Norway and Switzerland.²²⁵ The EnC illustrates how single-sector integration—minus the softer, more enlightened EU desiderata around civil, social, and political rights—could be the way forward for those who want to preserve the common market and customs union whilst shedding what they might deem the softer, less necessary bits of the EU project. This would be particularly appealing to an EU polity that may want to engage in energy diplomacy without the conditionality posed by the EU’s ‘guiding principles’ under Article 21 TEU and under other provisions that promote consistency and cohesion across the EU policy spectrum. This, of course, would be a tremendously regressive step if it were to happen. However, the persistent global economic crisis has had budgetary implications in that public services are being scaled back across a number of EU member states. At the EU level, this dynamic might find expression in the paring down of the EU to its strict economic essentials.

Finally, our intention has been, on the one hand, to present the limitations at play when the EU seeks to move in unison in

223. See Europe 2020, *supra* note 13, at 9. The Commission posits three scenarios for Europe by 2020. Scenario 1 (sustainable recovery) envisages the EU to be able to make a full return to the earlier growth path and to raise its potential to go beyond that. Scenario 2 (sluggish recovery) envisages that the EU will have suffered a permanent loss in wealth and start growing again from this eroded basis. Scenario 3 (lost decade) portends the EU will have suffered a permanent loss in wealth and potential for future growth. See also *id.* at 20 (warning against the risks of economic nationalism).

224. That is to say, the Economic and Monetary Union among 17 EU member states.

225. See *Boris Johnson Calls for ‘Pared Down’ EU Relationship*, BBC (Dec. 4, 2012), <http://www.bbc.co.uk/news/uk-politics-20592596>.

relation to the collective energy security of its members, whilst, on the other, to highlight the dynamism with which the EU functions when there is sufficient political will to do so. We conclude that, whilst the EU is restricted from acting the way a sovereign actor such as China or the US would in promoting its energy security, it makes good and full use of its existing competences by handling its energy needs comprehensively. We say this because the EU has a comprehensive energy policy that seeks to address internal and external aspects of energy security whilst also taking energy and its implications—e.g., on the environment, on the economy and so on—as being interlinked and therefore as meriting a cohesive response. We have also sought to provide insights into the breadth of EU energy-related policy and to use this as an example to highlight how questions around competences are invariably most pertinent when we consider energy security within the EU context.