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The Energy Community and the Energy Charter Treaty: Special Legal Regimes, their Systemic Relationship to the EU, and their Dispute Settlement Arrangements

By R. Leal-Arcas and A. Filis

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The Energy Community and the Energy Charter Treaty: Special Legal Regimes, their Systemic Relationship to the EU, and their Dispute Settlement Arrangements

By
Dr Rafael Leal-Arcas[♦] & Andrew Filis[♣]

ABSTRACT

The European Union (EU) is for its most part dependent on the world outside its borders for a steady and secure energy supply. The EU borders, or is close to, areas rich in energy-related natural resource endowments – such as Russia, the Caspian Sea, the Middle East and North Africa regions, and Norway – from where the bulk of energy imports into the EU are sourced. The collapse of the Soviet Union and of the bureaucratic regimes in Central and Eastern Europe – which precipitated the opening up of those economies to globalization and its attendant processes – has increasingly made their energy-related natural resource endowments available on global markets. Developed, yet energy-poor, Western economies – many of which have galvanized behind the EU – saw opportunities to enhance their energy security through those economies on the brink of collapse. To that end, the EU has sought to entangle those energy-rich (or otherwise 'energy-significant' states, e.g., regarding energy transit) areas into multilateral regimes – such as those based on the Energy Charter Treaty and the Energy Community. While both these special regimes count among their numbers several parties that are not EU member states, they are not neutral in their ontology, given that these regimes, since their inception, are inherently linked to the energy interests of EU economies. The present paper presents an analysis of these regimes, and their systemic relationship to the EU, along with a special focus on their dispute settlement arrangements. Furthermore, we refer to certain aspects of the meta-normative framework at the international law level that may be applicable to normative conflicts that often arise in pluralistic international law settings.

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Keywords: *Energy Charter Treaty, Energy Community, European Union, EU energy security, EU energy policy, dispute settlement, normative conflicts, fragmentation of international law, meta-norms, treaty interpretation.*

I. Introduction

This paper relates to European Union (EU) energy security and two special and important multilateral regimes (namely the Energy Charter Treaty (ECT) and the Energy Community (EnC)) regarding the promotion of EU energy security interests at the extra-EU level. EU energy security often takes place through the propagation of energy-related norms among third-party states via, among other things, hard-law means (e.g., international legal agreements). In this context, we hone in on the normative frameworks in relation to the ECT and the Energy Community Treaty (EnCT), examine their systemic relationship to the EU, and offer an account of their respective dispute settlement arrangements.

After this introduction, Section II provides some background information on EU energy policy along with key EU energy figures. Section III deals with EU external energy relations, while Section IV provides an overview of the systemic links between the EU and the two multilateral systems within scope (the ECT and the EnC). Section V examines the dispute settlement arrangements of the ECT and the EnC. Section VI comments on issues concerning concurrent legal obligations in order to further situate the topic within the broader international legal system. Section VII concludes the paper.

II. Background to EU energy policy

A number of authors predict that the wars of the future will not be fought over religion or freedom, but over resources and energy.[1] While these predictions may seem overly drastic, the fact remains that global energy consumption demands are growing at rates that are far from sustainable, given the current sources of energy. A crucial component of this equation is the concept of 'energy security,' which deals with the ability of a state to sustainably provide for its energy demands.

This section seeks to analyze the case of the EU – a major economic bloc – in the context of the governance frameworks that ostensibly contribute, and are likely to contribute, to its energy security. This discussion assumes significance, given the weak energy position the EU has traditionally possessed and the steps taken by it to mitigate the effects thereof. The journey towards an energy-secure EU requires the presence and functioning of strong

[1] See for example Michael T. Klare, *Resource Wars: The New Landscape of Global Conflict* (Macmillan, 2001) xi; Peter C. Glover, Michael J. Economides, *Energy and Climate Wars: How Naive Politicians, Green Ideologues, and Media Elites are Undermining the Truth about Energy and Climate* (Continuum, 2010) 228.

governance mechanisms and structures that are not only able to ensure that internal EU policy be undeterred from its energy security objectives, but that externalities such as the effects of a changing global energy environment be carefully studied and accounted for. It is within such a context that this section seeks to examine the existing EU energy governance framework and the effects that are likely to result from developments in global energy trade. It will survey the existing EU governance frameworks and institutions that exist in relation to energy and energy security, and will take a deeper normative look at these frameworks in light of recent international developments.

i. EU energy consumption vis-à-vis global energy consumption

In 2009, EU energy consumption stood at c. 1,703 Million tons of oil equivalent (Mtoe).[2] Of this figure, slightly less than half – namely, c. 48% (c. 818 Mtoe) – was sourced within the EU. This means that the EU imported up to 52% of its energy; in other words, the EU is energy-dependent by 52%.[3] The level of EU energy dependency fluctuates depending on the energy resource focused upon. For instance, the EU imports up to 83.5% of its oil, 64% of its gas, and about 38% of its coal.[4]

The EU's energy dependency also fluctuates widely depending on the origin of energy imports. For instance, 50% and 80% of EU oil and gas imports, respectively, come from just four non-EU member states: namely Algeria, Libya, Norway, and Russia.[5] The fact that at the EU level, the 28 member states are collectively 52% energy-dependent should not mask the EU member states' individual energy realities. At the member-state level, the degree of energy dependency varies hugely, as it is contingent upon their particular energy endowments, energy efficiency, respective market access to the energy resources/markets of third-party states, and on whatever their other relevant energy-related particularities might be.

In terms of EU energy consumption, the breakdown for the EU-wide figure during 2009 (1,703 Mtoe) is the following: 37% came from oil, 24% from gas, 16% from coal, 14% from nuclear energy, and just 9% came from renewable energy sources.[6] In other words,

[2] European Commission, 'Key Figures', Market Observatory for Energy, Directorate-General for Energy, June 2011, (at p. 11). Based on 2009 figures.
[3] Ibid., (at p. 5).
[4] Ibid., (at p. 6).
[5] European Commission, 'Statistical Pocketbook 2009. EU Energy in Figures (Part 2)', Directorate-General for Energy and Transport, Jan. 2009, (at p. 14). In relation to those gas imports, up to a third – 34% – comes from Russia (cf., based on calculations on 2009 figures available in European Commission, 'Key Figures', Market Observatory for Energy, Directorate-General for Energy, June 2011, at p. 11).
[6] European Commission, 'Key Figures', Market Observatory for Energy, Directorate-General for Energy, June 2011, (at p. 11).

77%[7] of EU energy consumption drew from traditional energy sources,[8] that is to say, from the sort of energy sources that are finite and patchily distributed across the world (and, most crucially in relation to climate change, highly polluting). In that sense, the current EU energy supply draws heavily from sources that are highly politicized. Competition for control over these resources has often led to great human suffering and loss. Simply put, the EU is 77% energy-dependent on these controversial hydrocarbons.[9]

What is more, given that the proportion of hydrocarbons in the EU's energy mix is more or less on a par with global figures, it is disheartening that the proportion of environmentally friendlier energy sources in the EU's energy mix is not substantially above the global figure.[10] This is particularly surprising given that the EU aspires to raising the share of renewables in its energy mix to 20% by 2020[11] and that the EU has generally taken the need for energy efficiency and climate change mitigation in earnest.[12]

To further contextualize EU energy needs, the EU's share of *global* energy consumption is about 14%.[13] This is close to the 1,700 Mtoe annual mark and it has remained steady over the last two decades.[14] By 2035, though, the EU's share of global energy consumption is projected to drop to about 10%,[15] while global demand is projected to rise substantially over the next two decades.[16] This could potentially be achieved by more efficient

[7] *Idem*.
[8] For the sake of brevity, let us interchangeably refer to these as 'hydrocarbons'/'fossil fuels'.
[9] European Commission, 'Key Figures', Market Observatory for Energy, Directorate-General for Energy, June 2011, (at p. 11).
[10] 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, June 2012 (www.bp.com/statisticalreview) (at pp. 40-41).
[11] European Commission Communication, 'Europe 2020: A Strategy for Smart, Sustainable, and Inclusive Growth' Brussels, 2010, (COM (2010) 2020 final), Annex I (at p. 32). Also see Directive 2009/28/EC (*of the European Parliament and 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*), Article 3 of which mandates minimum national targets that ought to be met in order for the EU in total to achieve its target- namely, to derive 20% of its final energy consumption from renewable energy sources by 2020. Annex I of Directive 2009/28/EC expressly states the national targets having regard to the energy realities that each member state faces. E.g., Belgium is bound to increase its renewable energy sources share from 2.2% in 2005 to 13% by 2020 whilst Sweden is bound to increase this from 39.8% to 49%.
[12] However, it is interesting, and perhaps encouraging, to note that the EU occupies up to 60% of the global market share in the renewables industry. See Communication from the Commission to the European Council and the European Parliament, *An Energy Policy for Europe*, Brussels, 10 January 2007, (COM(2007) 1 final) (at p. 4).
[13] Based on calculations of data (namely 12,274 Mtoe, representing global total energy consumption, and 1690.7 Mtoe representing EU total energy consumption) available in BP Statistical Review of World Energy, June 2012 (www.bp.com/statisticalreview) (at p. 40).
[14] See projections up to 2035 as cited in European Commission, 'Key Figures', Market Observatory for Energy, Directorate-General for Energy, June 2011, (at p. 3).
[15] *Idem.*
[16] This is based on the assumption that global energy demand is set to rise to c. 18,000 Mtoe by 2035, by which time EU energy demand is likely to remain static to around the 1,700 Mtoe mark. *Idem*.

use of energy within the EU over the next two decades, alongside the fact that future increases in global energy consumption are likely to be attributable to countries such as China and India (rather than those of the Organization for Economic Cooperation and Development (OECD)).[17] Based on these figures, by 2035, all other things being equal, the EU and the rest of its OECD peers are likely, collectively, to account for about 30% of global energy demand, whilst China and the rest of the world are likely to account for about 70%.[18]

ii. EU energy policy and its complications

The nature of EU energy policy has previously been examined.[19] We notice that EU energy policy is comprehensive and multifaceted. Multiple EU Commission communications testify to this. EU energy policy extends over a wide range of policy matters that relate to energy, and we note that EU energy policy encompasses inwardly and outwardly facing aspects. For instance, EU energy policy aims at, among other things:

1. the integration of the intra-EU electricity and gas markets through the 'Internal Energy Market' (IEM);[20]
2. the promotion of energy efficiency within the EU;[21] and
3. the decarbonization of EU economies.

Much of this relates to the internal EU reality and applies to the intra-EU territory. However, the advancement of EU energy interests cannot be, and – as we shall see – is clearly not, restricted to introspective EU measures.[22]

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[17] *Idem*. Further, in relation to China and India, the IEA projects that India and China would account for roughly 45% of the anticipated increase in global energy consumption between 2005 and 2035. See the Executive Summary to the 2007 IEA World Energy Outlook: China and India Insights report (at p. 3).

[18] The EU and the 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 European Commission, 'Key Figures', Market Observatory for Energy, Directorate-General for Energy, June 2011, (at p. 3).

[19] See for instance Leal-Arcas, R. and Filis, A. "Conceptualizing EU Energy Security through an EU Constitutional Law Perspective," *Fordham International Law Journal*, Vol. 36, No. 5, pp. 1225-1301, 2013.

[20] The EU aims to fully integrate 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'*, Brussels, 15 December 2011 (COM(2011) 885 final), (p. 19). For more information on the IEM, see http://ec.europa.eu/energy/gas_electricity/internal_market_en.htm.

[21] There is a raft of EU policies and legislation aimed at the promotion of the efficient use of energy across the EU membership. See http://europa.eu/legislation_summaries/energy/energy_efficiency/index_en.htm for more details. In relation to primary legislation, see Article 194.1(c) of the Treaty on the Functioning of the EU (TFEU), which promotes the efficient use of energy as an objective of the establishment and functioning of the internal market among the EU member states.

[22] See 2011 EU Commission Communication 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"'* 7 September 2011 (COM(2011) 539 final). Here the Commission cites the EU's heavy energy dependency on imports (c. 60% of its gas and c. 80% of its oil) and the growing competition the EU is likely to face in relation to rising future

The EU also directs efforts outwardly by engaging with third-party states in order to encourage, outside its borders, a range of practices such as more efficient and sustainable energy use, energy sector liberalization and investment protection, and pro-market processes that, arguably, contribute towards the promotion of EU energy interests by enhancing the volume of energy commodities that eventually reach global markets and/or protect EU energy investments abroad. We could call such efforts directed outside the EU, and principally concerned with energy, the EU's external energy policy.

However, notwithstanding the above, the multifaceted nature of energy – and the breadth of policy matters it engages – complicates matters for actors such as the EU when we compare the EU with sovereign entities such as the United States or the People's Republic of China. This is because the various matters energy may engage at the *intra*- and *extra*-EU fields of action – for instance, diplomacy, trade, competition and market regulation, environmental protection, and investment protection – in turn engage different levels of EU competence to act, ranging from exclusive[23] to shared[24] to zero competence.[25] In that sense, assessing the appropriate level of EU action initially requires the identification of the various policy matters implicated in order to subsequently assess what could be done at the EU level without the EU institutions unjustifiably infringing upon whatever prerogatives have been preserved by the 28 sovereign actors that make up the EU.[26] It is also important to bear in

energy demand. All these matters necessitate a comprehensive external energy policy. The Commission emphasizes how an EU external energy policy is central to achieving an IEM. Noting that the rise in global energy demand will not be due to the EU and other developed economies, the EU Commission recommends that the EU engage in activity aimed at encouraging less and least developed countries to access sustainable energy and to adopt more sustainable processes. See pp. 14 et ff.

[23] Article 3 TFEU.

[24] Article 4 TFEU.

[25] Consequently, whatever policy matter for which the treaties make no express provision remains squarely the sovereign preserve of EU member states. This is in line with the interpretative principle of *expressio unius est exclusio alterius,* i.e., the express mention of a matter or circumstance in a treaty in an exhaustive manner has the effect of excluding such matters not included. This is an interpretative principle to assist in deducing the scope of any given norm where this is textually unclear. The Vienna Convention on the Law of Treaties 1969 (VCLT), signed and ratified by most EU member states, codifies norms concerned, amongst other things, with interpretative matters (See Part III (Articles 26-38) VCLT). While the fact that France and Romania – both EU members – have not ratified the VCLT precludes its application, the norms it contains, however, are largely held to reflect extant customary norms, which may mean that it is well reasoned to rely on these to interpret the EU treaties. Consequently, it would be improper from an interpretative point of view to aggrandize EU competences where no competence has expressly been granted in those treaties by the sovereign actors involved, or where such possibility is not contemplated in the relevant treaties. In this context, see also what Takis Tridimas calls 'dormant EU competence,' to refer to situations "where, although the EU cannot pass legislation, the discretion of the national governments to do so is constrained by EU law." T. Tridimas "Competence after Lisbon: The Elusive Search for Bright Lines," in D. Ashiagbor, N. Countouris, and I. Lianos (eds.), *The European Union after the Treaty of Lisbon*, Cambridge University Press, 2012, pp. 47-76, at 75.

[26] For a fuller analysis on the EU constitutional aspects of, and considerations in, EU energy policy development and EU energy security, see Leal-Arcas, R. and Filis, A. "Conceptualizing EU Energy Security through an EU Constitutional Law Perspective," *Fordham International Law Journal*, Vol. 36, No. 5, pp. 1225-1301, 2013. See also Johnston, A. and van der Marel, E. "*Ad Lucem*? Interpreting the New EU Energy Provision, and in

mind that the challenges the EU faces in developing and promoting a coherent energy policy are not limited to inherent and systemic limitations, but stem from the grossly disparate energy realities among its 28 member states.[27]

Although the EU faces challenges (be they inherent, systemic or incidental) in going about addressing its energy interests in the manner that, say, China, India, Japan, or the US may, it makes full and effective use of whatever competences it is afforded. For instance, the EU (or, to be more accurate, its predecessor, i.e., the European Communities (EC)) had been the prime mover behind the ECT. Moreover, the EU played a major role in setting up the EnC, which draws in surrounding energy-significant states.[28] For instance, through the EnC, an isolated Greece – at the most southeastern extremity of the EU – has finally been territorially linked to the rest of the EU, thus territorially integrating the entire IEM into one cohesive area. The ECT, for its part, creates, among other things, important energy transit rights for ECT parties, which, crucially, also extend to fixed energy-related infrastructure,[29] thus enhancing energy trade flows between ECT parties and flows into the EU.

It is also the case that institutions such as the EnC allow the EU to maximize its interests in cases where it is perhaps politically challenging (or naïve to expect the EU) to attract energy-significant neighboring states with EU membership. In the immediate aftermath of the collapse of the bureaucratic regimes across Eurasia – in what had been lauded as the *end of history*[30] – it may have been more realistic to think that those economies on the brink of collapse might have been willing to join on whatever terms the developed Western European states may have imposed. This may have changed significantly nowadays what with the protracted global economic slump. Market failure may have given rise to skepticism towards globalized markets and economic integration as being unquestionably safer paths towards modernization and economic development. Consequently, those states may be less willing to seek EU membership proper.

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particular the Meaning of Article 194(2) TFEU," *European Energy and Environmental Law Review*, Vol. 22, Issue 5, pp. 181-199, 2013.

[27] Some EU member states – such as Denmark – are entirely oil independent, while others –such as Cyprus – produce the lion's share of their electricity through the combustion of oil. Some member states, e.g., Germany, have more comfortable relations with Russia – an important energy partner – whilst others, e.g., Poland do not. See the European Commission, 'Key Figures', Market Observatory for Energy, Directorate-General for Energy, June 2011, for an exposition of the energy realities across the EU alongside several themes – e.g., renewables use, electricity production, prices, and energy imports.

[28] Significant in terms of their energy-related natural resource endowments and/or their significance to the transit of energy flows into the EU.

[29] Article 7 ECT.

[30] That is to say, the notion that large-scale conflicts, say, between economic models during the Cold War had hitherto been resolved with the collapse of the Soviet Union, and that the result of human progress was the triumph of the purportedly inherently superior capitalist model. See Fukuyama, F. *The End of History and the Last Man*, London: Penguin 1992 at p. 67.

Within this context, we could perhaps understand a realization on the part of EU members' polities that it is best to focus on the core economic relations *per se* and to draw in third-party states, particularly energy-significant states, into EU membership-*lite* arrangements. In that respect, while it is politically naïve for the EU to expect states such as Moldova and Ukraine to be joining the EU as fully fledged EU members any time soon, drawing these states into more institutionalized energy relations is a less maximalist way of achieving EU energy security ends.[31]

iii. Contextualizing EU energy security

a. The traditional EU energy position: dependent and undiversified

Traditionally, the EU has been strongly dependent on imports to fulfil its internal energy requirements.[32] To illustrate, between 2007 and 2011, the EU relied on non EU Member States to supply around 53.5 per cent of its total energy[33] - a statistic which included imports of 41 per cent of its solid fuels, 25 per cent of its petroleum and 67 per cent of its gas supplies as of 2011.[34] Such a high level of energy dependence has resulted in a concerning paradox, where the EU – consuming one-fifth of the world's energy supply – is the world's largest importer of energy.[35] This positional incongruity is further accentuated by the lack of diversity within the EU's primary energy suppliers (namely Russia, Norway and Algeria), who account for 85 per cent of the EU's natural gas imports and almost 50 per cent of its crude oil imports.[36]

Such an undiversified reliance on external energy sources places the EU in a position that is vulnerable "*to energy price shocks or energy supply disruptions, which may translate into significant losses to competitiveness and GDP, inflationary pressures and trade balance deterioration*".[37] This was most visible in relation to the energy supply disruptions due to the

[31] See also the EU neighborhood policy, which draws into relations with the EU member states to its south and east. See http://ec.europa.eu/world/enp/policy_en.htm.

[32] Sanam Haghighi, *Energy Security: The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries* (Hart Publishing, 2007) 9; Pekka Voutilainen, 'Developing Energy Policy For Europe: A Finnish Perspective on Energy Cooperation in The European Union' (2008) 29 *Energy L.J.* 121, 123.

[33] European Commission Statistics (Eurostat), 'Eurostat Data for 2011, Energy dependence', last update of data: 08.01.2014, available at http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsdcc310&plugin=1.

[34] European Commission, 'EU Energy in Figures: Statistical Pocketbook 2013' (2013) 24.

[35] European Commission, 'The European Union Explained: Energy - Sustainable, secure and affordable energy for Europeans' (2012) 3.

[36] European Commission, 'Renewable Energy: A Major Player in the European Energy Market' SWD (2012) 149 final, 8.

[37] European Commission Directorate-General for Economic and Financial Affairs, 'Member States' Energy Dependence: An Indicator-Based Assessment', Occasional Papers 145 (April 2013) 5.

2006 and 2009 Russia-Ukraine gas disputes, which had significant deleterious consequences for infrastructure and quality of life in a number of EU Member States.[38] Given the continuation of this trend of energy dependence in recent times,[39] the forecast of its significant increase[40] to 70 per cent by 2030,[41] and the rise of competition for energy supplies from emerging economies,[42] there are important implications for the continued economic stability and security of European energy supplies.

b. Energy security: definitions

The majority of concerns generated by the challenges outlined above can be grouped under the umbrella term of those that impact the 'energy security' of the EU. Energy security itself is a nebulous concept, with there being competing approaches to defining its meaning and scope.[43] These approaches differ not only in their general conceptual understandings of the term, but also in its application to the different forms of energy resources such as oil and gas.[44] One approach emphasizes the continuity of energy supplies,[45] while another also factors in the absence of price volatility above a given price,[46] and a third approach extends this definition to the impacts on 'the economy and in some cases the environment'.[47] The European Commission's definition of the term – which is relevant for the purposes of this section – falls into this last category:

[38] Jonathan Stern, 'The Russian-Ukrainian gas crisis of January 2006' (2006, Oxford Institute for Energy Studies) 8; Aleksandar Kovacevic, 'The Impact of the Russia–Ukraine Gas Crisis in South Eastern Europe', (March 2009, Oxford Institute for Energy Studies) 1.

[39] European Commission, 'Renewable Energy: A Major Player in the European Energy Market' SWD (2012) 149 final, 8.

[40] European Commission, 'A European Strategy for Sustainable, Competitive and Secure Energy, Commission of the European Communities', COM(2006) 105 final 3, 9, 10.

[41] European Commission, 'Renewable Energy: A Major Player in the European Energy Market' SWD (2012) 149 final, 11; also see generally Sanam Haghighi, *Energy Security: The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries* (Hart Publishing, 2007) 10-11, citing *International Energy Outlook 2006* (at p. 43).

[42] In the context of natural gas supplies, see Michael Ratner, 'Europe's Energy Security: Options and Challenges to Natural Gas Supply Diversification' (August 2013, Congressional Research Service) 1-2.

[43] Christian Winzer, 'Conceptualising Energy Security' (EPRG Working Paper 1123, University of Cambridge Electricity Policy Working Group July 2011) 4.

[44] Sanam Haghighi, *Energy Security: The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries* (Hart Publishing, 2007) 14.

[45] UK Department of Energy & Climate Change, 'Energy Markets Outlook Report' (2009) 19: "Secure energy means that the risks of interruption to energy supply, are low".

[46] The International Energy Agency provides the following definition: "Energy security is defined in terms of the physical availability of supplies to satisfy demand at a given price." See IEA, *Towards a Sustainable Energy Future*, Paris, 2001.

[47] Christian Winzer, 'Conceptualising Energy Security', (EPRG Working Paper 1123, University of Cambridge Electricity Policy Working Group, July 2011) 5.

> *"The European Union's long-term strategy for energy supply security must be geared to ensuring, for the well-being of its citizens and the proper functioning of the economy, the uninterrupted physical availability of energy products on the market, at a price which is affordable for all consumers (private and industrial), while respecting environmental concerns and looking towards sustainable development, as enshrined in Articles 2 and 6 of the Treaty on European Union."*[48]

As the Commission in the same paper acknowledged, the path to EU energy security is one that takes into account the undiversified energy dependence of the EU economy and aims at reducing the risks associated with such dependence by diversifying sources of supply, both by product and geographically.[49] This path to energy security is, however, not as linear as it first seems, with there being a multitude of factors that exert strong influences. Examples include the EU's own clean energy commitments, the proposed Trans-Adriatic Pipeline, and the ongoing shale revolution in the United States.

iv. The EU energy governance framework

a. Pre-Lisbon Treaty

Until the entry into force of the landmark Lisbon Treaty in 2009, there was no express provision for the development of a common energy policy at the EU level.[50] While numerous false starts were made towards this objective, consensus was elusive.[51] As a result, the pre-Lisbon Treaty period was characterized by EU-level energy policy developments being an incidental function of the EU's 'environmental protection' and 'internal market' mandates.[52] During this period, energy policy was primarily formulated and implemented at national levels.[53] This position gradually shifted in the new millennium as a number of factors such as the increasing dependence on external energy sources, the lack of EU influence on the energy supply side and the potential failure of the EU to meet its climate change obligations under

[48] European Commission, 'Towards a European strategy for the security of energy supply', COM(2000) 769 final, p. 2.

[49] Ibid., at p. 10.

[50] See for example Frank Groome, 'From Contradiction to Cooperation: A New Legal and Diplomatic Foundation for Energy Policy in the EU' April 2012, *Journal of Energy Security*, available at http://www.ensec.org/index.php?option=com_content&view=article&id=343:from-contradiction-to-cooperation-a-new-legal-and-diplomatic-foundation-for-energy-policy-in-the-eu&catid=123:content&Itemid=389.

[51] An example of this was the attempt to include an energy chapter in the 1992 Treaty of Maastricht. This move was opposed by a number of EU Member States, especially those with high reserves, "as they did not want to give away autonomy in that field." Susanne Langsdorf, 'EU Energy Policy: From the ECSC to the Energy Roadmap 2050' (December 2011, Green European Foundation) 5.

[52] European Commission, 'Towards A European strategy for the security of energy supply', COM(2000) 769 final, 11: "*As a result, the energy problems which have inevitably cropped up since the Treaty of Rome was adopted, more particularly after the first oil crises, have been approached either through the mechanism of the internal market, or from the angle of harmonisation, environmental policy or taxation.*"

[53] Pekka Voutilainen, 'Developing Energy Policy for Europe: A Finnish Perspective on Energy Cooperation in The European Union' (2008) 29 *Energy L.J.* 121, 122-3.

the Kyoto Protocol led to the recognition of the need of a pan-EU policy aimed at ensuring long-term energy security.[54] This recognition first manifested in a European Commission Green Paper on the "Security of Energy Supply"[55] in 2000 and was subsequently followed up in a number of similar documents and accords, all of which were slow but steady steps towards a pan-EU energy policy that ultimately came into force through the Lisbon Treaty.

b. The Lisbon Treaty

The entry into force of the Lisbon Treaty of 2009 represented a turning point in the structure of EU energy policy governance. Firstly, it marked the shift of energy policy from being an exclusive EU Member State subject to one upon which EU Member States and the EU possess 'shared' legislative competence.[56] This means that both the Union and its Member States can "*legislate and adopt legally binding acts"* in the area of energy policy.[57] However, EU Member States competence is limited to the extent that the Union has not exercised or has decided to cease exercising its competence.[58]

Secondly, and more crucially, a separate section (Title XXI) on energy was included in the form of Article 194 of the Treaty on the Functioning of the EU (TFEU). This provided that the Union would act in a 'spirit of solidarity' between EU Member States to "(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; and (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."[59] While the same provision allows EU Member States to retain decision-making autonomy in matters concerning the mix of energy sources, the conditions for exploiting its energy resources and the structure of its energy supply,[60] this approach has signified a marked departure from the earlier approach in the pre-Lisbon Treaty era of EU Member States retaining complete control over policy decisions in the energy sector.

[54] COM(2000) 769 final 12.
[55] http://ec.europa.eu/energy/green-paper-energy-supply/doc/green_paper_energy_supply_en.pdf.
[56] Article 4.2(i) TFEU. The case of energy is, however, much more complex than just stating what the TFEU says in Article 4.2(i). For a constitutional analysis, see Leal-Arcas, R. and Filis, A. "Conceptualizing EU Energy Security through an EU Constitutional Law Perspective," *Fordham International Law Journal*, Vol. 36, No. 5, pp. 1225-1301, 2013. See also Johan Lilliestam and Anthony Patt, 'Conceptualising Energy Security in the European Context: A Policy perspective bottom-up approach to the cases of the EU, UK and Sweden' (SEFEP Working Paper 2012-4, June 2012) 9.
[57] Article 2.2 TFEU.
[58] Idem.
[59] Article 194(1) TFEU.
[60] Article 194(2) TFEU.

Thus, the Lisbon Treaty is an important stepping-stone for the EU to emerge as an entity with one voice in the international energy setting.[61] While questions exist about the method of policy formulation and implementation [62] – most notably the unanimity requirement, which effectively allows each EU Member State a veto on decisions – there is no doubt that the Lisbon Treaty is a solid manifestation of not just the recognition of the EU's precarious energy position, but also of the general agreement that the way forward lies through concerted and unified action by EU Member States. Whether the Lisbon Treaty is an effective or even appropriate framework for the fulfilment of this long-standing objective, however, is a matter that remains to be seen.[63]

III. EU External Energy Relations

The EU has been engaging in energy diplomacy with various states. These efforts have either resulted in international agreements or the creation of specialized bodies to facilitate energy relations. Some of them have major repercussions for the EU's energy security moving forward. Below is a non-exhaustive group of countries with which the EU has energy relations.

i. The BRIC countries

The EU has strategic partnerships with all BRIC (Brazil, Russia, India and China) countries.[64] Whilst the EU does not deal with the BRICs as a single group, it does so bilaterally.[65] 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 energy exporters *par excellence,*

[61] Frank Groome, 'From Contradiction to Cooperation: A New Legal and Diplomatic Foundation for Energy Policy in the EU' Journal of Energy Security (April 2012) 1.
[62] For example, whether the Lisbon Treaty actually changed the way the EU approached energy issues. See Gerda Falkner, 'EU Policies in the Lisbon Treaty: A Comparative Analysis' (Working Paper No. 03/2008, Institute for European Integration Research) 59.
[63] For a number of potential challenges that the implementation of the Treaty of Lisbon may be faced with, see generally Jan Frederik Braun, 'EU Energy Policy under the Treaty of Lisbon Rules: Between a new policy and business as usual' (Working Paper No. 31/February 2011, European Policy Institute Network).
[64] This is the case beyond the field of energy. In the field of trade, see for instance Leal-Arcas, R. "The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas," *Fordham International Law Journal*, Vol. 32, Issue 2, 2009, pp. 345-416; Leal-Arcas, R. "How Will the EU Approach the BRIC Countries? Future Trade Challenges," *Vienna Journal of International Constitutional Law*, Vol. 2, Issue 4, pp. 235-271, 2008.
[65] See for instance Leal-Arcas, R. "The European Union vis-à-vis Brazil and India: Future Avenues in Selected Trade Policy Areas," *International Journal of Private Law*, Vol. 2, Issue 2, 2009, pp. 109-134; Leal-Arcas, R. "The EU and Brazil: Trading Partners in Different Fora," *The Jean Monnet/Robert Schuman Paper Series*, Vol. 8, No. 11, June 2008, pp. 1-12.

whilst the opposite is the case for China and India. Out of the BRICs, China and India 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. Nevertheless, whilst China remains the highest GHG 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[66].

In relation to Chinese and EU relations, there has been bilateral activity[67]. 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[68]. In May 2012 the EU and China issued joint declarations in relation to energy, including energy security[69]. 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[70]. What is

[66] 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 to China. Taking the post-World War II era alone, the US 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.

[67] On the EU's breadth of external action with China, see http://eeas.europa.eu/delegations/china/eu_china/political_relations/index_en.htm; in relation to EU–China energy relations, see http://ec.europa.eu/energy/international/bilateral_cooperation/china/china_en.htm. On EU-China trade relations, see Leal-Arcas, R. "European Union-China Trade Relations," *Trade, Law and Development*, Vol. 2, No. 2, 2010, pp. 224-251.

[68] European Commission, 'Key Figures', Market Observatory for Energy, Directorate-General for Energy, June 2011, at p. 3.

[69] 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 http://eeas.europa.eu/delegations/china/press_corner/all_news/news/2012/20121213_01_en.htm.

[70] See the information sheet on the high-level conference on *"Cooperation on Energy Security: China-EU Government and Business Perspectives"*, held on 13 December 2012 in Beijing, China, organized by the Europe-China Clean Energy Centre, available at http://ec.europa.eu/euraxess/links/china/docs/20121213_Cooperation_on_energy_security_background.pdf. The Europe-China Clean Energy Centre (EC2) annual High-level conference was held in Beijing on 13 December 2012.

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 China could coordinate responses to events that disrupt their energy supplies[71].

In relation to Russia and its relations with the EU,[72] it is pertinent to mention that Russia is a key EU energy partner in terms of its oil, gas, and biofuels exports.[73] 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, 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 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[74].

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[71] China and EU member states currently cooperate in various fora. For instance, in the Major Economies Forum on Energy and Climate Change (MEF), which 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 US, 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 http://www.majoreconomiesforum.org/about.html for more information. 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 http://www.iea.org/countries/non-membercountries/).

[72] See http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia for a run-down on EU-Russia trade relations.

[73] See generally Kuzemko, C. (ed.) *Dynamics of Energy Governance in Europe and Russia*, Basingstoke: Palgrave Macmillan, 2012.

[74] 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

There is a 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)[75]. 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 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.[76] However a new PCA has yet to be concluded[77]. 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 from those of net energy 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.[78] It is helpful to think of the ECT as Plan B to what

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 a rundown of the dispute at 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. See Anna Shiryaevskaya & Daryna Krasnolutska, "Gazprom Sends Ukraine $7 Billion Bill as Gas Dispute Deepens," *Bloomberg*, 28 January 2013, available at 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 http://www.nato.int/cps/en/SID-E2280ADF-B6517611/natolive/topics_37750.htm.

[75] For a fuller exposition of EU-Russia trade relations, see Leal-Arcas, R. 'The EU and Russia as Energy Trading Partners: Friends or Foes?' (2009) 14 *EFA Rev*. pp. 337–366.

[76] On EU-Russia trade relations, see Leal-Arcas, R. "EU Relations with China and Russia: How to Approach new Superpowers in Trade Matters," *Journal of International Commercial Law and Technology*, Vol. 4, Issue 1, pp. 22-52, 2009.

[77] For more details, see http://eeas.europa.eu/russia/index_en.htm.

[78] The ECT currently has 54 Members of which 49 have ratified (see http://www.encharter.org/index.php?id=61&L=0). 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 Article 47 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 (see Article

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.[79] 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 regions outside those initially anticipated at the time of the ECT's adoption.[80] Despite the situation 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.[81]

ii. The Euro-Mediterranean Partnership

The Mediterranean has always held significant strategic importance for the EU and its energy supplies.[82] This is emphasized by the fact that around 65% per cent of the oil and natural gas consumed in Western Europe originates or passes through the region every year.[83] Given that

45(3)(a)), as was the case of Russia, which had not ratified the ECT before its notification to withdraw. We mentioned in a previous footnote that the Benelux 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.

[79] See Wälde, T. *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, London: Kluwer Law International, 1996 for a fuller analysis on the ECT, its history, and for a more critical perspective.

[80] See http://www.encharter.org/index.php?id=21&id_article=334&L=0.

[81] See http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia.

[82] EU Neighbourhood Info Centre, 'Euro-Mediterranean energy cooperation: working together for secure and sustainable energy,' where it is stated: "*The Euro-Mediterranean Partnership agreed as far back as 1998 that work on energy issues should cover the following priorities: Security of supply; Energy industry competitiveness; Environmental protection and sustainable development*." Available at http://www.enpi-info.eu/mainmed.php?id=286&id_type=3.

[83] North Atlantic Treaty Organization, 'NATO's role in energy security,' available at http://www.nato.int/cps/en/natolive/topics_49208.htm; see also Manfred Weissenbacher, "Energy Security in the Euro-Mediterranean Region," in Calleya, S. and Wohlfeld, M. (eds.) *Change and Opportunities in the Emerging Mediterranean*, Malta: MEDAC, 2012, pp. 452-469, at 458.

these figures are likely to escalate as the EU seeks to diversify its energy sources amidst a declining internal production capacity,[84] the importance of the region is set to grow manifold.[85] To this effect, EU-Mediterranean relations have, for a long time, contained energy-specific policies and commitments. These are primarily oriented towards two distinct objectives.

The first pertains to the objective of building a stable and more integrated Mediterranean energy supply grid through which energy can be routed to the EU.[86] In this regard, a number of initiatives such as the MED-REG (energy regulators), MED-EMIP (energy cooperation), MED-ENEC II (energy efficiency in construction), EAMGM II (Euro-Arab Mashreq gas market project) and the electricity market integration project have all been taken under the Euro-Mediterranean Partnership as well as other regional cooperation agreements.[87]

The second closely-related objective pertains to the EU's renewable energy commitments such as the "20-20-20" plan.[88] One of the options for EU Member States to meet their obligations under the commitments is to support the installation of renewable energy sites in third countries with the energy being produced to be used within the EU.[89] The Mediterranean, with its vast potential for the generation of renewable energy, presents a feasible option for states seeking to exploit this avenue.[90] One initiative thus oriented is the Mediterranean Solar Plan under which the EU provides financial and capacity-building assistance to states seeking to exploit solar power.

[84] Market Observatory for Energy, 'Europe's Energy Position – Markets and Supply' (Publication Office of the EU, 2010) 16. The oil output of Norway and the UK – the largest and 2nd largest European oil producers, respectively – has been in the decline since production in both countries peaked early in the 21st century. See *Memorandum submitted by the Department of Energy and Climate Change*, in UK offshore oil and gas: first report of session 2008-09, Vol. 2: Oral and written evidence, Volume 2 (House of Commons: Energy and Climate Change Committee, 2009) 68; see also M. Höök & K. Aleklett, 'A decline rate study of Norwegian oil production,' *Energy Policy*, Vol. 36, Issue 11 (2008), pp. 4262-4271.

[85] European Commission, 'On security of energy supply and international cooperation - "The EU Energy Policy: Engaging with Partners beyond Our Borders"' COM(2011) 539 final, p. 5.

[86] The Africa-EU Partnership, 'Completing the circuit – interconnecting the energy grids of the Mediterranean' available at http://www.africa-eu-partnership.org/success-stories/completing-circuit-interconnecting-electricity-grids-mediterranean.

[87] Manfred Weissenbacher, "Energy Security in the Euro-Mediterranean Region," in Calleya, S. and Wohlfeld, M. (eds.) *Change and Opportunities in the Emerging Mediterranean*, Malta: MEDAC, 2012, pp. 452-469, at 464.

[88] See European Commission, Communication from the Commission, Europe 2020: A strategy for smart, sustainable, and inclusive growth, Brussels 3.3.2010, COM(2010) 2020 final.

[89] Sotiris Varouxakis, 'Renewable Energy in the Euro-Mediterranean Framework' (Instituto Europeo del Mediterráneo, 2013) 263-4.

[90] Ibid.

iii. The Africa-EU Energy Partnership

The Africa-EU Energy Partnership (AEEP) is a 'long-term framework for structured political dialogue and cooperation between Africa and the EU'[91] on energy issues of mutual strategic importance. The objective of the AEEP is to ensure 'improved access to reliable, secure, affordable, cost-effective, climate friendly and sustainable energy services for both continents, with a special focus on achieving the MDGs in Africa.'[92] To this effect, the First High Level Ministerial Meeting of the AEEP agreed on a set of goals to be achieved by 2020.[93]

These were focused on six primary focus areas, which included: (i) energy access targets, including bringing access to energy to at least an additional 100 million Africans,[94] (ii) energy security targets, including doubling interconnections within Africa and between Africa and the EU, and doubling the African gas exports to Europe,[95] (iii) renewable energy targets, including increasing the generation and use of renewable energy in Africa,[96] (iv) capacity building targets, which involved training and financing,[97] (v) investment targets aimed at stimulating the flow of investment into the energy sector in Africa,[98] and (vi) dialogue goals targeted at continuing the ongoing dialogue on the sector.[99]

iv. Persian Gulf-EU Partnerships

The geographical scope of the Persian Gulf encompasses the six members of the Gulf Cooperation Council (GCC) (namely Saudi Arabia, Oman, the United Arab Emirates, Qatar, Bahrain, and Kuwait), plus Iran and Iraq. According to British Petroleum, proven oil reserves in the Persian Gulf countries (without counting Bahrain) accounted for more than 60 per cent of the global proved oil resources as of 2007[100] and more than 40 per cent of the proved gas

[91] Africa-EU Partnership, '2nd Joint Africa-EU Strategy Action Plan 2011-2013,' at http://www.africa-eu-partnership.org/sites/default/files/documents/doc_energy_action_plan_2011-2013_en.pdf, p. 55.
[92] See for example: Africa-EU Energy Partnership, 'AEEP Moving with Full Steam Ahead' (EU Energy Initiative – Partnership Dialogue Facility, 2012).
[93] High-Level Meeting of the Africa-EU Energy Partnership Bulletin (International Institute for Sustainable Development (IISD) in collaboration with the German Agency for Technical Cooperation (GTZ) GmbH, September 2010) Volume 181 Issue 1.
[94] Africa-EU Partnership, '2nd Joint Africa-EU Strategy Action Plan 2011-2013,' http://www.africa-eu-partnership.org/sites/default/files/documents/doc_energy_action_plan_2011-2013_en.pdf, p. 56.
[95] Ibid., p. 57.
[96] Ibid,. at p. 58.
[97] Ibid,. at p. 59.
[98] Idem.
[99] Ibid., at p. 60.
[100] BP Statistical Review of World Energy, June 2008, available at http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2008/STAGING/local_assets/downloads/pdf/statistical_review_of_world_energy_full_review_2008.pdf, p. 6.

reserves at the end of the same year.[101] When this is taken in conjunction with the fact that less than 30 per cent of these resources are currently being exploited,[102] it becomes clear that any energy security policy must target deep cooperative links with this region. This need was realized as early as the late 1980s, when the EU and the GCC states entered into a Cooperation Agreement which aimed to promote cooperation on 'mutually advantageous terms in all spheres.'[103] Specific to the field of energy, the Agreement sought to further cooperation through a number of processes: cooperation between energy undertakings in the two regions, joint analyses and studies of the energy trade and clean energy between the two regions, and the exchange of information between the regions on energy issues.[104] Furthermore, the Agreement led to the establishment of two bodies, namely an annual Joint Council and Ministerial Meeting on the strategic level, and an Energy Experts Group on the operational level.[105]

However, it would seem that the EU-GCC Cooperation Agreement has not been able precipitate cooperation to the extent initially contemplated. This fact was recognized and sought to be altered by the signing of a Joint Action Program for the execution of the Cooperation Agreement for the period 2010-2013, which contained specific sections devoted to oil and gas issues, energy efficiency, and clean energy.[106] This move is illustrative of the potential benefits that cooperation between the two parties can bring – fulfilling the EU's need for diverse and secure energy sources while, at the same time, accounting for the GCC states' desires to secure a sustainable demand for its oil and gas, and to foster internal capital injections and inflows from capital surplus states.[107]

Energy relations between the EU and the other two Persian Gulf countries (Iran and Iraq) have not developed as efficiently as with the GCC states.

[101] Ibid., at p. 22.
[102] Economist Intelligence Unit, 'The GCC in 2020: Resources for the future' (The Economist, 2010) pp. 3-4.
[103] Preamble, Cooperation Agreement between the European Economic Community and the Gulf Cooperation Council ("EU-GCC Cooperation Agreement"); Article 1(1)(b) of the EU-GCC Cooperation Agreement.
[104] Article 6, paras 1-5 of the EU-GCC Cooperation Agreement.
[105] A. Papadopoulou *et al*., 'Tools and mechanisms fostering EU GCC cooperation on Energy Efficiency' (World Renewable Energy Congress 2011, Policy Issues), p. 2309.
[106] See generally Abdulaziz Al-Shalabi, Nicolas Cottret and Emanuela Menichetti, "EU-GCC Cooperation on Energy - Technical Report" (Sharaka Research Paper No. 3, June 2013) 57.
[107] Mohammed Al-Sahlawi, 'Energy Security in the EU from GCC Perspective' in Mohamed A. Ramady (ed.), *The GCC Economies: Stepping Up to Future Challenges* (Springer, 2012) 57.

IV. Linking the European Union to the Energy Charter Treaty and the Energy Community

It is well known that Europe has many years of experience in integrating markets. The EU can be seen as a regional model for the judicialization and juridification of energy relations. In this section, we provide an analysis of the EU relationship with both the ECT and the Energy Community.

i. The Energy Charter Treaty and its relationship to the EU

The Energy Charter Treaty (ECT) is an international agreement which aims to provide a 'multilateral framework for energy cooperation' based on the principles of 'open, competitive markets and sustainable development.'[108] By binding governments to commitments that guarantee open markets, non-discrimination and access for foreign investment,[109] the ECT aims to strengthen the global rule of law on energy issues and thereby reduce the risks and associated with energy-related investments and trade.[110] The ECT itself rests on five primary areas: investment protection,[111] trade,[112] transit,[113] environmental protection,[114] and dispute settlement,[115] while there are optional protocols on various topics, including energy efficiency and the environment.[116]

In 1990, at a European Council meeting in Dublin, Ruud Lubbers, the Dutch Prime Minister, who, at the time, presided over the Council, called for more institutionalized relations with the energy-rich economies in Eurasia following their collapse in order to benefit from their consequent opening-up and orientation towards the global market-based economic order. This led to the adoption of the 1991 European Energy Charter, which is a non-legally binding political declaration embodying key principles of international energy cooperation. The 1991 European Energy Charter paved the way for the negotiation and eventual adoption of the ECT[117] and the Energy Charter Process.[118] Prior to the advent of the

[108] *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, Brussels: Energy Charter Secretariat, 2004, p. 13.
[109] Francis McGowan, 'Can the European Union's Market Liberalism Ensure Energy Security in a Time of 'Economic Nationalism'?' *Journal of Contemporary European Research*, Vol. 4(2) 2008, 90, 97.
[110] *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, Brussels: Energy Charter Secretariat, 2004, at 14.
[111] Part III of the ECT.
[112] Part II of the ECT.
[113] Article 7 of the ECT.
[114] Article 19 of the ECT.
[115] Part V of the ECT.
[116] Protocol on Energy Efficiency and Related Environmental Aspects (PEERA), 1994.
[117] 34 ILM 360 (1995). The official historiography is contained in the *Final Act of the European Energy Charter Conference*. For the official account, see *Final Act of the European Energy Charter Conference (Lisbon, 1994)* in *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, Brussels: Energy Charter Secretariat, 2004 (at pp. 23-24).

ECT, Western industrialized states attempted to have an energy-sector specific agreement adopted within the context of the General Agreement on Tariffs and Trade (GATT), but this effort ultimately foundered.[119] In that sense, the advent of the ECT was a success for multilateralism, given the political difficulties in having such an agreement adopted within the multilateral trade system.

The ECT's fundamental purpose was to promote open energy markets, predicated on, chiefly, investment protection, in the energy-significant, yet economically depressed, Eurasian economies following the geopolitical and geo-economic re-shuffle in Eurasia as a result of the collapse of the Soviet Union. A more critical reading of the ECT and the events that led to its adoption would suggest that, beyond the official rhetoric, its actual aim was to enhance the energy security of developed European economies by, amongst other things, laying down norms to promote the eventual opening-up of those economies, and their energy sectors, to external exploitation, and to thus promote access for the industries of the developed European economies to the energy resources in those economies.[120] In that sense, with such ostensible foundational links to the EU, the ECT regime presents an inherent bias towards EU industrial and energy interests.[121] Whilst there is legal equality between ECT parties, the fact that their economies are so disparate means that the benefits of ECT membership – such as investment protection in the energy sectors – are likely to accrue in an asymmetric manner that favors those economies with developed energy exploration (upstream) sectors. The European Communities is a foundational *sui juris* party to the ECT, as are those EU member states that were part of the European Communities at the time of the ECT's adoption.[122]

Currently, there are 54 ECT signatories (including each EU member state and the EU in its own right), out of which four ratifications are still pending (Australia, Belarus, Iceland, and Norway).[123] Russia signed the ECT and was applying it provisionally until 18 October 2009, but has not ratified it. Russia notified the Energy Charter Secretariat that it would

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[118] The Energy Charter Process is a forum to exchange best practices with third parties and refers to all Energy Charter-related activities.
[119] See Wälde, T. *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, London: Kluwer Law International, 1996, for a fuller analysis on the ECT, its history, and for a more critical perspective.
[120] *Idem*.
[121] For an EU perspective account of the European Energy Charter, the Energy Charter Treaty, and its relationship to the EU, see http://europa.eu/legislation_summaries/energy/external_dimension_enlargement/l27028_en.htm.
[122] See for background http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998D0181:EN:HTML
[123] See http://www.encharter.org/index.php?id=61.

withdraw from the ECT's provisional application from that date.[124] This has implications for EU energy interests, given the volume of EU-bound energy flows from Russia. Russia's unwillingness to ratify the ECT, arguably, significantly undercuts the ECT's effectiveness from an EU standpoint and from the standpoint of other Western energy-importing economies.

ECT parties that have ratified may withdraw after the conclusion of the first five years following ratification.[125] Additionally, ECT parties that had ratified before communicating their intention to withdraw from the ECT remain bound by ECT investment protection obligations for a further 20 years following withdrawal.[126] For those parties who have signed but not ratified the ECT– as in the case of Russia – it is possible to withdraw with effect within a shorter timeframe—namely 60 calendar days.[127]

Whilst the ECT expressly asserts state sovereignty over natural resources[128] – itself a *truism* under international law[129] – it provides robust protection for investor interests in the territories of ECT parties.[130] It does so by entrenching a legal right to compensation in cases where an ECT party carries out an expropriation or otherwise compromises investor interests in some legally significant manner. The ECT does not necessarily obligate its parties to liberalize their energy markets, it does not mandate inward flows of foreign investment, and it does not obligate its parties to provide energy exploitation contracts to *all* ECT parties on a non-discriminatory basis.[131] However, it does provide disciplines that benefit energy-sector investment interests once these have been welcomed by ECT parties into their territory. In sum, once investments take place within ECT party territories, ECT parties must provide

[124] See http://www.encharter.org/index.php?id=61 in relation to membership, pending ratifications, and Russian position, and http://www.encharter.org/fileadmin/user_upload/document/ECT_ratification_status.pdf for details of ratification.
[125] Article 47 ECT.
[126] Ibid.
[127] Article 45(3)(a) ECT.
[128] Article 18 ECT.
[129] See Sornarajah, M. *The International Law on Foreign Investment*, 2nd ed., Cambridge: CUP 2004, where 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"*(emphasis added) (at p. 43); in other words, there must be previous state consent for any erosion of PSNR.
[130] See Part III ECT (Articles 10 to 17), which 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 (Article 12(2) ECT), 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. The ECT also heavily restricts sovereign rights of expropriation so that expropriations may be permissible to the extent they are ECT-compliant (Article 13 ECT).
[131] See *Final Act of the European Energy Charter Conference (Lisbon, 1994*), Part IV (Understandings), in *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, at p. 25.

indiscriminate treatment to foreign investors (in other words, they must treat all as if they were investors from their 'most favored nation'), and must not discriminate between foreign and domestic investors (in other words, they must provide 'national treatment' to foreign investors).

ii. The Energy Community and its relationship to the EU

The Energy Community (EnC) is a treaty-based regime set up under the Energy Community Treaty (EnCT) whose signatories include the EU and several third-party states. It is not an EU institution, despite the fact that it inducts various parts of the EU's *acquis communautaire* into the EnC's legal order. Unlike the Energy Charter, which is an independent, international organization, the EnC is a regional EU platform oriented at the creation of an integrated energy market in South-East Europe (SEE).[132] The Treaty establishing the Energy Community was signed in October 2005 by the European Community and nine countries from SEE,[133] with the objective of the 'creation of a single energy market, including the coordination of mutual assistance in case of serious disturbances to the energy network or external disruptions, and which may include the achievement of a common external energy trade policy.'[134] This was to be achieved by the Contracting Parties in two primary ways. First, the Parties were to adopt the *acquis communitaire* in a number of areas,[135] including energy, environment, competition, electricity, gas, oil, and renewables.[136] And second, the Parties were to ensure compliance with a set of "generally acceptable standards" of the EU.[137]

Currently, the EnC extends to nine parties – the EU, on the one hand, and Albania, Bosnia & Herzegovina, Kosovo,[138] the Former Yugoslav Republic of Macedonia, Moldova,

[132] Council Decision (2006/500/EC) on the conclusion by the European Community of the Energy Community Treaty (2006), at p. 15.
[133] Energy Community, 'About the Treaty,' at http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/About_the_Treaty.
[134] Rozeta Karova, 'Energy Community for South Eastern Europe: Rationale Behind and Implementation to Date' (EUI Working Papers RSCAS 2009/12, Robert Schuman Centre for Advanced Studies, 2009) 10.
[135] European Commission, 'Report From The Commission to The European Parliament and the Council under Article 7 of Decision 2006/500/EC (Energy Community Treaty)' COM(2011) 105 final.
[136] For details, see European Community, 'Energy Community Acquis,' available at http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/EU_Legislation.
[137] Title II, Chapter VI of the Treaty establishing the Energy Community.
[138] Kosovo's status under international law is unsettled. The administrative region commonly referred to as Kosovo has been a territory within the Yugoslav Republic and, subsequently, within Serbia. The United Nations' (UN) Security Council, under Resolution 1244 of 10 June 1999, established the UN Interim Administration Mission in Kosovo (UNMIK) in order to provide an interim administration for Kosovo under which its people could enjoy substantial autonomy. The UN Security Council vested UNMIK with authority over the territory and people of Kosovo, including all legislative and executive powers and administration of the judiciary. Since then, Kosovo authorities declared independence (15 June 2008), which was recognized by a majority of UN members. However, this move was not unanimously endorsed by the UN Security Council, which leaves the status of Kosovo unsettled under international law. Currently, Kosovo is listed as neither a UN permanent member nor as a UN observer.

Montenegro, Serbia, and Ukraine,[139] on the other. Georgia, Turkey, Armenia, and Norway have EnC observer status.[140] The EnC came into existence in 2006 and has initially been designed to last for 10 years – up to its expiry in 2016.[141] Following the EnC's expiry, parties to the EnCT may unanimously extend its duration or, where there is no unanimity, may extend it for those parties that are in favor of doing so, so long as two thirds of the parties support this.[142]

The EnC could be seen as a uni-sectoral *'integration without membership'*[143] arrangement. The effect of the EnC is that parties are legally obligated to apply certain areas of the EU *acquis communautaire*[144] as a means of setting up an institutional, legal, and economic framework aimed at integrating the energy landscapes across the territories to which the EnC extends.[145] Regulatory convergence and investment protection seem to be key features of the EnC, which aims at integrating the gas and electricity markets among EnC parties to whatever extent may be politically possible. In this manner, the EnC can be seen as extending the EU's IEM with those EnC members that have not become EU members.

The EU, for its part, is inextricably linked to the EnC.[146] It was the EU – an original signatory – who proposed the EnC. EU interests are represented in both of the EnC decision-

[139] Ukraine is a highly energy-significant state regarding EU energy inflows from Russia. In 2011, the EU Commission made a series of policy recommendations to the EU Council and Parliament aimed at the speedy integration of Ukraine into the EnC, including through tripartite political and administrative cooperation between the EU, Russia, and Ukraine, to ensure steady relations in light of gas price and supply disputes between Russia and Ukraine, which had implications for EU energy security. See the 2011 EU Commission Communication 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"'* 7 September 2011 (COM(2011) 539 final) (at p. 5).

[140] This is possible under Article 96 EnCT, although all EnC members must consent to this through the Ministerial Council, which governs the EnC. 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 1§2 and 95 EnCT. 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.

[141] For an EU account on the EnC, see http://europa.eu/legislation_summaries/energy/external_dimension_enlargement/l27074_en.htm.

[142] Ibid.

[143] See Petrov, R. "Energy Community as a Promoter of the European Union's 'Energy Acquis' to Its Neighbourhood," 38(3) *Legal Issues of Economic Integration* (2012).

[144] See Title II of the EnCT. The EU energy *acquis* and the EU environment *acquis* are inducted into the EnCT legal order (see Chapters II and III, respectively), whilst Chapters IV and V of the EnCT contain provisions on the effect of the EU renewable energy *acquis* and EU competition *acquis,* respectively, to the EnCT legal order. The EnC permits staggered implementation. For instance, Moldova is doing so in four successive stages, whilst Ukraine in five.

[145] Article 2 of the Energy Community Treaty.

[146] See Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty (2006/500/EC), which spells out the level of EU's involvement and influence in the EnC.

making bodies set up under the EnCT (namely the 'Ministerial Council' [147] and the 'Permanent High Level Group'[148]) at a higher rate than those of ordinary EnC members.

The EnC could be used to further promote EU energy interests with third-party (i.e., non-EU members) states. One means of doing so is through the EU's trade relations. For instance, the EU Commission has recommended that free trade agreements (FTAs) with third-party states neighboring the EU be used as a means of promoting EU energy interests.[149] What is more, the EU Commission has stated that the EnC should be promoted with geographically proximate and energy-significant third-party states that are currently negotiating or concluding an FTA with the EU.[150]

The advent of the EnC could also be seen as a less idealistic way of integrating neighboring states into the EU's sphere of economic influence, without the conditionality and strings that come with full EU membership; conditionality regarding minimum standards for EU member states in relation to civil, political, and social rights. All these issues are generally bypassed – despite arguably a very clear mandate in primary EU legislation against this[151] – by drawing neighboring states into economic relations via means such as the EnC that advance EU energy interests without alienating the economic and political elites in those third-party states through any EU demands for social reform in their territories.

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[147] Article 48 EnCT: "*The Ministerial Council shall consist of one representative of each Contracting Party and two representatives of the European Community. One non-voting representative of each Participant may participate in its meetings*" (emphasis added).

[148] Article 54 EnCT: "*The Permanent High Level Group shall consist of one representative of each Contracting Party and two representatives of the European Community*" (emphasis added).

[149] 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",' Brussels, 7 August 2011, COM(2011) 539 final (at p. 7). Note also that 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. The EU is currently negotiating new agreements with several third-party states, which shall contain 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," Brussels, 10 November 2010, (COM (2010) 639 final) (p. 19). See also a list of energy-related treaties concluded between the EU and third-party states at http://ec.europa.eu/world/agreements/searchByActivity.do?parent=8512&xmlname=751&actName=Energy&printAcrivity=.

[150] 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",' Brussels, 7 August 2011, COM(2011) 539 final (at p. 7).

[151] See Article 21.1 of the Treaty on European Union (TEU), which refers to the guiding principles that must frame EU action. According to Article 21 TEU, EU external action is subject to guiding principles such as: "*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*".

Despite the Energy Community being lauded as a "success story"[152] by the European Commission, numerous challenges have been identified. The most significant of these relates to the failure of many Contracting Parties to fully implement the *acquis* and ensure the enforcement of the rules thereof.[153] Another concern has been the lack of sufficient investment to foster infrastructure modernization required for the proper implementation of a number of EU directives and policies.[154] In other terms, there has been a discernible discord between the not unimpressive form and content of the Energy Community Treaty and its actual implementation at the national level. Thus, while there has been limited progress for the Contracting Parties of the Energy Community, it has been far below expectations at the time of formation. Even the European Commission acknowledged in a 2011 report that the Energy Community's "*ultimate ambition – integration into the EU's internal energy market – seems, for the time being, just a long-term objective*."[155]

V. Dispute settlement in the Energy Charter Treaty and in the Energy Community

i. Dispute settlement in the Energy Charter Treaty

Dispute resolution within the ECT regime would vary depending on the nexus of parties to a particular dispute and/or the subject matter of the dispute. In relation to the nexus of disputants, dispute resolution is differentiated depending on whether the dispute involves a state against another state or an investor against a state. There are separate dispute resolution regimes for interstate disputes and investor-state disputes, as there are for disputes over investment, trade, transit, environmental or competition matters.

In relation to *interstate* disputes, Article 27 ECT provides for an arbitration procedure for disputes regarding the interpretation or application of the Treaty (except for competition and environmental issues). In relation to *state-investor/investor-state* disputes,[156] Article 26 ECT provides various options at the discretion of *investors* on how to seek redress, including the option to take host governments to international arbitration in relation to complaints about

[152] COM(2011) 105 final, p. 3.
[153] Ibid, pp. 5-6.
[154] Idem. Also see for example World Bank, 'Lights out? The outlook for energy in Eastern Europe and the former Soviet Union' (World Bank 2010), available at http://siteresources.worldbank.org/ECAEXT/Resources/258598-1268240913359/Full_report.pdf.
[155] COM(2011) 105 final 5.
[156] Traditionally, disputes have been investor-state, where the state was the defendant. However, more recently, we are seeing state-investor disputes, where the state is the plaintiff. For a list of disputes registered at the International Center for the Settlement of Investment Disputes (ICSID), see https://icsid.worldbank.org/ICSID/FrontServlet.

investment protection.[157] In relation to *trade-related* disputes, Article 29 and Annex D of the ECT include a mechanism – closely based on the World Trade Organization's (WTO) Dispute Settlement System – for settling trade disputes between ECT parties, where at least one of them is not a WTO member; otherwise, the ECT defers to the WTO's dispute resolution regime all trade-related disputes between ECT parties who are also WTO members. The fact of deferring disputes to other more appropriate fora – in this case the WTO's dispute settlement mechanism – is an important element of dispute resolution within the ECT order.[158] In relation to disputes involving *transit matters*, Article 7 ECT provides for a specialized conciliation mechanism (Article 7(7) ECT) which aims to expedite dispute resolution and to make the process less formal.

Finally, in relation to competition and environmental issues, these engage Articles 6 and 19 ECT, respectively, which contain sub-clauses promoting dispute resolution through diplomatic processes. Article 6(7) makes clear that complaints based on competition matters are to be resolved diplomatically wherever possible, according to Articles 6(5) and 27(1) ECT, rather than through international arbitration or some other binding adjudicative process. Regarding complaints based on environmental issues, Article 19(2) ECT defers their resolution to whatever applicable international fora may exist and, in the absence of such fora, the complaint may be referred to the ECT diplomatic body, namely the Charter Conference.

In sum, *interstate* disputes are outside the remit of binding adjudicative processes, as there is a clear preference for bilateral solutions and for conciliation based on multilateral practices, thus underlying the need for international standards and multilateralism. It is not surprising that diplomatic – as opposed to independent adjudicative – means of resolving interstate disputes are popular among states, given that these preserve important sovereign prerogatives and are also more amenable to the promotion of voluntarist multilateralism. In that sense, an adjudicative-*lite* ECT may be more legitimate in the minds of its parties and, consequently, more enduring than some other special regime with a more robust supranational adjudicative agency. That said, however, complaints brought by investors are dealt with in a

[157] Investor-state disputes under Part III of the ECT are governed by Article 26 ECT, which gives the choice to investors, following a 3-month cooling period, to initiate resolution proceedings by submitting the dispute: a) to the courts or administrative tribunals of the host state party to the dispute; b) in accordance with a previously agreed dispute settlement procedure; or c) to international arbitration. If the investor opts for international arbitration, the investor has the further choice between arbitration under the rules of the ICSID, the United Nations Commission on International Trade Law (UNCITRAL), or the Arbitration Institute of the Stockholm Chamber of Commerce. In effect, therefore, states give their unconditional consent under Article 26(3) ECT to the submission of a dispute to international arbitration, given that the choice lies with investors.

[158] See Article 4 ECT, which prohibits derogation from the GATT, while Annex G of the ECT conditions how WTO rules are discharged between ECT parties.

more robust – from an investor standpoint – manner given that, as we have seen above, it is within the prerogative of investors to choose how an *investor-state* dispute should be addressed.[159]

Under Article 26 ECT, unconditional state consent to international arbitration-based resolution appears to be the norm, despite the two exceptions to a state's unconditional consent to arbitration under Article 26(3)(a) ECT.[160] In fact, there are about 30 investor-state international arbitration cases[161] under the ECT of which the Energy Charter Secretariat is aware, whilst there is one *interstate* case known (to the Energy Charter Secretariat) that was ultimately resolved diplomatically.[162]

Finally, there is no inherent (to the ECT special regime) adjudicative agency in the sense that one exists within the EU legal order (cf., the Court of Justice of the European Union (CJEU)) or, which, to an extent, exists within the WTO with its Dispute Settlement Body (DSB). What the ECT provides for, however – particularly in *investor-state* disputes – is, among other things, recourse to international arbitration – that is to say, to an agency extraneous to the ECT-related institutional framework that has been invested with adjudicative competence. That said, the ECT-related bodies such as the Energy Charter Secretariat do not, in any way, manage or handle disputes.[163]

ii. Dispute settlement in the Energy Community

The Treaty Establishing the Energy Community (EnCT) sets up a dispute settlement mechanism (DSM) under Articles 90 to 93. This DSM is closely modeled on the EU's 'infringement procedure,' that is to say, the process to challenge and to ultimately correct EU

[159] See Article 26 ECT.
[160] Annex ID-related exception: States listed under Annex ID of the ECT do not give unconditional consent to international arbitration in cases where the investor has already submitted the dispute to a national court or tribunal (cf., Article 26.2.a ECT) or to a previously agreed mechanism (cf., Article 26.2.b ECT). States listed under Annex ID must provide a written statement of policies, practices and conditions to the ECT Secretariat. Annex ID states are: Australia; Azerbaijan; Bulgaria; Canada; Croatia; Cyprus; the Czech Republic; the EU; Finland; Greece; Hungary; Ireland; Italy; Japan; Kazakhstan; Mongolia; Norway; Poland; Portugal; Romania; Russia; Slovenia; Spain; Sweden; Macedonia; Turkey; and the USA. Note, however, that neither Canada nor the USA has signed the ECT. Annex IA-related exception: States listed under Annex IA do not give unconditional consent with respect to a dispute arising under the last sentence of Article 10(1) ("umbrella clause"). Annex IA states are: Australia; Canada; Hungary; and Norway.
[161] See http://www.encharter.org/index.php?id=213 for a list of the investor-state arbitration cases known to the Energy Charter Secretariat.
[162] See http://www.encharter.org/index.php?id=269.
[163] See the following link http://www.encharter.org/index.php?id=213&L=0, where the Energy Charter Secretariat states that: *"…there is no requirement that such disputes be notified to the Secretariat, nor is the Secretariat involved in the administration of the investor-state dispute settlement procedure. The information below was compiled from various public sources, and includes links to publicly available documents; while the Secretariat has made efforts to ensure that this information is reliable, its accuracy and completeness cannot be guaranteed"*.

law infringements committed by EU member states.[164] However, the EnC dispute settlement process and the EU's infringement procedure diverge on an important point: there is no recourse to a traditional *adjudicative* agency that could lead to a *judicial* decision within the EnC's dispute settlement regime. Instead, what we have within the EnC's DSM is recourse to a diplomatic forum to render what appears to ultimately remain a diplomatic decision. This forum is the EnC's 'Ministerial Council,' a body charged with finding whether there has been a breach of the EnCT and with deciding on how such a breach ought to be rectified.[165]

Furthermore, an Advisory Committee (a team of three lawyers) exists adjunct to the Ministerial Council and whose role is to prepare reasoned opinions on alleged breaches of EnC obligations (similar to how, within the context of the EU, the Advocates-General discharge their duties towards the CJEU). Moreover, the Ministerial Council has a quasi-judicial role in relation to issues of interpretation in certain circumstances.[166] Those who may petition the Ministerial Council for a determination are: any party to the EnCT, the EnC's 'Regulatory Board', and its 'Secretariat'.[167] Serious and persistent breaches of EnCT obligations may incur penalties such as the suspension of EnC member rights. A 2008 Decision[168] by the (EnC) Ministerial Council further added flesh to the bones of the somewhat minimal provisions of the EnC's DSM regime by elaborating more detailed rules.

[164] EU member states are responsible for applying EU law. This responsibility involves the adoption of domestic measures by a specified deadline in order to incorporate EU law into their respective legal systems. Where a member state fails to do this correctly or in time, this is deemed an EU law *infringement*, be it due to an action or an omission on the part of an EU member state. Under the relevant Treaties (Article 258 TFEU and Article 106a of the Treaty establishing the European Atomic Energy Community), the EU Commission is responsible for ensuring that EU law is correctly applied and has powers to mandate EU member states to take corrective action. The EU Commission also has powers to refer an EU member state's infringement to the CJEU. For a fuller exposition of the infringement procedure and the role of the EU Commission, see http://ec.europa.eu/eu_law/infringements/infringements_en.htm.

[165] See generally TITLE VII of the EnCT, Implementation of Decisions and Dispute Settlement, Articles 89-93.

[166] Under Article 94 EnCT, the 'Ministerial Council' and, on occasion, the 'Permanent High Level Group' exercise quasi-judicial functions in interpreting terms or concepts in the EnCT where there is no EU jurisprudence to assist with interpreting these.

[167] See Articles 90 and 92 EnCT.

[168] See Procedural Act No. 2008/01/MG-EnC of the Ministerial Council of the Energy Community, 27 June 2008, on the Rules of Procedure for Dispute Settlement under the Treaty, available at http://www.energy-community.org/pls/portal/docs/296193.PDF. This preliminary procedure is normally handled by the Secretariat as "an independent institution being in a position to clarify the factual and legal circumstances of each case". Under such circumstances, the Secretariat will initiate a case by way of an *Opening Letter* (see Article 12, 2008 Ministerial Council Decision) to be followed, as the case may be, by a *Reasoned Opinion* (Article 13, 2008 Ministerial Council Decision) and *Reasoned Request* to the Ministerial Council. In the course of this three-step procedure, the offending party is given the opportunity to argue its case and to justify its measure or, to "comply of its own accord with the requirements of the Treaty" before the complaint is submitted to the Ministerial Council (under Article 14, 2008 Ministerial Council Decision). As the Secretariat may be approached by private bodies for it to espouse their complaints, the procedural rules introduced by the 2008 Ministerial Council Decision also contain provisions that govern that avenue for complaints. For a summary on the EnC's DSM, see http://www.energy-community.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/Dispute_Settlement.

The contribution of these rules has been to introduce preliminary procedures before complaints reach the Ministerial Council.

From a comparative perspective, the EnC's diplomatic element, as reflected in the Ministerial Council, stands in for the adjudicative element often encountered in other legal orders – such as in the EU (with the possibility, say, of recourse to the CJEU) or even in the WTO system (where, despite its own DSB's diplomatic-judicial hybrid character, there are adjudicative organs that make judicial determinations).[169] That said, certain areas of the EU's *acquis communautaire* are also the *acquis* of the EnC.[170] Therefore, we see the induction of discreet *corpora* of law from an extraneous legal order – namely from that of the EU – into another particular legal order – namely into the EnC's. Whilst this allows no *systemic* role for the CJEU *per se* in the EnC legal order, by directly inducting its energy (and parts of other) *acquis* jurisprudence, the CJEU becomes, in effect, an influential adjudicative agency *for* the EnC, albeit one that is extraneous and whose activity is restricted to other jurisdictional realms.[171]

VI. Certain issues relating to concurrent special legal regimes

i. General remarks

The EU foundational treaties, the ECT and the EnCT create legal relations between their respective sovereign state parties and, in the case of the EU treaties and the EnCT, between the parties *inter se* and between each party and the EU, and between each party and the EnC, to the exclusion of third-party states. All three regimes – the EU, the ECT, and the EnC – are instances of particular international law predicated on general international law in order to function.[172] They depend on the broader normative framework that is general international

[169] Namely the 'Panel' and, if Panel findings are appealed, the 'Appellate Body,' which is charged with making determinations that are then issued in reports to be ultimately considered for adoption by the WTO's DSB (the *alter ego* of the WTO General Council, the highest level diplomatic decision-making body of the WTO).
[170] See Title II of the EnCT. The EU energy *acquis* and the EU environment *acquis* are inducted into the EnCT legal order (see Chapters II and III, respectively), whilst Chapters IV and V EnCT contain provisions on the effect of the EU competition *acquis* and EU renewable energy *acquis*, respectively, to the EnCT legal order.
[171] Namely to the jurisdictions of the EU and of Euratom. The CJEU is the adjudicative institution of the EU (see Articles 13 and 19 TEU; Article 251 of the Treaty on the Functioning of the European Union (TFEU)) and the European Atomic Energy Community (Euratom) (see Article 144 of the Consolidated version of the Treaty establishing the European Atomic Energy Community). The CJEU is also an adjudicative institution for the European Economic Area (EEA) in relation to the EU member states involved in the EEA, but not for Iceland, Liechtenstein, and Norway (which, while EEA parties, are not EU member states), for whom the European Free Trade Agreement (EFTA) Court has jurisdiction in relation to cases involving any of those three countries. In relation to the EFTA Court, see Articles 105-108 of the Agreement on the European Economic Area.
[172] Should all parties concerned in contracting an interstate legal agreement have previously ratified the Vienna Convention on the Law of Treaties (VCLT) 1969, then the functioning of any such agreement would also be predicated on the provisions of the VCLT 1969.

law, given that the latter is dispositive of a wide range of state acts and interstate situations, including the contracting of interstate agreements that create legal relations (or that have other legal implications) and the setting-up of supranational legal orders. We could understand the relevance of general international law to such interstate and supra-state processes through viewing public international law as an institution that initially arose due to the necessity to regulate the inter-action between *imperia*[173] and, as such, it persists in recent history to be dispositive of legal questions engaging state sovereignty and state responsibility.

Here we shall focus on the ECT and EnCT. Both these instruments involve parties that, for the most part, are also United Nations (UN) members,[174] and that – setting aside their other incidental *inter se* diplomatic relations – are already involved with each other in all manner of legal relations, be these treaty-based or otherwise. In that sense, a broader normative context comes to apply to all these states, both jointly and severally. Unsurprisingly, normative conflicts (that is to say, conflicts between concurrent norms, be these in relation to rules or principles, within a single legal regime but flowing from different instruments, or between norms flowing from different legal regimes) and/or conflicts of jurisdiction are neither uncommon nor unheard of in complex networks of international obligation.[175]

For the most part, ECT and EnCT parties are UN members. The UN legal order contains a most helpful tool to address such normative conflicts that engage a norm flowing from the UN legal order or the UN legal order *per se*, namely Article 103 of the UN Charter, which promotes obligations owed by UN members under the Charter over their other international obligations, should a conflict arise. From an international law (and UN) standpoint, where a dispute involves a state that is also a UN member, any potential deadlock between, on the one hand, a UN Charter-based obligation, and, on the other, an obligation owed, say, under ECT or EnCT, would have to be resolved in favor of the former. Also, another feature of the international legal system is the notion that when any given norm comes into conflict with some peremptory norm (*jus cogens*), the latter shall always prevail.

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[173] See among others Anghie, A. *'Imperialism, Sovereignty, and the Making of International Law'* Cambridge: Cambridge University Press, 2007; and Mieville, C. *Between Equal Rights: A Marxist Theory of International Law*' Leiden: Brill, 2005.

[174] As we mentioned earlier, Kosovo's status under international law is unsettled. Kosovo is neither a UN member nor an observer. That said, given that the UN Interim Mission in Kosovo was created further to a UN process (namely under a UN Security Council Resolution (Resolution 1244, 10 June 1999), it is an entity subject to the UN Charter and legal order.

[175] See UN General Assembly, International Law Commission (ILC), 58th session, Geneva, (1 May–9 June and 3 July–11 August 2006), Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (A/CN.4/L.682) (13 April 2006) (§484, p. 245 and §486, p. 246).

a. Legal hierarchies in addressing normative conflicts

Such degree of practicability and straightforwardness (as expressed through Article 103 of the UN Charter and the paramountcy of *jus cogens* norms) is not necessarily encountered in every instance of normative conflict, which is often why we must resort to the most universal setting – namely general international law – to identify the key features of the meta-normative regime, and what kind of tie-breaking features this meta-normative regime may contain. Thus, the question remains: what happens where there is no tie-breaker, such as Article 103 of the UN Charter, or no conflict with a peremptory norm within a particular international law order, such as a special legal regime (as are the EU, the EnC, and the ECT) to help unlock normative tensions of this nature?

Evidently, a useful response to a similar question that involves a *known* nexus of identifiable states (or other relevant entities for the purposes of international law) would begin by identifying the applicable normative context(s) linked to those states or entities; normative contexts founded on an inter-play between norms flowing from peremptory or other norms of general international law, from norms flowing from relevant (to the nexus of entities) international conventions, or from other sources of international law.[176] In that sense, invariably, recourse to broader normative frameworks would be necessary, given that the normative conflict (or conflict of jurisdictions) may involve norms that flow from peremptory (*jus cogens*) or other *erga omnes* norms of general international law. This inherent hierarchy in the international legal system[177] means that, where such peremptory or other *erga omnes* norms exist at the general level, such norms may operate to resolve an otherwise intractable normative conflict. The point is to identify the types of universal *erga omnes* norms that apply in such cases in the absence of applicable particular international law conflict-resolving norms or in the event where such norms do indeed exist but where reliance upon these would lead to an unfair and solipsistic outcome not in line with international law.

While we shall outline below the sort of juridical tools and techniques that help unlock normative conflicts, we posit that it is neither a lack nor ignorance of these tools that are at the center of intractable normative conflicts; rather, it is the fact that legal disputes among states

[176] For an illustrative list of the sources of norms to be taken into consideration from a UN legal order standpoint, see the Statute of the International Court of Justice (ICJ), and in particular Article 38.

[177] No hierarchy exists in relation to the sources of law – e.g., by pitching, say, general principles against norms flowing from some legal agreement. That said, a hierarchy exists between norms – be they found in custom, convention, or elsewhere. A clear example is how peremptory norms (*jus cogens*), UN Charter norms, other *erga omnes* obligations, or acts of the UN Security Council may trump norms flowing from contracted international legal agreements. In that sense, there is no formal hierarchy of normative sources *per se*; rather, there is a substantive hierarchy based on the content of the norms, irrespective of their source provenance. See ILC Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (A/CN.4/L.682) (13 April 2006), (at §85, p. 47).

(or between states and other international entities) are rarely addressed before an adjudicative agent invested with the necessary breadth of authority/jurisdiction, or that possesses an all-encompassing omniscient gaze to make such a body likely to reach such coherent determinations that draw from *all* relevant elements of the entire *corpus* of international law.[178] The closer we come to that is probably when interstate disputes come before the International Court of Justice (ICJ) for a determination.[179] Another example of such a universal omniscient *juristic/scholarly* – albeit not *adjudicative* - gaze would be that of the International Law Commission (ILC).[180] Rather, what we have are determinations – say, within the WTO or the EU – that are based, for their most part, on the objectives of the particular legal agreements that those legal regimes are founded upon. However, there are exceptions where we witness legally coherent determinations that go beyond the objectives of those legal agreements to include norms flowing from other legal agreements that exist in other legal systems, or generally from other normative sources.

When we talk about normative conflicts, we need to begin by making clear where a conflict may arise and what it may involve. Are all the seemingly conflicting norms valid and relevant to the matter in hand and, if so, what is the relationship between the norms in conflict? For instance, this relationship can be one of complementarity or exclusivity. Also, normative conflicts may arise between norms from within one legal instrument, from within different instruments but one legal order, or from within distinct legal orders. However, as we shall see below, no legal order is ever isolated from the broader normative context that an interstate act, event, or situation may engage.

While conflicts between the ECT, the EnCT, and the EU regimes are, admittedly, not commonplace, they are not entirely unlikely. Nor is speculation about the inter-play between these regimes redundant. In this section, we offer an overview of a rather complex area of international law in order to situate the phenomenon of normative conflict, and/or jurisdictional conflicts, within the context of the broader international legal system, and to outline its main features.

[178] The independence and the expansiveness-of-purview of the arbiter is a fundamental issue in cohesively resolving normative conflicts involving norms flowing from other regimes. See General Assembly, Official Records, Sixty-first session Supplement No. 10 (A/61/10), Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), (at § 28, pp. 417-418).

[179] However, such an eventuality would likely be due to the operation of particular international law, given that it would likely take place within the context of, and would be pursuant to, the UN Charter and to the Statute of the ICJ.

[180] See ILC Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (A/CN.4/L.682) (13 April 2006), (at p. 255).

ii. Normative conflicts and the EU legal order

Within the EU legal order, there are express *quasi*-meta-norms that consider normative conflicts and provide for their resolution. Namely Article 351 TFEU, which states that the TFEU takes precedence over previous treaties (i.e., treaties to which a current EU member state is a party and that came into force when that EU member state had yet to accede to the EU) involving EU member states, without affecting their legal relations with third-party states.

iii. Normative conflicts and the Energy Charter Treaty

Within the ECT legal order, the interplay of ECT norms may also assist with normative conflicts. Article 16 ECT makes clear what the effect shall be of previous or subsequent legal agreements on the disposition of obligations under the ECT. The wording reflects general principles of international law in relation to the interpretation and interplay of concurrent yet competing international obligations; in sum, that subsequent international obligations involving a particular nexus of states are discharged contingent and without prejudice to earlier international obligations involving that particular nexus of states.

A case in point involving a jurisdictional and normative conflict involving the EU and the ECT is the *Electrabel v. Hungary* arbitration case within the context of the International Centre for the Settlement of Investment Disputes (ICSID).[181] This case illustrates the legal fault-lines involving clashes among special regimes. Whilst the ECT involves a distinct legal regime to that of the EU, the EU is also implicated in that there are ECT provisions that show deference towards regional supranational organizations, such as the EU. Also, the EU is implicated in that it is a fundamental proponent of the ECT multilateral system.

This *Electrabel v. Hungary* arbitration case concerned concessions given through a power purchase agreement (PPA) by the Hungarian state to an energy production company which was later privatized. With the accession of Hungary to the EU and the consequent application of the *acquis communautaire* – including the EU's competition *acquis* – to its territory, the EU Commission reviewed various preferential agreements that Hungary had in place and advised Hungary to nullify those in breach of EU competition rules. Consequently, the PPA in question had to be set aside by Hungary. Unsurprisingly, this had implications for the PPA rights' holders, who subsequently issued arbitration tribunal proceedings under the ECT citing the investment protection rules in the ECT, which Hungary had ratified in 1998,

[181] *Electrabel S.A. v the Republic of Hungary* (ICSID Case No. Arb/07/19), available at http://www.italaw.com/cases/documents/1624.

before its EU entry in 2004. The complaint hinged principally on the ECT requirement to treat investors fairly and equitably.

The tribunal examined both questions of jurisdiction and applicable law, given the seeming normative conflict between Hungary's ECT obligations and its EU obligations. Whilst neither party objected to the tribunal's jurisdiction, the EU Commission (not a party *per se* to the proceedings, but clearly an important actor given its vanguard role in the EU project) raised *amicus curiae* jurisdictional objections on the basis that the matter was within the exclusive jurisdiction of the CJEU. As the proceedings were brought under the ECT, and in line with the admissibility provisions of the ICSID Convention, the tribunal was ultimately satisfied that it could establish jurisdiction to examine the complaint. The tribunal found in favor of Hungary on the particular relationship between EU law and the ECT to that case. While it held that the dispute could be considered on the basis of the ECT, regard would have to be had to the broader normative context, which in this case included the EU *acquis* and general international law, in order to resolve the normative tensions at play.

Ultimately, the case turned on the distinct facts of the case, including the timing of Hungary's accessions to the ECT and the EU, and the investors' home state, which in this case had been Belgium, i.e., another EU member state and not some (non-EU) third-party state, which undoubtedly would have led to a very different argumentation and outcome. However, what we have witnessed with this case is the assertion of the notion that it is possible for as many fora as are implicated by a matter and nexus of states to be legitimately simultaneously seized of a case, with no hierarchy of legal regime or forum *per se*. In this case, we clearly witness that, although the arbitration tribunal asserted the legitimacy of the ECT endorsed resolution process, given that jurisdiction was established and not estopped by some inherent fact relevant to the ECT special regime, the tribunal's examination of the dispute – having admitted recourse to EU law as part of the broader normative context that governed the matter at issue – ultimately led to the upholding of EU norms, rather than to their relegation as secondary *vis-à-vis* ECT norms.

iv. Normative conflicts and the Energy Community

The EnC also contains provisions that contemplate the interplay of concurrent international obligations. Articles 101-103 EnCT make clear that obligations flowing from the EnCT are without prejudice to chronologically earlier obligations and to obligations owed in relation to the WTO system.

v. Other conflict-related matters relevant to the European Union-Energy Charter Treaty-Energy Community nexus

a. Concurrent jurisdictions

Conflicts between special regimes are not limited to substantive normative conflicts, but may also relate to questions of forum admissibility and jurisdiction. Unsurprisingly, it may be in the interests of parties to a dispute to have it examined by a particular forum. As the *Electrabel v Hungary* arbitration case attests, there often is no dispositive norm to promote one forum over another, given that there is no necessary hierarchy among special regimes when considered against the backdrop of general international law. Under the autonomous jurisdiction rules of each regime, their respective adjudicative agencies may legitimately be able to exercise jurisdiction.[182] When all competing elements claim exclusivity, questions about jurisdiction can be handled through reasoned legal arguments along the lines of the principles discussed earlier in relation to the relationship between *lex specialis, lex generalis, lex posterior, and lex prior,* aided by other norms of general international law.

In cases, say, that involve a trade-related dispute between two WTO members, the terms of the WTO system prohibit parties from seeking determinations from other fora, should such disputes involve matters that fall within their WTO membership.[183] Similarly, under EU law, an EU member state may be restricted, by operation of EU law, in its recourse to the fora of other special regimes to which it is party, so long as the subject-matter falls within the scope of its EU membership and for which the CJEU purportedly has exclusive

[182] A case in point is the *Mox Plant* dispute between Ireland and the UK, in which three distinct special regimes were engaged – namely the EU, the tribunal under the UN Convention on the Law of the Sea (UNCLOS), and the arbitration provisions under the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR Convention), which brought four decisions. See Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, Final Award (*Ireland v. the United Kingdom*) (2 July 2003), Permanent Court of Arbitration, ILM vol. 42 (2003) p. 1118. The other *Mox Plant* cases are: *the MOX Plant case*, *Request for Provisional Measures Order (Ireland v. the United Kingdom)* (3 December 2001), International Tribunal for the Law of the Sea (ITLS), ILM vol. 41 (2002); and the MOX Plant case, Order No. 3 (*Ireland v. the United Kingdom*) (24 June 2003), Permanent Court of Arbitration, ILM vol. 42 (2003), p. 1187. Regarding the *MOX Plant* case in the context of the EU legal order, the EU Commission brought a legal action against Ireland before the European Court of Justice for having brought this case against the UK before the ITLS under UNCLOS. See Case C-459/03, ECR 2006, p. I-4635. For a fuller analysis of the relationship between special regimes from a general international law perspective, see ILC Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (A/CN.4/L.682) (13 April 2006) (at pp. 65-83, and 97-99).

[183] See Article 23.1 of the Dispute Settlement Understanding (DSU), which obligates members to refer their disputes to the DSS to the exclusion of self-determination or other fora. Furthermore, under Article IX:2 of the WTO Agreement, the WTO Ministerial Conference and the General Council have the exclusive authority on a three-fourths majority basis to adopt interpretations. Again, we witness the elevation of the political/diplomatic mechanisms of the WTO over the adjudicative mechanism. In this manner, it may be better equipped to contain intractable interstate disputes from resulting in other fora.

jurisdiction.[184] Consequently, how and to which end interpretative norms – be they flowing from applicable VCLT or customary law norms – are applied depends largely on the specific adjudicative forum considering the dispute. That said, states are not automatically estopped from taking matters to other fora, should this be, among other things, permissible under the admissibility rules specific to those fora. In that respect, although certain special legal regimes may obligate parties, on a contractual (therefore 'voluntarist') basis, to *opt out* from whatever benefits are afforded under other special legal orders, they neither, on their own strength, invalidate *per se* the legal obligations owed by parties under other special regimes, nor do they invalidate whatever *erga omnes* (or otherwise) obligations those parties owe or are owed under general international law.[185]

It is also worth pointing out that at the particular international law level – that is to say, at the level of regional custom and at the level of special legal regimes[186] based on a theme or geographical region – other than operative general law principles flowing from general international law, we may also have conflict resolving norms (e.g., conflict clauses) that have been inscribed into the constitutive instruments of those orders. Such provisions express an acknowledgement on the part of state parties of the existence of broader enveloping or parallel normative contexts/frameworks by which state parties are obligated to abide. For instance, we see this in EU treaties, in the ECT and in the EnCT, alongside other special legal regimes based on particular international law (e.g., the WTO system).[187]

[184] The CJEU has exclusive jurisdiction over EU institutions acts and over certain aspects of intra-EU relations. See Section 5 (Article 264) TFEU, whereby the CJEU has exclusive jurisdiction over cases issued by EU member states against the European Parliament and certain actions against the Council or brought by EU institutions *inter se*, and may declare measures by EU bodies void.

[185] The fulfillment of international obligation is governed by norms of general international law pertaining to State responsibility. Draft Articles on Responsibility of States for Internationally Wrongful Acts ('Draft Articles') exist (available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf), which provide some indication as to how issues around State responsibility for an international wrong, including a breach of an international obligation, may be considered under international law. As of August 2012, the Draft Articles had yet to be adopted in the form of a legal instrument by the international community. For a historical run-down of the development of the Draft Articles, see http://untreaty.un.org/ilc/summaries/9_6.htm. In that respect, the breach of an international, say, treaty-based obligation is not governed only by the treaty in question, but also by the operation of rules of general international law that deal with obligations that pertain to State responsibility at the interstate level.

[186] Sometimes these special legal orders are erroneously referred to as 'self-contained' orders. This is misleading as it reinforces the misperception that these exist in isolation to the broader normative context that governs the relationship between a particular nexus of states and/or that is engaged by the circumstance at issue. See ILC Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (A/CN.4/L.682) (13 April 2006) (at §193, p. 100).

[187] The DSU stipulates the exclusive jurisdiction of the DSB over WTO disputes. Although WTO Panels and the Appellate Body have considered international agreements outside the WTO covered agreements in interpreting provisions – discussed *passim* – and although Article 3.2 DSU refers to "customary rules of interpretation of public international law," it is less clear that this creates sufficient scope for the DSB to widen its purview from interpreting WTO rules to interpreting these in an *intra vires* manner sympathetic to extraneous international legal agreements and custom. There have been instances where interpretations of terms have been given in

b. *'Inter se'* legal agreements

The EU sets up its own legal order, which is both thematic (ostensibly about a customs union and internal market) and geographical (extending over the territories of 28 European states). The ECT sets up a special regime along thematic lines (namely, for its most part, energy-sector investment protection) and quasi-geographical lines (mainly concerned with east-west energy flows) among its signatories. The EnCT sets up an order that is both geographical (the EU and its periphery) and thematic (gas and electricity market regulatory convergence and integration). What we often encounter in such regimes is an *inter partes* strengthening of legal (and other) relations to the exclusion of third-party states while, at the same time, the initial set of states (involved in the *inter se* agreements in question) maintains its independent legal relations with third-party states. In such situations, it is important to note that normative conflicts may arise in relation to obligations owed under different arrangements.

These sort of *inter se* legal agreements often may affect the rights of third-party states. An example is where, say, WTO members set up an *inter se* union – e.g., the EU. In such an event, this may not be to the detriment of their WTO peers, nor may this diminish the rights held by third-party states under whatever multilateral or bilateral legal agreements may have been in place at the time. In the example of the WTO, this is not simply by operation of Article XXIV of the GATT, which mandates that the setting up of free-trade areas or customs unions involving a WTO member may not diminish the existing trade concessions towards those WTO members that are excluded. It is also because other concurrent legal obligations owed to those third-party states excluded (that is to say, states that are not party to those free-trade areas or customs unions) may not be docked, given that they too involve valid norms and obligations that also have to be discharged.

It is also worth noting that under the ECT regime, Article 25.1 makes clear that *inter se* agreements between states that happen to be ECT parties may also be contracted even if these exclude other ECT parties. This, however, is not to say that any such agreements may diminish the rights owed under the ECT between ECT parties *per se.* With respect to Article 25 ECT, the EU and its member states declared in the Final Act of the European Energy Charter Conference that, while the effect of Article 25 ECT is to uphold EU legislation that discriminates in favor of companies incorporated in any EU member state, Article 25 ECT seems not to uphold EU legislation, which makes it possible for the EU to extend the

relation to extraneous agreements (see *US – Shrimp/Turtle* discussed *passim*); however, arguably, these have not added to or diminished the rights and duties of WTO members. Under Article IX:2 of the WTO Agreement, only the Ministerial Council - i.e., the utmost diplomatic and legislative WTO organ – and the General Council – i.e., the *alter ego* of the DSB – may adopt authoritative interpretations of WTO rules.

preferential treatment resulting from the wider process of economic integration to companies in other (third-party) states, unless this is done in a manner that is in line with Article 25 ECT.[188] Presumably, through the contracting of an Economic Integration Agreement, rather than a mere extension of EU law *per se*. There may be inherent rules in particular legal orders – e.g., conflict clauses – on how this ought to be avoided. A case in point is Article 351 TFEU, which expressly states that international legal agreements between any EU Member State, in its own right, and any third-party state contracted before 1958, or for acceding States, before the date of their accession to the EU, are unaffected by the TFEU (and its predecessor) so that the rights of third-party states are not diminished and their obligations are not made more onerous.

However, where no such inherent express rules exist, there are techniques to resolve these tensions, mainly by having regard to general principles of law at the general international law level. One such principle is *pacta sunt servanda* (i.e., legal agreements must be upheld).[189] In relation to legal consequences for third-party states, another fundamental principle is that which seeks to shield third-party states from legal effects arising from legal agreements to which they are not party, as per Article 34 VCLT and its analogous norm existing in custom. These principles are important to bear in mind when we consider the legal implications that the EU, the ECT, and the EnC special orders may have for third-party states.

VII. Conclusion

The EU engages with the world outside the territory of its constituent Member States in a diverse manner in order to promote its energy security. For instance, the EU does this in various fora where it co-exists with third-party states, including through special regimes relating to energy, such as the ECT and the EnC. We have seen how the EU has been the prime mover behind both the ECT and the EnC. The ECT was a timely response to significant geostrategic events – namely the collapse of the bureaucratic regimes in the eastern and central part of Europe and the re-casting of *machtpolitik* regionally – that had enhanced opportunities for the industries of the developed Western states to access energy resources in those regions, whilst the EnC came a few years later to place on a more institutionalized footing the EU energy interests in those regions by promoting the integration of energy markets – chiefly gas and energy – through regulatory convergence across EnC members. In

[188] See *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, p. 32, 2004.
[189] Article 26 VCLT.

the case of the EnC, the EU is afforded a more prominent position in that, among other things, certain areas of its *acquis* are inducted into the EnC's legal order, the EU has more influence than its EnC peers in the highest decision-making bodies of the EnC,[190] and the EnC is essentially the realization of EU external energy policy with those states between it (i.e., the EU) and its energy supplier *par excellence,* namely Russia.

The EU's pursuit of closer energy relations with its neighbors along single-sector lines – as is the case with the EnC – could also be understood as a less maximalist approach of EU Member States' polities to promoting their interests with neighboring energy-significant states (without the conditionality of EU membership) with terms that are politically acceptable to the polities in those neighboring states.

The dispute settlement arrangements for both the ECT and EnC legal orders contain a considerable degree of deference towards the diplomatic process. In the ECT, in instances involving purely interstate disputes there is a clear preference for diplomatic solutions. Moreover, in the ECT, irrespective of the nexus of parties, for disputes engaging matters such as competition and the environment, there is a preference for diplomatic solutions and, in the case of environmental matters, for multilateralism. For trade, the ECT system defers to the WTO normative framework to which the majority of ECT parties are also subject. Where we see the possibility for adjudicative-like processes within the ECT is in state-investor disputes, where investors are given first dibs in relation to *their* preferred method of dispute resolution, including arbitration.

With the EnC, there is no traditional adjudicative agency *per se*; however, there is an omnipotent Ministerial Council – the highest EnC decision-making body – which has powers to make determinations and, in some cases, adopt its own definitive interpretations (where none exist within the applicable *acquis* by the CJEU). This shows a preference for diplomacy over supranational independent adjudicative structures, as we see in the EU and, to a limited extent, in the WTO legal order.

Regarding the ECT and EnC and how they relate to the EU legal order and between one another, we note that fragmentation *per se* and normative conflict are actually less of an issue, given the high degree of kinship and provenance between the legal orders involved. In relation to the ECT, the *Electrabel v. Hungary* arbitration case – albeit an arbitration case binding on the parties concerned and with very limited normative effect for the purposes of international law – illustrates how conflicts may be resolved when the EU legal order is

[190] As mentioned earlier, in the EnC's Ministerial Council and the Permanent High Level Group, the EU is afforded two representatives, whilst the other EnC members are afforded one.

focused upon. This is not to say that the EU and/or states burdened by EU-related obligations have a free hand to renege on ECT obligations; rather, it is to say that the EU is taken as one entity and that ECT breach allegations between EU member states are deferred to the EU's legal order for resolution. We witness this preference to defer a dispute to a more *specific* or *chronologically recent* order in how the International Tribunal for the Law of the Sea has deferred disputes between EU Member States to the CJEU on the basis that a more appropriate forum seems to exist, to whose jurisdiction both parties were subject due to their common EU membership and, crucially, due to the fact that the subject-matter of the dispute fell within the scope of their EU relationship. In the EnC legal order, the fact that its law stems from certain areas of the EU's *acquis* restricts the possibility for conflicts with the EU legal order, or with other orders, given the primacy of the EU *acquis* within the EnC.