

# THE GLOBAL EFFECTS OF EU ENERGY REGULATION

Davor Petrić\*

*The European Union's internal energy market is founded on a mix of measures employed at various levels of competence, and aimed to safeguard the EU's key objectives, such as energy security, energy efficiency, and environmental protection. It is generally recognised that institutional features of the internal market provide the EU with considerable capacity to externalise its regulatory measures at different levels of governance. This article assesses the validity of this proposition in the case of EU energy regulation. Analysing instances of the external effects of EU energy law and policy in two dimensions – global and regional – it is shown that even without a consolidated EU internal and external approach, there are considerable effects – both positive and negative from the perspective of EU energy interests – in each of the instances observed. Confirming the contemporary literature on the EU external governance in a wider context, a conclusion is drawn that the internal checks and divisions present the greatest impediment for the more efficient externalisation of EU energy regulation.*

**Keywords:** European Union, energy regulation, energy policy, internal energy market, regulatory externalisation

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\* Assistant Lecturer and PhD student at the Faculty of Law, University of Zagreb. The author is grateful to Professor Tamara Perišin for her guidance and suggestions during the initial phases of the research; to Mark Davies for his help with the language revision and copyediting; and to two anonymous reviewers for their insightful comments. The research was conducted under the project 'Novi hrvatski pravni sustav 2017' at the Faculty of Law, University of Zagreb. The usual disclaimer applies.

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## I. INTRODUCTION

European Union (EU) energy law and policy represent a complex and multidimensional issue. Various aspects of energy regulation (e.g., the production, distribution, sale and consumption of energy) are scattered along several policy areas. Some of these policy areas (e.g., trade, transport and industry, environmental protection, sustainable development, or foreign affairs) fall under either exclusive, shared or complementary EU competence. In other instances, the EU has no competence to act at all. EU energy regulation is therefore seen as a 'conglomerate of loosely coupled sectoral regimes',<sup>1</sup> which carry different identities (determined by the market, environment or security), occupy different functional spaces, and have even developed different external dimensions.

Regarding energy, the EU is geologically, geo-strategically, and structurally unlike any other international actor or economy.<sup>2</sup> It consumes increasing quantities of energy commodities. Its Member States lack internal resources, making the EU highly import-dependent. The EU struggles to establish coherent energy policies and legislation, due to the Member States' contradicting energy policies, their heterogeneous energy realities, regional and global energy market developments, and political complexities. Energy-poor entities, such as the EU, are generally unable to use energy as a diplomacy tool to influence the behaviour of other international actors.<sup>3</sup> They are left to utilise the power of other sectoral internal policies and regulations in external relations with third parties.

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<sup>1</sup> Sandra Lavenex, 'The Power of Functionalist Extension: How EU Rules Travel' (2014) 21 *Journal of European Public Policy* 885, 887.

<sup>2</sup> Rafael Leal-Arcas and Andrew Filis, 'Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective' (2013) 36 *Fordham International Law Journal* 1224, 1298.

<sup>3</sup> *Ibid* 1276.

It is often noted that the EU is, at its core, still predominantly 'a market'.<sup>4</sup> The EU is, moreover, seen as a 'regulatory entity', which pursues and prioritises 'governance through rules and regulation'.<sup>5</sup> The creation and development of the internal market therefore involves an extensive delegation of powers to independent regulatory bodies and supranational agencies.<sup>6</sup> In market-related policy areas for which the Member States have ceded regulatory competence to the EU, the latter generates a considerable amount of economic and social regulation that can produce important external effects.<sup>7</sup> The Union's 'external governance' is indeed most prominent in the internal market and competition policies, where countries whose economies are strongly interconnected with the EU's are more susceptible to regulatory convergence.<sup>8</sup> The internal market in itself has institutional features that provide the EU with considerable capacity for externalising economic and social market-related policies and regulatory measures.<sup>9</sup> The EU is therefore often depicted as a dominant global regulator, routinely 'exporting, globalizing or uploading'<sup>10</sup> its rules and standards.

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<sup>4</sup> Chad Damro, 'Market Power Europe' (2012) 19 *Journal of European Public Policy* 682, 683, meaning that its identity has been primarily constructed around the internal market project, which provides for the 'material existence of the EU'.

<sup>5</sup> Ibid 687.

<sup>6</sup> Claire Dupont and Radostina Primova, 'Combating Complexity: The Integration of EU Climate and Energy Policies' in Jale Tosun and Israel Solorio Sandoval (eds), *Energy and Environment in Europe: Assessing a Complex Relationship* (2011) 15 *European Integration Online Papers* 1, 3 <eiop.or.at/eiop/pdf/2011-008.pdf> accessed 12 December 2017.

<sup>7</sup> Damro (n 4) 688.

<sup>8</sup> Frank Schimmelfennig, 'Europeanization Beyond Europe' (2012) 7 *Living Reviews in European Governance* 5, 9 <www.europeangovernance-livingreviews.org/Articles/lreg-2012-1/> accessed 12 December 2017.

<sup>9</sup> Damro (n 4) 683.

<sup>10</sup> Alasdair R Young, 'Europe as a Global Regulator? The Limits of EU Influence in International Food Safety Standards' (2014) 21 *Journal of European Public Policy* 904, 909.

There is a growing body of scholarship analysing and describing this phenomenon with different concepts, such as 'the Brussels effect',<sup>11</sup> 'Europeanisation',<sup>12</sup> 'policy diffusion',<sup>13</sup> 'territorial extension',<sup>14</sup> etc. Although these theories have important differences – discussion of which exceeds the scope and intention of the present article – for the purpose of the main argument here, their key commonalities are highlighted.

The theories all recognise the uniqueness of the autonomous EU norm creation: the process starts with forging consensus among the Member States, where often the most stringent standard is adopted, thus representing the regulatory 'race to the top'; this initial step is followed by the norm's application outside the EU's territorial or personal jurisdiction; the extra-jurisdictional application is underpinned by the voluntary acceptance of the EU norm by target subjects, driven by either the EU's commercial or political leverage. Notably, all instances of the 'extraterritorial' application of EU policies and measures are characterised by the absence of physical force. Theory distinguishes two avenues for such 'regulatory globalisation': (i) market-driven harmonisation through 'soft' conditionality and unilateral regulatory convergence, and (ii) political harmonisation through treaties and institutions.<sup>15</sup> Importantly, in externalising its internal policies and regulations, the EU acts as a power that is aware of its market and regulatory strengths.<sup>16</sup> For example, various official documents, such as the 'Europe 2020 Strategy', have called for the establishment of an external political and trade agenda that would be heavily reliant on exporting market-related

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<sup>11</sup> Anu Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1.

<sup>12</sup> Schimmelfennig (n 8).

<sup>13</sup> Damro (n 4).

<sup>14</sup> Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87.

<sup>15</sup> Bradford (n 11) 43-44. Political harmonisation may furthermore occur with exports of policies and regulations through bilateral (via accession agreements and partnership treaties) or multilateral agreements (by incorporating EU standards into legal regimes of international organisations).

<sup>16</sup> Scott (n 14) 88.



policies, acting as an international standard-setter, developing global rules, and so forth.<sup>17</sup>

The main hypothesis to be explored in this article is the following: the selected instances of external effects of EU energy regulation (dependent variables, here) may be explained by the structural characteristics of this policy area (independent variables, here). The main argument may be summarised as follows: despite the EU energy regulation being an inherently politicised and controversial policy area, sensitive due to national security and sovereignty issues, and despite its incremental and fragmented status, there are considerable external effects of EU energy regulation. These external effects emerge in different dimensions – global and regional – resulting from the EU's various regulatory activities and can be qualified as positive or negative.

'Positive' external effects<sup>18</sup> entail various benefits, rewards and successful regulatory convergence: institutionalising agreements, exporting EU rules and institutions, etc. These benefits are observed from the perspective of EU energy interests. Thus, for instance, if a particular result of EU energy regulation lies in the interest of EU policy – such as the achievement of a beneficial agreement on energy imports, the successful conclusion of an EU-brokered multilateral energy treaty, or the general success of its foreign energy policy – then it is regarded as a positive effect.

'Negative' effects, on the other hand, occur as a consequence of diminishing EU material, normative or political interest – such as the inability to satisfy its energy demands, internal political strife over energy issues, the rejection of an EU-advocated international instrument, or in the general failure of its foreign policy efforts. Negative external effects<sup>19</sup> would thus include: reducing energy imports or terminating trade benefits; implementing embargoes and boycotts; delaying, suspending or denouncing agreements; withdrawing preferences; etc. The positive effects will be uncovered based on factors such as consolidated EU external policy and energy regulatory activity, or the existing constellation of regional geopolitical powers (the

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<sup>17</sup> Damro (n 4) 694.

<sup>18</sup> Similarly termed by Damro as 'externalisation associated with positive conditionality', Damro (n 4) 691.

<sup>19</sup> Ibid.

EU's overwhelming size in the global economy). The negative effects will be explained by constraints such as shortcomings in the EU regulatory framework (the absence of regulatory propensity, i.e. of institutional readiness to introduce or uphold stringent standards), internal divisions (decision-making checks) and growing diversity (either of actors through geographical enlargement, or regarding energy realities), high dependence on external actors (Russia in particular), or a constellation of preferences in the international institutions.

The present inquiry of the global effects of EU energy law and policy is structured as follows. After these introductory remarks, section II briefly introduces the structural characteristics that determine unilateral regulatory globalisation. These include the material realities of the EU energy sector and its institutional features. It is argued that the existence and interaction of these characteristics generally predispose the EU to act as a global regulator or 'market-power'. This function allows the EU to effectively externalise its internal policies into the international arena.<sup>20</sup> However, such international effectiveness of the EU regulatory externalisation can be understood only with explicit reference to the international context within which a particular internal regulatory area operates. It is therefore important to further conceptualise various external pressures, together with combinations of internal and external institutions and actors, which all considerably influence the likelihood of externalisation.<sup>21</sup> Therefore, the mainstream scholarship suggests that such analyses should be conducted by precisely theorising sectoral EU market-related policies, such as energy regulation, which is the focus of section III. Section III thus presents a discussion of the global effects of EU energy regulation at the international (within the International Civil Aviation Organisation and World Trade Organisation) and regional level (the Energy Community Treaty and Energy Charter Treaty). This section is wrapped up by briefly sketching avenues for further research, namely the external effects of the EU energy regulation in bilateral instances, most prominently in relations with Russia, the USA and Canada. Section IV draws conclusions.

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<sup>20</sup> Damro (n 4) 689.

<sup>21</sup> See Damro (n 4) and Young (n 11).

It is important to emphasise at this point that the discussion in this article intentionally remains mostly descriptive. Like some of the seminal articles in the field, this article is one of the first attempts to analyse EU energy regulation in its external dimension and to draw doctrinal conclusions on its global (ir)relevance. The article aims: (i) to provide a comprehensive overview of the policy area in question; and (ii) to arrive at a better understanding of the global role of EU energy regulation, thus to contribute to the academic literature discussing the external effects of EU regulation in general. In a theoretical inquiry, I classify and qualify the global effects of EU energy regulation, i.e. I assess at which levels and to what extent these effects are manifested, and what their consequences are.

## II. EU ENERGY LAW AND POLICY: FROM NATIONAL MONOPOLIES TOWARDS THE ENERGY UNION

The EU is the second biggest economy of the world, strongly dependent on energy imports to fulfil its internal demands.<sup>22</sup> It is also the world's largest energy importer, importing about 55% of its energy supply: around 85% of its oil and around 65% of its natural gas.<sup>23</sup> The EU's primary energy supply is characterised by a lack of diversity. Three key exporters – Russia, Norway and Algeria – account for 85% of the EU natural gas imports and almost 50% of its crude oil imports.<sup>24</sup> This trend of the EU's high energy-dependence is forecasted to increase to 70-80% by 2030.<sup>25</sup> Moreover, EU Member States' energy sectors vary widely in terms of resources, infrastructure, investments, prices, regulatory level, foreign agreements, etc.<sup>26</sup> This makes prospects for a unified EU energy policy even more difficult to achieve.

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<sup>22</sup> Eurostat, 'Statistical Books: EU in the World - 2016 Edition' <[ec.europa.eu/eurostat/en/web/products-statistical-books/-/KS-EX-16-001](http://ec.europa.eu/eurostat/en/web/products-statistical-books/-/KS-EX-16-001)> accessed 16 May 2017.

<sup>23</sup> Michael Ratner et al, 'Europe's Energy Security: Options and Challenges to Natural Gas Supply Diversification' (2013) US Congressional Research Service Report 1, 5 <[fas.org/sgp/crs/row/R42405.pdf](http://fas.org/sgp/crs/row/R42405.pdf)> accessed 16 December 2017.

<sup>24</sup> Leal-Arcas and Filis (n 2) 1234.

<sup>25</sup> Rafael Leal-Arcas and Andrew Filis, 'The Energy Community and the Energy Charter Treaty: Special Legal Regimes, their Systemic Relationship to the EU, and their Dispute Settlement Arrangements' (2014) 12 Oil, Gas & Energy Law 1, 10.

<sup>26</sup> Leal-Arcas and Filis (n 2) 1241.

Historically, the EU's origins lie in matters related to various aspects of energy regulation. Two of the original European communities – the European Coal and Steel Community and the European Atomic Energy Community – dealt with the provision of energy for European economies.<sup>27</sup> However, energy regulation at the European level did not rank highly in importance, given that the Member States defiantly preserved it as their sovereign prerogative. This continued despite the severe repercussions of the 1970s oil crises, the central importance of energy to modern economies, and envisaged savings potentially accrued from an integrated and flexible European energy market.

Nevertheless, a paradigmatic shift in energy-related regulatory governance towards the EU level slowly occurred for a number of reasons. Energy policy gradually and ever more explicitly started to become an area within the Union's competence.<sup>28</sup> First, whole branches of the economy formerly understood as the 'bastions of national sovereignty'<sup>29</sup> underwent drastic changes, reflecting the dynamics of integration and liberalisation at the EU level, characterised by privatisation, deregulation and intensified competition. Similarly, the EU energy market over the last couple of decades has been extensively 'communitarised' or 'supranationalised'. Second, the consolidation of EU energy markets has been boosted by external challenges requiring an integrated EU energy policy. The most prominent have been the high dependence on external energy suppliers and the trends of increasing energy prices, energy security issues (supply disturbances, especially from Russia as the key energy exporter), environmental protection and climate change. Shifts in EU energy policy have been equally influenced by the series of EU enlargements to the East to include more energy import-dependent states.<sup>30</sup>

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<sup>27</sup> Desmond Dinan, *Ever Closer Union. An Introduction to European Integration* (Palgrave 2010) 466. The Treaty establishing the European Coal and Steel Community expired in 2002, while the EURATOM Treaty is still in force.

<sup>28</sup> Dupont and Primova (n 7) 15.

<sup>29</sup> Alexei Ispolinov and Tatiana Dvenadtsatova, 'The Creation of a Common EU Energy Market: A Quiet Revolution with Far-Reaching Consequences' (2013) 2 *Baltic Region* 78, 78.

<sup>30</sup> Neill Nugent, *The Government and Politics of the European Union* (Palgrave 2010) 343.

Nowadays, EU energy policy stands as a comprehensive and multifaceted issue covering a wide range of related policy matters. The EU pursues its energy policy objectives in a wider context by positioning energy, where appropriate, as a central part of its external relations, and by exporting its regulatory rules and standards.<sup>31</sup> Advocating a stable and transparent regulatory framework for the production and trade of energy, the EU seeks the creation of a liberalised pan-European energy market where 'energy can be exchanged on the basis of supply and demand, rather than on national interests and geopolitical considerations'.<sup>32</sup>

The EU energy *acquis*<sup>33</sup> consists of a plethora of rules and policies covering among others: the functioning of the internal energy market, competition and state aid, environmental protection, the promotion of renewable energy sources, energy efficiency and savings, energy security and crisis management, and the interconnection of energy networks.<sup>34</sup> Recent landmarks for the EU energy governance were the entry into force of the Lisbon Treaty and the enactments of the Third Energy Package and Energy-Climate Package.

The 2009 entry into force of the Lisbon Treaty caused a formal shift for energy policy from being an exclusive Member State competence to a shared (between the EU and the Member States) legislative competence. It included a separate section (Title XXI) on energy in the Treaty on the Functioning of the European Union (TFEU). Clarifying the catalogue of competences and reserving the ordinary legislative procedure for simpler energy decision-making, EU energy governance was to an extent 'strengthened and

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<sup>31</sup> Stephan Renner, 'The Energy Community of Southeast Europe: A Neo-Functionalist Project of Regional Integration' (2009) 13 *European Integration Online Papers* 1, 3 <eiop.or.at/eiop/pdf/2009-001.pdf> accessed 13 December 2017.

<sup>32</sup> Ibid.

<sup>33</sup> Given that the majority of energy legislation was adopted on an internal market basis (Article 114 TFEU), it is still uncertain whether the reasoning of the *ERTA* judgment (Case 22-70 *Commission v Council (European Agreement on Road Transport)* EU:C:1971:32), ie 'exclusive external competence for the Union exists wherever the single market competence is exercised', will similarly be extended to consolidate EU external competence in all aspects of the energy policy.

<sup>34</sup> Tamara Perišin, 'Pending EU Disputes in the WTO: Challenges to EU Energy Law and Policy' (2014) 10 *Croatian Yearbook of European Law and Policy* 371, 380.

streamlined'.<sup>35</sup> The Lisbon amendments thus offer a clearer legal basis for pursuing EU ambitions regarding the 'energy trinity' – environment, the internal market and external relations.<sup>36</sup>

As a counterbalance to the increased EU regulatory capacity, Member States under the Lisbon Treaty retained autonomy in matters concerning the mix of energy sources, the conditions for exploiting their energy resources and the structure of their energy supply.<sup>37</sup> However, important aspects of energy, such as competitive conditions of energy trade within the internal market (state aid, antitrust) and the question of tariffs for third-country energy commodities (common commercial policy) have remained within the exclusive competence of the EU.<sup>38</sup> This arrangement has been described as 'a carefully crafted compromise' between national sovereignty over domestic resources and energy taxation issues, and shared EU competence for the remainder of affairs.<sup>39</sup> It has been proposed therefore to construe the post-Lisbon EU energy regulation as a new 'Union method', i.e. a combination of the 'community method' and coordinated intergovernmental action by the Member States.<sup>40</sup> Furthermore, numerous internal and external aspects of the EU energy policy engage a multiplicity of EU institutions,<sup>41</sup> thus rendering international representation in energy policy extremely complex.

In parallel with the EU landmark project of completing the internal market, efforts continued to liberalise European energy markets and establish a functioning EU internal energy market. For this, three key phases of energy

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<sup>35</sup> Israel Solorio, 'Bridging the Gap Between Environmental Policy Integration and the EU's Energy Policy: Mapping Out the "Green Europeanisation" of Energy Governance' (2011) 7 *Journal of Contemporary European Research* 396, 410.

<sup>36</sup> *Ibid* 411.

<sup>37</sup> Leal-Arcas and Filis (n 25) 12.

<sup>38</sup> Leal-Arcas and Filis (n 2) 1252.

<sup>39</sup> Jan Frederik Braun, 'EU Energy Policy under the Treaty of Lisbon Rules: Between a New Policy and Business as Usual' (2011) 31 *European Policy Institute Network Working Paper* 1, 2.

<sup>40</sup> *Ibid* 8.

<sup>41</sup> To name the most important: EU Commissioners for Energy Union and Climate Change and Energy; the European Council's President; the High Representative for Foreign Affairs and Security Policy; the EU External Action Service; the Foreign Affairs Council as a subcommittee of the Council of Ministers; etc.



legislation from the 1990s onwards brought measures that aimed to remove numerous legal obstacles, approximate tax and pricing policies, establish common norms and standards, and set environmental and safety regulations. Following the two regulatory packages in 1998 and 2003, the so-called 'Third Energy Package' was adopted in 2009.<sup>42</sup> It contained a bulk of directives and regulations that required legal (via ownership) and functional 'unbundling' of the production, supply and transmission of electricity and natural gas, and increased regulatory powers at the EU level.<sup>43</sup> These measures were met with predictable resistance from France and Germany that had persistently defended their national champions, as well as from large utilities companies, which complained about violation of their property rights.<sup>44</sup> Thus, the Third Energy Package became and still remains a subject of many heated discussions and arguments.<sup>45</sup>

Complementing the Third Energy Package, the so-called '20-20-20' Energy-Climate Package was introduced in late 2008.<sup>46</sup> As the name suggests, it

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<sup>42</sup> Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L 211/55; Directive 2009/73/EC concerning common rules for the internal market in natural gas [2009] OJ L 211/94; Regulation No 713/2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L 211/1; Regulation No 714/2009 on conditions for access to the network for cross-border exchanges in electricity [2009] OJ L 211/15; Regulation No 715/2009 on conditions for access to the natural gas transmission networks [2009] OJ L 211/36.

<sup>43</sup> Through the establishment of the Agency for Cooperation of Energy Regulators. See Perišin (n 34) 377. The most important pieces of this legislative package were: two directives establishing common rules for the internal market of electricity and natural gas, and two regulations on conditions for access to the network for cross-border exchanges in electricity and to the natural gas transmission networks.

<sup>44</sup> Dinan (n 27) 470.

<sup>45</sup> Ispolinov and Dvenadtsatova (n 29) 85.

<sup>46</sup> Directive 2009/28/EC on the promotion of the use of energy from renewable sources [2009] OJ L 140/16; Directive 2009/29/EC to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63; Directive 2009/31/EC on the geological storage of carbon dioxide [2009] OJ L 140/114, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation No 1013/2006 [2009] OJ L 140/114; Decision No 406/2009/EC on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136.



aimed to tackle climate change through innovative measures for energy production and consumption. The EU thus committed to reach the following binding targets by 2020:<sup>47</sup> cutting greenhouse gases emissions by 20% of the levels of 1990; reducing energy consumption by 20% through increased energy efficiency; and increasing renewable energy use by 20%.<sup>48</sup>

Entering into the new institutional cycle in 2015, the EU Strategic Agenda listed the pursuit of an EU Energy Union as one of its key priorities.<sup>49</sup> This was afterwards endorsed by the European Council, and followed by the European Commission's Energy Union strategy.<sup>50</sup> The Commission proposed the creation of an Energy Union to address the fragmentation of the EU energy market, holistically approaching the integration of an ever-wide range of policy sectors, including energy, the environment, security,

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<sup>47</sup> At least a 40% reduction of emissions from the 1990 levels, with at least a 27% increased share of renewables and at least a 27% improvement in energy efficiency, are targets set for the year 2030. This framework was adopted in 2014. The EU objective for 2050 remains to reduce emissions to 80-95% below the 1990 levels. See European Commission, 'Climate Strategies and Targets' <[ec.europa.eu/clima/policies/strategies\\_en](http://ec.europa.eu/clima/policies/strategies_en)> accessed 12 April 2016. See also Måns Nilsson, Claudia Strambo and André Månsson, 'A Qualitative Look at the Coherence between EU Energy Security and Climate Change Policies' (2014) British Institute of Energy Economics 1, 5. The European Parliament has recently proposed a 'zero emissions strategy' ensuring no greenhouse gases emissions after 2050. See European Parliament, 'EP Plenary Session Newsletter 2-5 October 2017 – COP23: MEPs to Press EU to Ratchet up Its Climate Goals' <[www.europarl.europa.eu/ireland/en/news-press/ep-plenary-session-newsletter-2-5-october-2017](http://www.europarl.europa.eu/ireland/en/news-press/ep-plenary-session-newsletter-2-5-october-2017)> accessed 16 October 2017.

<sup>48</sup> Nugent (n 30) 344. The core pieces of this regulatory package, through which the designated targets were to be achieved, were: the Renewable Energy Directive, with binding national targets for lifting the share of renewable energy sources in the EU; the revised and strengthened EU Emissions Trading Directive, envisaging the inclusion of additional industrial sectors in the emissions trading scheme; the Effort Sharing Decision, containing individual greenhouse gas emissions reduction targets for Member States; and the Directive for the promotion of energy efficiency and development of carbon capture and storage.

<sup>49</sup> European Council, 'Conclusions: 26/27 June 2014' EUCO 79/14 <[data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf](http://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf)> accessed 28 January 2018.

<sup>50</sup> Anders Stouge, 'Time to Get Holistic on Energy' EURACTIV (London, 29 September 2016) <[www.euractiv.com/section/energy/opinion/time-to-get-holistic-on-energy/](http://www.euractiv.com/section/energy/opinion/time-to-get-holistic-on-energy/)> accessed 10 October 2016.

trade, industry, agriculture, research and innovation, foreign policy, regional and neighbourhood policy, consumer protection, etc.<sup>51</sup>

In 2016, the Commission started publishing proposals for the revision of parts of the Energy-Climate Package, most importantly the EU Emissions Trading System (ETS) Directive for the period after 2020,<sup>52</sup> and the Greenhouse Gas Emissions Regulation for non-ETS sectors.<sup>53</sup> As part of the so-called 'Energy-Security Package', the Commission initiated the revision of the Security of Gas Supply Regulation.<sup>54</sup> The idea of creating a fully-fledged EU Energy Union was once again floated as one of the top priorities for the Union in the post-Brexit era, following the EU-27 meeting in Bratislava.<sup>55</sup>

Finally, in late 2016 the European Commission published the latest instalment of the Energy Union initiative, with an aim to consolidate and strengthen the EU energy legislation.<sup>56</sup> This so-called 'Winter Energy Package' represents the most ambitious and far-reaching set of legislative proposals introduced so far – hence touted as a 'mega-package' – aiming

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<sup>51</sup> The Energy Union project formally encompasses five dimensions: '(a) security, solidarity and trust; (b) a fully integrated internal energy market; (c) energy efficiency for reducing dependence on energy imports and emissions; (d) climate action – decarbonising the economy; and (e) research, innovation and competitiveness'. European Commission, 'Building the Energy Union' <[ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/building-energy-union](http://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/building-energy-union)> accessed 29 January 2017.

<sup>52</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments COM/2015/0337 final - 2015/0148 (COD).

<sup>53</sup> Proposal for a Regulation of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 for a resilient Energy Union and to meet commitments under the Paris Agreement and amending Regulation No 525/2013 of the European Parliament and the Council on a mechanism for monitoring and reporting greenhouse gas emissions and other information relevant to climate change COM/2016/0482 final - 2016/0231 (COD).

<sup>54</sup> Ruth Losch and Lothar van Driessche, 'European Commission Presents Energy Winter Package 2016' (2016) 2 *Linklaters* 1 <[www.institutee.cz/podklady-k-prednasce-ceps-3-5/34375193/161202\\_newsletter\\_energy\\_1.pdf](http://www.institutee.cz/podklady-k-prednasce-ceps-3-5/34375193/161202_newsletter_energy_1.pdf)> accessed 13 December 2017.

<sup>55</sup> European Council, 'Bratislava Declaration and Roadmap' <[www.consilium.europa.eu/en/press/press-releases/2016/09/16-bratislava-declaration-and-roadmap/](http://www.consilium.europa.eu/en/press/press-releases/2016/09/16-bratislava-declaration-and-roadmap/)> accessed 29 September 2016.

<sup>56</sup> Losch and van Driessche (n 54) 1.

towards a wholly integrated and genuinely liberalised, EU-wide single energy market. The overall package covers various issues, ranging from 'capacity mechanisms and diversification of supply to energy prices and costs, eco-design, bioenergy sustainability, innovation and transport'.<sup>57</sup>

The recently published State of the Energy Union report claims that the EU has continued to make progress towards achieving its energy and climate goals.<sup>58</sup> However, such estimates seem far-fetched, given that many of the above-mentioned proposals still have to successfully pass the legislative procedure and satisfy the tough bargaining positions of the Member States and the European Parliament, let alone to take effect on the ground. Finally, the actual progress of the aforementioned EU energy initiatives is extremely difficult to measure, due to the 'unquantifiable objectives' and lack of recent and updated data.<sup>59</sup> In this sense, the new report of the EU Court of Auditors notes a lack of progress towards reaching the 2030 targets and the 2050 objectives of the EU energy and climate policies.<sup>60</sup>

This section of the article has outlined some of the most important structural characteristics of EU energy policy that determine the prospects for successful regulatory globalisation. On the one hand, the material realities show that the EU is an energy-poor entity in terms of internal resources and is characterised by a dependence on imports and a lack of diversity of supply. On the other hand, the size of the internal market means that the EU has an overwhelming share in global trade. The EU also has well-developed trade relations with third countries. Regarding institutional features, it has been

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<sup>57</sup> European Commission, 'Press Release: Commission Proposes New Rules for Consumer Centred Clean Energy Transition' <[ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition](http://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition)> accessed 5 December 2016.

<sup>58</sup> European Commission, 'Second Report on the State of the Energy Union' <[ec.europa.eu/commission/publications/2nd-report-state-energy-union\\_en](http://ec.europa.eu/commission/publications/2nd-report-state-energy-union_en)> accessed 7 February 2017.

<sup>59</sup> Peter Teffer, 'Energy Union Report Provides Little Evidence of Progress' EUobserver (Brussels, 3 February 2017) <[euobserver.com/energy/136788](http://euobserver.com/energy/136788)> accessed 10 February 2017.

<sup>60</sup> European Court of Auditors, 'Landscape Review – EU Action on Energy and Climate Change' (EU Publications Office, 2017) <[www.eca.europa.eu/en/Pages/DocItem.aspx?did=41824](http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=41824)> accessed 29 September 2017.

shown that EU energy policy has a specific status in the light of national security and sovereignty issues. EU energy policy is currently fragmented and incrementally developed. The best illustration of this is the EU's uncompleted energy market. However, the EU's regulatory capacity in the energy market, as in the many other policy areas, is high. Indeed, the internal energy market is extensively regulated through various measures, not exclusively emerging from the energy policy toolkit. Regulatory propensity is likewise high. This is reflected in the enforcement of stringent and risk-averse standards in the protection of health and the environment in EU energy regulation. The following section of the article reviews the global effects of the EU energy regulation introduced above. The introduced structural characteristics are observed in interaction with other factors in the international context. A combination of the internal and external characteristics and actors affect the likelihood of the externalisation and international effectiveness of EU energy regulation, as will be shown in the remainder of the article.

### III. GLOBAL EFFECTS OF THE EU ENERGY REGULATION: SELECTED INSTANCES

#### *1. International Arena: Pursuing Incontestable Universal Values or Something More?*

In the discussion about the consequences of the EU energy regulation at the international level, two salient issues emerge: the effects on international aviation and on trade.

During the last couple of decades, the EU has become increasingly mindful of climate change and the environmental impacts of new technologies. It has strived to position itself at the vanguard of global efforts to tackle these challenges.<sup>61</sup> To give substance to its declared normative goals, the EU began

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<sup>61</sup> The EU international environmental and climate policy was originally rather inward-looking. However, more recently the EU has assumed a leading role in global environmental and climate governance and diplomacy. Its role was crucial in turning the Kyoto Protocol into an operative international agreement in the face of the firm opposition of the USA and other developed countries. See Andrew Farmer (ed), *Manual of European Environmental Policy* (Earthscan/Routledge 2012).

to include in its energy regulation innovative environmental policy approaches. In line with the most relevant principles of the international climate regime as laid down in the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and its 1997 Kyoto Protocol,<sup>62</sup> the EU developed and launched its flagship initiative in 2005 – the Emission Trading System (ETS). With the primary aim of environmental protection, it extensively regulated industrial energy consumption. This sophisticated intra-EU system was the first of its kind in the world, hailed as the most ambitious 'grand policy experiment' for meeting, and possibly surpassing, the EU's Kyoto commitments.<sup>63</sup>

The original ETS Directive<sup>64</sup> was enforced with the intention of achieving a cost-effective reduction of greenhouse gas emissions within the EU. In modelling it, the EU adopted both market-based and regulative instruments. The ETS represented a so-called 'cap-and-trade' system for different industrial sectors, in which the policy-maker determined the cap while delegating the allocation of reductions to the market.<sup>65</sup> Therefore, it served

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<sup>62</sup> Kyoto's successor was negotiated at the Conference of Parties (COP21) in Paris in 2015, under the prominent leadership of the EU. State Parties came forward with their proposed contributions to limit the global temperature increase to 'well below 2°C' of the pre-industrial levels. The EU and its Member States, however, struggled with separate ratifications of the Paris accords. The Union had to secure a fast-track deal allowing it to ratify the Paris Agreement, without every Member State having previously ratified it at national level. At present, the EU as a whole accounts for 12% of global emissions. See James Crisp, 'EU Overcomes Sovereignty Fears to Secure Deal on Climate Change' EURACTIV (London, 30 September 2016) <[www.euractiv.com/section/energy/news/eu-overcomes-sovereignty-fears-to-secure-deal-on-climate-change/](http://www.euractiv.com/section/energy/news/eu-overcomes-sovereignty-fears-to-secure-deal-on-climate-change/)> accessed 13 October 2016. Recently, the UN report revealed that the proposed contributions to limit global warming fell 'alarmingly' short of what was needed to reach this goal. See United Nations Environment Programme, 'The Emissions Gap Report 2017. A UN Environment Synthesis Report' (November 2017) <[wedocs.unep.org/bitstream/handle/20.500.11822/22070/EGR\\_2017.pdf](http://wedocs.unep.org/bitstream/handle/20.500.11822/22070/EGR_2017.pdf)> accessed 8 November 2017.

<sup>63</sup> Jon Birger Skjærseth and Jørgen Wettestad, 'The Origin, Evolution and Consequences of the EU Emissions Trading System' (2009) 9 *Global Environmental Politics* 101.

<sup>64</sup> Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L 275/32.

<sup>65</sup> Nilsson et al (n 47) 5.

as an instrument for allocating carbon emission allowances (in tons of CO<sub>2</sub>) to industry, which can buy or sell these allowances as deemed necessary.<sup>66</sup> However, recent findings point out that the low prices of the carbon emission allowances, which dropped especially after the 2008 economic crisis, but were also kept low as a political gesture to appease national industries, caused a lack of incentive for industry to invest in and adopt cleaner energy sources.<sup>67</sup> This implied that the ETS in some instances actually disincentivised 'reduc[ing] emissions from the extensive use of fossil fuels in power generation and industrial processes' through technologies such as carbon capture and storage (CCS).<sup>68</sup>

In the first instance, the application of the ETS was extended to power plants and energy-intensive industrial sectors, which account for about 40% of the EU's CO<sub>2</sub> emissions. Afterwards, it progressively drew in all major polluting

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<sup>66</sup> Skjærseth and Wettestad (n 63) 102.

<sup>67</sup> Peter Teffer, 'EU to Extend Free CO<sub>2</sub> Pass to Intercontinental Flights' EUobserver (Brussels, 3 February 2017) <euobserver.com/environment/136787> accessed 12 February 2017. Instead of significantly increasing to thirty euros as initially projected, the carbon price plummeted to below ten euros per tonne. However, the ETS in practice went beyond any other instance of inter-state cooperation on the protection of the environment within the context of the UNFCCC or the WTO. Almost all globally traded emission credits initially went through the EU trading scheme. Through this, the EU has also managed to successfully export low-carbon strategies to several major emitting states. A growing number of them have integrated 'cap-and-trade' schemes into their national climate policies – New Zealand, Australia, Canada and Japan being among them. China has recently also launched a process of setting up its own emissions trading system, partly modelled after the ETS. See also Leal-Arcas and Filis (n 2) 1282, and Peter Teffer, 'EU "Regrets" Trump U-turn on Clean Power' EUobserver (Brussels, 29 March 2017) <euobserver.com/environment/137423> accessed 27 April 2017.

<sup>68</sup> International Energy Agency, *20 Years of Carbon Capture and Storage – Accelerating Future Deployment* (Paris, 2017) <www.iea.org/publications/freepublications/publication/20-years-of-carbon-capture-and-storage.html> accessed 18 April 2018. The CCS was expected to heavily contribute to reducing fossil fuel emissions in the EU. However, although the EU invested 'at least EUR 587 million in grants, subsidies, and public procurement on CCS' between 2007 and 2017, it is striking that in the EU nowadays there are no CCS plants. See Peter Teffer, 'After Spending €587 Million, EU has Zero CO<sub>2</sub> Storage Plants' EUobserver (Brussels, 6 October 2017) <euobserver.com/investigations/139257> accessed 10 October 2017.



industries, including the aviation and shipping industries.<sup>69</sup> Hence, a revised and strengthened ETS Directive was introduced as the centrepiece of the EU Energy-Climate legislative package.<sup>70</sup> The new scheme aimed to cover additional industrial sectors' emissions, starting from 2012. The Aviation Emissions Directive<sup>71</sup> was adopted to include civil aviation in the EU emission allowance-trading scheme. The EU hoped that 'the extended scheme, the world's largest greenhouse gas emission trading system, would serve as the nucleus of a much larger global carbon market'.<sup>72</sup>

The Aviation Emissions Directive in effect required all airlines, EU and foreign, to purchase carbon permits equalling their greenhouse gas emissions for all their flights arriving at, or departing from, EU territory.<sup>73</sup> Scott and Rajamani argued that a degree of territorial extension was included in this regulation from the outset,<sup>74</sup> given that the EU: (i) would regulate sections of flights which took place abroad; (ii) would observe the content of third country legislation, by exempting from the ETS regime flights departing from countries that had adopted 'equivalent measures'<sup>75</sup> to reduce the

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<sup>69</sup> Leal-Arcas and Filis (n 2) 1281.

<sup>70</sup> ETS Directive (n 52); Dinan (n 27) 475.

<sup>71</sup> Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L 8/3.

<sup>72</sup> Dinan (n 27) 476.

<sup>73</sup> Bradford (n 11) 30.

<sup>74</sup> See Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *European Journal of International Law* 469. Scott and Rajamani argue that the EU is strategically engaging in an exercise of 'contingent unilateralism': using market power to stimulate climate action, and to substitute for climate inaction elsewhere. This concept consists of two key elements: the application of EU climate change law to greenhouse gas emissions that are generated abroad and rendering this geographical extension dependent on the adoption of adequate international or third country climate change regulation.

<sup>75</sup> China's official aviation regulator (China Air Transport Association) has demanded all domestic airline carriers to cut their energy and carbon intensity by 22% by 2050. China also immediately demanded exceptions from the ETS for its air companies; however, the EU did not comply with the request and failed to elaborate on the concept of 'equivalent measures'. See Arthur Neslen 'Hedegaard Stops Clock on Aviation Emissions Law' EURACTIV (London, 13 November 2012) <[www.euractiv.com](http://www.euractiv.com)



environmental impact of these flights; and (iii) bound itself to consider amending the Directive following the eventual adoption of an 'agreement on global measures to reduce aviation emissions'.<sup>76</sup>

The inclusion of international aviation in the ETS was seen by the EU's irritated trade partners as a blatant 'break from international practice'<sup>77</sup> and 'another instance of the EU's regulatory unilateralism'.<sup>78</sup> It was likewise fiercely opposed by the aviation industry in the EU. The controversial decision sparked considerable backlash from foreign governments and airlines. Several countries threatened legal action, retaliation in the form of 'tit-for-tat' taxes, restrictions on traffic rights for EU carriers, and discriminatory treatment of EU aircraft manufacturers.<sup>79</sup> The US Congress passed a bill mandating the US Secretary of Transportation to prohibit, under certain circumstances, US companies from complying with the EU Aviation Emissions Directive.<sup>80</sup> Foreign carriers threatened to forego European Airbus aeroplanes in favour of competing US-based Boeing planes.<sup>81</sup> Both China and India prohibited their national carriers from complying with the EU scheme, while the Chinese government additionally blocked USD 4 billion worth of orders from Airbus.<sup>82</sup>

Several US airlines challenged their inclusion in the ETS before the Court of Justice of the European Union (CJEU), claiming that the EU Directive violated international law. The CJEU confirmed the Aviation Emissions

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[com/section/climate-environment/news/hedegaard-stops-clock-on-aviation-emissions-law/](http://com/section/climate-environment/news/hedegaard-stops-clock-on-aviation-emissions-law/)> accessed 13 October 2016.

<sup>76</sup> Scott (n 14) 97.

<sup>77</sup> Dinan (n 27) 476.

<sup>78</sup> Rafael Leal-Arcas and Andrew Filis, 'Legal Aspects of the Promotion of Renewable Energy within the EU and in Relation to the EU's Obligation in the WTO' (2014) 1 Renewable Energy Law and Policy Review 3, 23.

<sup>79</sup> Lorand Bartels, 'The Inclusion of Aviation in the EU ETS: WTO Law Considerations' (2012) 6 Issue Paper ICTSD Programme on Trade and Environment 1, IV.

<sup>80</sup> European Union Trading Scheme Prohibition Act of 2011 (49 USC 40101 note), Public Law No. 112-200, 112th Congress, 126 Stat. 1477, approved on 27 November, 2012. These powers were, however, never exercised.

<sup>81</sup> Bradford (n 11) 51.

<sup>82</sup> Bartels (n 79) 6.

Directive's 'validity [in light of] various international agreements and customary international law', finding no violations of the principles of territoriality and sovereignty of third states.<sup>83</sup> Following the unsuccessful legal challenge, air companies continued exerting pressure on their respective governments to resolve the issue politically in other available fora, such as the International Civil Aviation Organisation (ICAO) and the World Trade Organisation (WTO).<sup>84</sup>

Numerous countries argued against the EU's ETS on the ground that the ICAO, a UN agency for the airline sector, has sole jurisdiction for regulating international aviation emissions, as envisaged by the Kyoto Protocol.<sup>85</sup> A number of ICAO contracting parties lodged reservations expressly denying that unilateral measures were permitted, while Russia aggressively warned about the possibility of its retaliatory measures against 'states which introduce unilateral market-based measures'.<sup>86</sup> In 2011, the ICAO Council endorsed the New Delhi Declaration urging the EU to refrain from including flights by non-EU carriers in its ETS.<sup>87</sup> In 2012, twenty-three ICAO parties adopted the Moscow Declaration denouncing the EU aviation emission scheme, threatening a range of measures in response. This included litigation on the basis of the ICAO's Chicago Convention on International Civil Aviation, the prohibition of domestic airlines from participating in the EU scheme, countermeasures such as imposing additional charges on EU carriers, etc.<sup>88</sup> In the end, the EU yielded to all these pressures and decided

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<sup>83</sup> Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* EU:C:2011:864, as cited in Bradford (n 11) 31.

<sup>84</sup> Tamara Perišin, 'Transatlantic Trade Disputes on Health, Environmental and Animal Welfare Standards: Background to Regulatory Divergence and Possible Solutions' (2014) 10 *Croatian Yearbook of European Law and Policy* 249, 252.

<sup>85</sup> Dinan (n 27) 476.

<sup>86</sup> Bartels (n 79) 6.

<sup>87</sup> Twenty-six countries signed the New Delhi Declaration in September 2011, which was endorsed by the ICAO Council in October 2011 in the form of the working paper: ICAO, 'Inclusion of International Civil Aviation in the European Union Emissions Trading Scheme (EU ETS) and Its Impact' C-WP/13790. See also Bartels (n 79) 6.

<sup>88</sup> Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS <[www.ruaviation.com/docs/3/2012/2/22/50/](http://www.ruaviation.com/docs/3/2012/2/22/50/)> accessed 10 September 2016. See also Bartels (n 79) 7.

to temporarily suspend the application of the aviation emission scheme for a period of one year pending the outcome of negotiations in the ICAO.

In a step towards global cooperation on aviation emissions, the ICAO agreed in 2013 to develop a global system of market-based measures governing greenhouse gas emissions for international aviation.<sup>89</sup> In response to this progress, the EU decided to 'stop-the-clock' and limit the geographical scope of the scheme exclusively to EU territory until the end of 2016. The decision on a multilateral mechanism was delivered at the ICAO's General Assembly in October 2016.<sup>90</sup> The deal, colloquially known as the Montreal Agreement, was characterised by the EU as the 'lowest common denominator', since the ICAO parties managed to water-down the EU's original ambition.<sup>91</sup> The EU compromised on the market-based mechanism becoming mandatory only after 2027, instead of 2021. Seventy countries which account for more than 87% of global aviation emissions, including all EU Member States, China and the USA, pledged to join the mechanism as from 2021.<sup>92</sup> However, the remainder of countries including Russia, India, South Africa and Brazil rejected joining the scheme during the initial voluntary phase (2021-2027).<sup>93</sup>

The Montreal Agreement has been heavily criticised for its vagueness, mostly by EU political representatives and environmental groups. Technical details on the mechanism and governance system were left to be devised by independent expert groups until 2019. This brings into question the existing EU ETS, which is seen by many as a more robust and effective mechanism for

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<sup>89</sup> Leal-Arcas and Filis (n 78) 23.

<sup>90</sup> Jorge Valero, 'Global Deal on Aviation Emissions Puts EU Scheme under Pressure' EURACTIV (7 October 2016) <[www.euractiv.com/section/transport/news/global-deal-on-aviation-emissions-puts-eu-scheme-under-pressure/?nl\\_ref=22134749](http://www.euractiv.com/section/transport/news/global-deal-on-aviation-emissions-puts-eu-scheme-under-pressure/?nl_ref=22134749)> accessed 17 October 2016. The official name of the mechanism is CORSIA (Carbon Offsetting and Reduction Scheme for International Aviation) <[www.icao.int/environmental-protection/Pages/market-based-measures.aspx](http://www.icao.int/environmental-protection/Pages/market-based-measures.aspx)> accessed 17 October 2016.

<sup>91</sup> Jorge Valero, 'Europe Sees ICAO Deal to Curb Aviation Emissions within Reach' EURACTIV (30 September 2016) <[www.euractiv.com/section/transport/news/europe-sees-icao-deal-to-curb-aviation-emissions-within-reach/](http://www.euractiv.com/section/transport/news/europe-sees-icao-deal-to-curb-aviation-emissions-within-reach/)> accessed 16 October 2016.

<sup>92</sup> Valero (n 90).

<sup>93</sup> Ibid.

reducing aviation emissions than the new ICAO agreement.<sup>94</sup> Legislative discussion about its future, which must be concluded before mid-2018, has been postponed until after the ICAO conference. Lack of compromise will mean that foreign air companies will automatically be brought back into the ETS. The European Parliament remains very critical of the market-based mechanism of the ICAO agreement since it falls short of the Paris climate agreement's goals, and is unlikely to approve the proposal to repeal the ETS.<sup>95</sup> On the other hand, the Commission plans to propose continued exemption from the scheme for intercontinental flights, given the achieved consensus in the ICAO on reducing aviation emissions.<sup>96</sup>

Aside from the potential inter-institutional clashes, it is interesting to note how in this instance the EU initially tried to legitimise its regulatory unilateralism. In spite of its proclaimed dedication to multilateralism in international relations, the EU invoked 'normatively desirable and universally applicable' value, i.e. the mitigation of climate change.<sup>97</sup> From this perspective, EU regulatory externalisation reflected the 'altruistic purposes of a benign hegemon, acting in the collective interest to provide a global public good'.<sup>98</sup> Difficulties associated with the conclusion of an international treaty on climate change and market-based measures governing aviation greenhouse gas emissions thus provided the EU with 'an imperative to act unilaterally'.<sup>99</sup> Scott and Rajamani have criticised this decision since the EU did not take into account UNFCCC's principle of 'common but differentiated responsibilities and respective capabilities', which requires that 'developed countries should take the lead and bear a relatively greater burden in addressing the causes and effects of climate change'.<sup>100</sup> However, the EU also disguised under climate and environmental concerns a motive to 'level the playing field' and not to place its industries in a comparative

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<sup>94</sup> Valero (n 91).

<sup>95</sup> Ibid.

<sup>96</sup> Teffer (n 67). In November 2017, the agreement on the reform of the EU ETS after 2021 was reached between the European Commission, Member States in the Council and the European Parliament convening in so-called 'trilogue' meetings.

<sup>97</sup> Bradford (n 11) 37.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid 38.

<sup>100</sup> Scott and Rajamani (n 74) 469.

disadvantage. As Bradford argued, to ensure the competitiveness of the EU airlines (and being heavily lobbied by them), the EU included foreign airlines into its aviation emissions scheme.<sup>101</sup>

In sum, the EU ETS in the ICAO produced negative effects in the form of a political backlash, and (threats of) legal and commercial retaliations. The ETS was underpinned by EU regulatory capacity in the extensive regulation of emissions trading. Another factor was the EU regulatory propensity in enforcing stringent standards of environmental protection in aviation emission regulation, as well as the regulatory interest of protecting the EU aviation industry. To date, some countries (e.g. Switzerland, with which the EU has recently signed an agreement to link their emissions trading systems) have adopted domestic EU-like, albeit less ambitious, measures to cut airline carriers' energy and carbon intensity. The EU regulation on governing aviation emissions, as well as its climate diplomacy, induced the decades-awaited agreement on a global market-based mechanism in the ICAO, at least indirectly. Notwithstanding all its reported shortcomings, this agreement will be an example of the '*de iure* export' of an EU measure to the international level, i.e. to all 191 contracting parties to the Chicago Convention after the mechanism becomes binding.<sup>102</sup> This 'export' is strongly determined by the size of the EU market, i.e. the significance of the EU aviation industry and air traffic share in world trade. Therefore, externalisation of EU energy regulation in this instance may be regarded as successful.

What is left to be seen is whether the existing or extended EU ETS will remain in place. In a context where the EU reinstated the international reach of its aviation emissions regulation, the debate on its validity in the light of WTO trading rules could reopen. In such an event, potential disputes before the WTO Appellate Body would imply negative effects of EU regulatory externalisation, as has emerged in a couple of other instances.<sup>103</sup> Indeed, the

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<sup>101</sup> Bradford (n 11) 40.

<sup>102</sup> Ibid 30.

<sup>103</sup> It was generally considered that the WTO system was not expressly concerned with energy trade. For more on this see, Anna Marhold, 'The World Trade Organization and Energy: Fuel for Debate' (2013) 2 European Society of International Law Reflections 1, 2. Nevertheless, due to certain international developments and global

scheme originally raised several difficult legal questions on its compatibility with the EU's WTO obligations,<sup>104</sup> which may become relevant again.

However, despite the possibility of violating a number of WTO obligations, it is also likely that the EU would still be successful in justifying its aviation emissions scheme on the grounds of environmental protection. More precisely, the 'conservation of exhaustible natural resources' and the 'protection of human, animal or plant life or health' are recognised as general exceptions in the WTO legal regime.<sup>105</sup> What could be problematic is proving that the (re)imposition of the scheme does not amount to prohibited protectionism or an unnecessary obstacle to trade.<sup>106</sup> Aside from concerns about the competitiveness of EU airlines, the ETS was also largely a political gesture towards the EU's green lobby, since aviation accounts for only 2% of global CO<sub>2</sub> emissions and only 3% of overall EU emissions.<sup>107</sup> However, the enormous expansion of the number of passengers has made international aviation a growing source of greenhouse gas emissions. As the European Environmental Agency data show, 'CO<sub>2</sub> emissions from flights have increased between 1990 and 2014 by 80% and are expected to grow another

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energy dynamics, energy-related disputes under WTO law have recently emerged. Several of these novel WTO disputes have concerned the EU. The EU tries to leverage its position in the international trade to influence developments of global energy regulation through the imposition of criteria and certification requirements on imported energy products entering its market. For a discussion on this, see Emanuela Orlando, 'The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges' (2013) 21 *Transworld Working Paper* 1, 10-11. All the emerging disputes are recognised as essential for the 'further development of EU energy law and policy, in particular for the functioning of the internal market, standards of environmental protection and question of national energy security'. See here, Perišin (n 34) 372.

<sup>104</sup> Bartels (n 79) 1. Those were: (i) the prohibition of quantitative restriction on imports and exports; (ii) violation of the 'most favoured nation' rule concerning national treatment, given 'the differing costs based on distance travelled and its proposed granting of selective exemptions'; (iii) violation of GATT transit rules in the light of the 'last leg' aspect of the scheme; and (iv) the violation of GATS rules on measures affecting trade in services, e.g. those dependent on air transport services, such as tourism.

<sup>105</sup> Ibid 8.

<sup>106</sup> Perišin (n 34) 375.

<sup>107</sup> Dinan (n 27) 476.



45% by 2035'.<sup>108</sup> In contrast, if applicants would prove that the EU ETS serves protectionist causes or has been adopted arbitrarily or disproportionately to the aim sought, the EU measure would be declared as contradicting WTO rules. The resolution of such an eventual dispute would render a final conclusion on the effectiveness of externalising the EU regulation of aviation emissions in the global trade setting.

## *2. Regional Attempts: Falling Short of a Complete 'Success Story' for Being Overly Ambitious*

The previously mentioned emergence of energy-related WTO disputes is partially a consequence of the lack of inter-state agreement on establishing a viable energy-specific regime at the global level. Backed by several developed net energy-importing states, the EU has been for a long time a leading advocate for a comprehensive international multilateral agreement on energy under WTO auspices – although, to date, unsuccessfully. Faced with this impasse in the WTO, the EU turned its efforts to conclude geographically narrower legally binding instruments. This bore fruit in the cases of two regional instruments: the Energy Community Treaty<sup>109</sup> (EnC) and the Energy Charter Treaty<sup>110</sup> (ECT), which this section of the article focuses on.

As observed earlier, integration and consolidation of the EU internal energy market is an important driver of EU energy policy.<sup>111</sup> Even though EU energy law is currently not fully harmonised, the Union is engaged in promoting regulatory convergence in its closest neighbouring states by exporting the EU market *acquis*. For this, energy regulation is incorporated within several instruments of EU external policy: ranging from the European Economic Area and European Neighbourhood Policy, multiple Association Agreements, intergovernmental agreements governing the construction and operation of energy transmission infrastructure, to the ECT and the EnC.

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<sup>108</sup> Teffer (n 71).

<sup>109</sup> Treaty establishing Energy Community [2006] OJ L 198/18.

<sup>110</sup> The Energy Charter Treaty, signed in 1994 and entered into legal force in 1998, consolidated version and related documents are available here: <[www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/](http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/)> accessed 16 December 2017.

<sup>111</sup> Leal-Arcas and Filis (n 2) 1260.



The first significant regional energy project was the ECT. It came about as a result of a political initiative concerned with the consolidation of international cooperation in the field of energy, launched originally as the declaratory and non-binding European Energy Charter Declaration of 1991. The ECT was made concrete and strengthened in 1994 as a plurilateral international agreement aiming to provide 'a framework for energy cooperation based on the principles of open, competitive markets and sustainable development'.<sup>112</sup> Essential features also encompassed principles of non-discrimination, environmental protection and free access for foreign investment. With its subsequent optional protocols on various issues, the ECT aimed to strengthen the global rule of law on energy issues, and thereby reduce the risks associated with energy-related investments and trade.<sup>113</sup> Priority areas originally included in the ECT regime were investment promotion and protection, trade liberalisation, unrestricted transit, the environment, energy efficiency and dispute settlement.<sup>114</sup>

The ECT represented an example of the EU's engagement in the promotion of its own energy interests by creating a level playing field for long-term energy cooperation based on complementarity.<sup>115</sup> The Commission, as an EU agent, was involved in structuring the agreement. It aimed to achieve regulatory convergence in the legal systems of other signatories, by exporting predictable regulatory and investment frameworks devised on the basis of the then-existing EU legislation.<sup>116</sup> The EU also intended to embed the principles of interdependence and rule-based market governance, and thereby trigger the development of more integrated international energy markets.<sup>117</sup> These principles were successfully exported to more than fifty Euro-Asian states participating in the ECT regime. Its regional reach is reflected in the

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<sup>112</sup> Leal-Arcas and Filis (n 25) 21.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Irina Pominova, 'Risks and Benefits for the Russian Federation from Participating in the Energy Charter: Comprehensive Analysis' (2014) ECT Secretariat Knowledge Centre Occasional Paper 1, 2.

<sup>116</sup> Tomas Maltby, 'European Union Energy Policy Integration: A Case of European Commission Policy Entrepreneurship and Increasing Supranationalism' (2013) 55 *Energy Policy Journal* 435, 438.

<sup>117</sup> Ibid.

predominance of the European and former Soviet Union countries.<sup>118</sup> The ECT regulations drew heavily on the EU packages of energy legislation, complemented with the WTO norms in respective areas (e.g. transport), as well as with the EU and international practice on bilateral investment treaties.<sup>119</sup> To ensure safe and reliable energy flow towards its market, the EU promoted the adoption of internationally consolidated rules and standards governing energy transit.<sup>120</sup>

However, the externalisation of EU energy regulation through the ECT was only partially successful, given that some of the most important signatories failed to fully ratify it. These leading energy-exporting countries (most notably Russia and Norway) had the same grounds for non-ratification: the EU-influenced arrangement reflected EU concerns as a dominant importer. The Treaty thus established a lenient foreign investments regime in the energy sector, which contradicts the interests of the exporting countries that champion their energy sources as 'national patrimony'.<sup>121</sup> The dominant perception of the ECT as a legal instrument primarily devised to ensure the security of the EU energy supply was confirmed by the 2012 Arbitral Decision of the International Centre for Settlement of Investment Disputes in the case of *Electrabel v Hungary*.<sup>122</sup> According to the decision, the EU had assumed the leading role in the ECT since the beginning, and acted as a determining factor in its establishment. The Tribunal furthermore asserted that there was a 'presumption of non-contradiction between the ECT regulations and EU law'.<sup>123</sup> Therefore, in this particular instance, the EU-centred nature of the ECT regime with the overarching objective of levelling the playing field for interstate cooperation in the energy sector somewhat undermined the

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<sup>118</sup> Pominova (n 119) 3.

<sup>119</sup> Ibid 8.

<sup>120</sup> Anatole Boute, 'The Good Neighbourliness Principle in EU External Energy Relations: The Case of Energy Transit' in Dimitry Kochenov and Elena Basheska (eds), *The Principle of Good Neighborliness in the European Legal Context* (Brill Nijhoff 2015) 355.

<sup>121</sup> Sergey Seliverstov, 'Energy Security of Russia and the EU: Current Legal Problems' (2009) IFRI European Governance and Geopolitics of Energy 1, 8.

<sup>122</sup> ICSID Case No ARB/07/1 *Electrabel SA v Republic of Hungary* <[icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C111/DC7353\\_en.pdf](https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C111/DC7353_en.pdf)> accessed 16 December 2017, as cited in Boute (n 124) 366-367.

<sup>123</sup> Ibid, para 4.134.

prospects of externalising EU energy regulation to the participating target states.<sup>124</sup>

In parallel with its engagement in the ECT, the EU turned its attention to a geographically even narrower energy arrangement. The EnC represented another EU initiative aimed at extending the internal energy market and *acquis communautaire* in the field of energy, environment and competition, through the integration of the energy markets in Southeast Europe and beyond, on the grounds of a legally binding treaty.<sup>125</sup> The promotion of regulatory convergence through the EnC was pursued in accordance with the goals of EU energy policy, such as energy security, the diversification of energy supply and transit routes, sustainability, etc. Additional interest in exporting EU regulation via the EnC to the neighbouring, historically conflicting, region was to ensure the enhanced economic development and stable and predictable social, political and regulatory environment in these bordering areas, which shelter important corridors for energy supplies and are therefore crucial for the diversification of the EU's gas imports.<sup>126</sup>

The Treaty establishing the EnC entered into force in 2006, and currently includes the EU on the one side, and the countries of the Western Balkans,<sup>127</sup> Moldova, and Ukraine on the other, with Turkey, Armenia, Georgia and

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<sup>124</sup> It is useful to note that in 2015 the International Energy Charter was formally adopted and subsequently signed, as a form of continuation of the European Energy Charter process. A number of signatories from other regions of the world have joined (Africa, South America). It identifies the basic principles for strengthening energy cooperation at the international level. See The International Energy Charter <[www.energycharter.org/process/international-energy-charter-2015/overview/](http://www.energycharter.org/process/international-energy-charter-2015/overview/)> accessed 8 August 2016. It remains uncertain whether this will reproduce the earlier dynamics and crystallise into a binding international treaty. In any case, it will provide another instance for the EU to attempt to exercise its regulatory externalisation.

<sup>125</sup> Boute (n 120) 355.

<sup>126</sup> Renner (n 31) 5.

<sup>127</sup> These are Albania, Bosnia and Herzegovina, Kosovo, the FYR of Macedonia, Montenegro, and Serbia. These states are also the focus of the German-led 'Western Balkans Six' initiative. Important pillars of this recent EU policy approach are regional cooperation, infrastructure connectivity and trans-border energy projects. Energy therefore remains an important factor of EU initiatives towards this region's economic development and integration process.

Norway having the status of observers. The main objectives of the EnC, which partially mirror the TFEU chapter on energy, are: the creation of a single energy market; the development of market competitiveness; investments in energy infrastructure; the improvement of environmental standards; the promotion of energy efficiency through the use of renewables; ensuring the stability of energy supply; and the achievement of a common external energy policy, especially 'towards the Caspian, North African and Middle Eastern region'.<sup>128</sup> Therefore, the participating states agreed to adopt the relevant EU *acquis* and modify their institutional, legal and economic framework to make it suitable for implementing the exported EU energy regulation.<sup>129</sup>

The EnC represents a prototype of how the EU exports its internal policies and regulations. It illustrates the model of 'single-sector integration without membership',<sup>130</sup> i.e. without attaching political requirements concerning civil, social, and political rights. These requirements represent the foundational values of the entire EU integration project. Facing the energy-related challenges of the last couple of decades, this dynamic expresses a less idealistic way of externalising the strict economic essentials of the EU. Expanding its sphere of economic influence and energy interests to its neighbouring states that are all in theory possible candidates for accession, while bypassing demands for democratic and social reforms, is arguably contrary to the very clear mandate in EU primary law as contained in Article 21 of the Treaty on European Union (TEU). This article enshrines an obligation for the EU to promote its 'guiding principles' (democracy, rule of

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<sup>128</sup> See Leal-Arcas and Filis (n 2) 1261. See also Boute (n 120) 382.

<sup>129</sup> Concerning the export of standards, one particular example is worth mentioning. As one of the core pieces of the Third Energy Package, the EU Renewable Energy Directive features the possibility of EU cooperation with third countries in renewable energy issues. All EnC contracting parties have thus agreed to an obligatory share of renewable energy in their total energy consumption by 2020. These shares were calculated in accordance with the EU methodology: Albania - 38%, Bosnia and Herzegovina - 40%, FYR of Macedonia - 28%, Moldova - 17%, Montenegro - 33%, Serbia - 27%, Ukraine - 11%, and Kosovo - 25%. See Sergiy Dmitrovich and Nicole Viktorovna, 'Economic Expansion of the European Renewable Energy Market in Case of European Union Law' (2014) 4 Ukrainian Journal on Marketing and Innovation Management 136, 141-142.

<sup>130</sup> Leal-Arcas and Filis (n 2) 1260.

law, human rights, etc.) in all external relations, including EU energy-related agreements with third countries, in order to ensure consistency and cohesion across the EU policy spectrum.<sup>131</sup>

With the EnC, the EU consciously reproduced an identical regional integration model based on the neo-functionalist approach as institutionalised with the early Communities.<sup>132</sup> It was employed with an aim of extending EU governance by 'projecting internal solutions to its external relations'.<sup>133</sup> The EnC's structure thus closely resembles the initial institutional architecture of the two original European communities, with the only exception being the lack of a traditional adjudicative agency that could render binding judicial decisions.<sup>134</sup>

However, the specific results of the implementation of the EnC Treaty are rather mixed. All parties implemented the institutional structures foreseen by the Treaty, substantially modified their energy policies, and formally amended their energy legislation to bring them into line with the EU *acquis*. Despite the praises from the European Commission extolling the EnC as a 'success story', many practical challenges remain.<sup>135</sup> First, ensuring the enforcement of the implemented *acquis* remains problematic. Second, state practices related to poor administrative capacities, structural characteristics and the 'fuel poverty' of the energy sector in Southeast Europe keep preventing the liberalisation and integration of their energy markets with the

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<sup>131</sup> Leal-Arcas and Filis (n 25) 26.

<sup>132</sup> Renner (n 31) 7.

<sup>133</sup> Ibid 14.

<sup>134</sup> Leal-Arcas and Filis (n 25) 29-30. The authors describe how the EnC's dispute settlement mechanism is procedurally modelled after the EU infringement procedure. Its ineffectiveness is, nevertheless, largely due to the absence of a superior adjudicator such as the CJEU, notwithstanding the successfully implemented Ministerial Council decisions on breaches of the obligation to transpose EU legislation into national law. The Ministerial Council acts as a deliberative forum for rendering diplomatic decisions on breaches of the EnC Treaty and deciding on available remedies. An Advisory Committee, composed of three independent lawyers and adjunct to the Ministerial Council, has the task of preparing reasoned opinions on alleged breaches of EnC obligations, comparable to the Advocates Generals at the CJEU.

<sup>135</sup> Leal-Arcas and Filis (n 25) 27.

EU internal energy market.<sup>136</sup> For instance, vertically integrated and state-owned energy providers, 'persistent cross-subsidies and the politically motivated low level of energy tariffs' and the lack of both 'domestic generation and cross-border transmission infrastructure' are the typical remaining problems.<sup>137</sup> Finally, the lack of sufficient investment to foster infrastructure modernisation (energy production, transmission and distribution) indicates that the fundamental problems of the energy sector in this region remain unresolved. This postpones integration of the fully functioning pan-European energy market as envisaged by the EU policy-makers.

Lessons drawn from the partially successful experience of the EnC point to two conclusions. First, the idea to create the EnC had its origin in the European Commission's initiative. Thus, the contracting states did not participate in creating the rules regulating their energy sectors within established institutions, but instead committed themselves to adopting the relevant existing EU legislation.<sup>138</sup> Consequently, lack of a favourable and receptive domestic legal and socio-political environment in the target states negatively affected the success of the externalisation of EU energy regulation. Unfavourable domestic conditions in the target states arguably suffered from the omission from the EnC Treaty of political conditionality, despite the clear mandate for the EU to promote its values and democratic principles in all external relations. Second, the energy sectors of the EU and its Southeast European partners are strongly interdependent, with 'mutual vulnerabilities and complementary interests'.<sup>139</sup> This affects the EU's bargaining power to impose unilaterally its energy policy and regulations on the countries in the region. In addition, studies of neighbourhood policies overwhelmingly show the inconsistent expansion of *acquis* rules when there is no clear full EU membership prospect on the horizon,<sup>140</sup> as is the case with the states participating in the EnC. For these reasons, what initially appeared to be a 'success story' of EU regulatory externalisation is presently stumbling.

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<sup>136</sup> Renner (n 31) 12.

<sup>137</sup> Ibid 13.

<sup>138</sup> Ibid 14.

<sup>139</sup> Schimmelfennig (n 8) 21.

<sup>140</sup> Ibid.



In sum, the external effects of EU energy regulation in both cases of regional energy relations – the ECT and the EnC – were generally positive. This is reflected in the EU-brokered establishment of the institutionalised binding treaties, and the export of portions of the EU energy *acquis* to several contracting parties. In both instances this was caused by EU regulatory capacity and a consolidated external approach. In the case of the EnC specifically, regulatory externalisation was influenced by the power asymmetry and the trade and political interdependence of the EU and target states, mostly the aspiring EU accession candidates. In both instances, market power is also part of the explanation of the positive effects. It is not uncommon for the EU to rely on the strength of its market to achieve other policy goals, in this case to attract third countries to the aforementioned energy treaties. This contributes to the increased leverage of the EU on countries that have established substantial trade relations with the EU or strive to gain greater access to the EU market. Therefore, EU regulatory externalisation in both instances has generally been successful.

The successful export of the EU energy *acquis* to third parties and the creation of institutional segments facilitate the eventual integration of the neighbouring regions in the EU energy market. In the EnC example, regulatory externalisation has been formally successful, yet incomplete in practice given the lack of enforcement of the implemented legislation and the structural shortcomings of the region's energy sectors. In the ECT example, negative effects were produced through the constant rejections of important energy-exporting states to ratify this Treaty, due to the EU-centred importer-friendly arrangements. This, in turn, affected ECT's geographical reach and its global relevance.

As confirmed in these two instances, in a politically contested field such as EU energy governance, regulatory convergence is more likely regarding subjects in a similar situation (energy dependence) or in power asymmetry relations (potential candidates for EU accession). In such an event, it is even possible for the EU to unilaterally impose its energy rules and standards on target countries. In contrast, relations with energy-producing countries or international super-powers (Russia, the USA) demand a more flexible approach and mutual adjustments to encourage a minimum of cooperation.<sup>141</sup>

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<sup>141</sup> Lavenex (n 1) 896-897.



That is why the external effects of EU energy regulation in numerous bilateral instances, most prominently in relations with Russia, the USA and Canada, as roughly sketched in the following paragraphs, are important avenues for future research.

### 3. Further Research

Through the two regional energy treaties presented in the previous section of the article, the EU primarily strove to promote its energy interests. These arrangements were seen by third parties as beneficial exclusively for the EU and its energy policy priorities. The dominance of EU energy interests was the obstacle for Russia's accession to any of the two instruments. In general, EU-Russia energy relations are highly politicised and troublesome, with numerous crises occurring over time, such as energy supply cuts, Ukrainian energy and military crises, etc.<sup>142</sup> Nevertheless, relations with Russia during the last two decades had some minor positive effects in the form of limited regulatory convergence through institutionalised cooperation, policy agreements and trans-governmental networks.

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<sup>142</sup> EU economic sanctions, originally introduced against Russia in 2014 following the annexation of Crimea, have been extended to 2018. They target, *inter alia*, the Russian energy sector through 'financial limitations on Russian energy companies, and curtailing Russian access to sensitive technologies used for oil production and exploration'. See Council of the EU, 'Press release: Russia: EU prolongs economic sanctions by six months' <[www.consilium.europa.eu/en/press/press-releases/2017/06/28-eu-sanctions-russia/](http://www.consilium.europa.eu/en/press/press-releases/2017/06/28-eu-sanctions-russia/)> accessed 12 July 2017. The negative economic impact of EU sanctions and the Russian countersanctions is estimated at around EUR 30 billion, representing a decrease of 10.7% from the previous period (between 2014 and 2016). See Oliver Fritz, Elisabeth Christen, Franz Sinabell and Julian Hinz, *Russia's and the EU's Sanctions. Economic and Trade Effects, Compliance and the Way Forward* (Austrian Institute of Economic Research – Kiel Institute for the World Economy 2017) <[www.wifo.ac.at/en/pubma\\_entries?detail-view=yes&publikation\\_id=60669](http://www.wifo.ac.at/en/pubma_entries?detail-view=yes&publikation_id=60669)> accessed 3 October 2017. On 'redistributive impact' of the sanctions across the EU, see Francesco Giumelli, 'The Redistributive Impact of Restrictive Measures on EU Members: Winners and Losers from Imposing Sanctions on Russia' (2017) 55 *Journal of Common Market Studies* 1062. On trade projections, see Francesco Giumelli, 'EU-Russia Trade Bouncing Back Despite Sanctions' *EUobserver* (Brussels, 17 October 2017) <[euobserver.com/opinion/139485](http://euobserver.com/opinion/139485)> accessed 17 October 2017.

Despite this, successful EU regulatory externalisation towards Russia is less likely, aggravated by the high dependence of the EU on Russian energy imports, and by the institutional features on both sides: on the one hand, the rigidity of Russian formal and informal institutions (centralised leadership and state capitalism), and on the other hand, unconsolidated EU foreign energy policy and inter-institutional struggles.

An interesting example is the effects of the EU's energy regulation on the Russian state-controlled energy company Gazprom, which holds a 34% share of the natural gas market in Europe and controls the world's largest gas reserves.<sup>143</sup> In 2016, a preliminary settlement was reached between Gazprom and the European Commission over a previously initiated antitrust investigation.<sup>144</sup> In the settlement, Gazprom accepted the EU's authority in applying competition and energy rules, e.g. on third-party access to gas infrastructures, diversification and security of supply, strict 'unbundling' of energy production, supply and transmission, etc.<sup>145</sup> The deal helped to unlock

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<sup>143</sup> Anna Kinberg Batra and Gunnar Hoekmark, 'Nord Stream 2 is Incompatible with the Energy Union' EUobserver (Brussels, 9 February 2017) <euobserver.com/opinion/136848> accessed 7 March 2017.

<sup>144</sup> Alissa de Carbonnel and Foo Yun Chee, 'Gazprom Putting "Final Touch" to EU Antitrust Deal' Reuters (Brussels, 26 October 2016) <uk.reuters.com/article/uk-russia-gazprom-eu-competition-idUKKCN12Q28O?il=0> accessed 29 October 2016. The antitrust investigation was initiated in 2012 for Gazprom's alleged abuse of a dominant position in the energy markets of Central and Eastern European Member States. In 2017, Gazprom responded by offering the Commission legally binding commitments, failing which it could be fined up to 10% of its worldwide turnover under EU competition rules. The Commission's Statement of Objections proposes three main commitments to modify Gazprom's policy in the Member States' energy markets during next eight years: (i) ensuring competitive gas market prices; (ii) removing restrictions on cross-border gas resales imposed through its dominant market position; and (iii) enabling the free flow of gas without imposing anticompetitive conditions on gas infrastructure operators. For more, see European Commission, 'Gazprom Case (number 39816) Upstream Gas Supplies in Central and Eastern Europe' <ec.europa.eu/competition/elojade/isef/case\_details.cfm?proc\_code=I\_39816> accessed 12 June 2017; and Eric Maurice, 'EU and Gazprom Closer to Amicable Deal' EUobserver (Brussels, 13 March 2017) <euobserver.com/energy/137219> accessed 14 April 2017.

<sup>145</sup> European Commission (n 144). Gazprom's rejection of the same EU energy and competition rules blocked the previous Russian project named South Stream (a

contentious pipeline projects, which will raise the flow of Russian gas into the EU market in the future. All this was notwithstanding the opposition of Eastern European Member States to Russia's increased energy dominance, the incompatibility with the Energy Union's goal to diversify energy supplies,<sup>146</sup> and the recent challenge before the CJEU of the Commission's

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pipeline under the Black Sea to Bulgaria and via the Balkan Peninsula further to the EU). See Andrew Rettman, 'New EU law takes aim at Russia pipeline' EUobserver (Brussels, 8 November 2017) <euobserver.com/energy/139800> accessed 8 November 2017.

<sup>146</sup> Sijbren de Jong, 'Nord Stream 2: The Elephant in the Room' EUobserver (Brussels, 7 February 2017) <euobserver.com/energy/136806> accessed 5 March 2017. The 'Nord Stream 2 saga' has recently been further politicised within the EU itself. A clash between the Commission's DG ENER and the Council's legal service on the legal regime of Nord Stream 2's offshore section raised an issue about whether the 2009 Third Energy Package (namely the Gas Directive) or merely international law applied to the pipeline. See Andrew Rettman, 'EU Lawyers Give Russia Pipeline a Free Pass' EUobserver (Brussels, 2 October 2017) <euobserver.com/energy/139236> accessed 7 October 2017. The Council's legal service held that the Directive does not apply. See Council of the EU, 'Opinion of the Legal Service' (27 September 2017) <www.politico.eu/wp-content/uploads/2017/09/SPOLITICO-17092812480.pdf> accessed 1 October 2017. The European Commissioners for the Energy Union and Climate Action in a letter to the European Parliament asserted the same. See European Commission, 'Request Pursuant to the Framework Agreement – Nord Stream 2' (12 September 2017) <www.politico.eu/wp-content/uploads/2017/09/NS2-SPOLITICO-17091912000.pdf> accessed 1 October 2017. Despite this, the DG ENER has persisted in backing the Directive's applicability. See Sebastian Sass, 'Deliberate Misconceptions about Nord Stream 2?' EUobserver (Brussels, 9 October 2017) <euobserver.com/opinion/139335> accessed 11 October 2017. The core problem is the Council legal service's assessment that 'the assumption that the opening of supplementary routes [with Nord Stream 2] might increase the Union's dependence on its external energy providers is counter-intuitive'. Such a position is opposed by the Nordic, Baltic and especially the Visegrad 4 states (the Czech Republic, Slovakia, Poland and Hungary), for fear of Russia's supply cuts. The idea of amending the Directive to subject the controversial pipeline in full to the Third Energy Package and thus resolve this legal battle was raised at the EU summit in October 2017 and is strongly supported by the Commission. See Andrew Rettman, 'Legal tweak could extend EU control on Russia pipeline' EUobserver (Brussels, 20 October 2017) <euobserver.com/energy/139570> accessed 27 October 2017. Another issue is whether to negotiate with Russia on the Nord Stream 2 project bilaterally through the involved Member States (primarily Germany), or through the Commission

decision for its alleged violation of both the EU-Ukraine Association Agreement and the EnC Treaty.<sup>147</sup>

The controversy continued when the US Congress passed a bill threatening the imposition of extraterritorial sanctions on EU firms involved in investing in the Russian energy projects, including the most contentious Nord Stream 2 project, citing, *inter alia*, Russia's involvement in conflicts in Ukraine and Syria as the main reason.<sup>148</sup> A couple of Member States fiercely opposed this act and sided with Russia. They accused the USA of adopting an extra-jurisdictional act, abusing geopolitical crises as a leverage for reducing EU energy imports from Russia, and securing a greater share in EU energy supplies for the competing US companies. The Commission likewise criticised the bill for challenging EU energy independence and security, entailing 'serious risks of detrimental political spill-overs'.<sup>149</sup> At the same time, the Commission envisaged retaliatory counter-measures in the event of US sanctions being implemented against EU energy companies.<sup>150</sup>

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acting on the Council's unanimous decision. See Andrew Rettman, 'EU Drafts Tough Conditions for Russia Pipeline' EUobserver (Brussels, 14 September 2017) <euobserver.com/energy/139023> accessed 15 September 2017. However, after the October 2017 summit, it was reported that no unanimity was reached among the Member States on these issues (i.e. negotiation mandate and applicable legal rules).

<sup>147</sup> Szymon Zaręba, 'Challenging the European Commission Decision on the Opal Gas Pipeline' (2016) 84(934) Polish Institute of International Affairs Bulletin. The legal challenge also focuses on the incompatibility of the Nord Stream 2 pipeline project with Article 9(1) of the 2009 Gas Directive concerning common rules for the internal market in natural gas, which requires 'unbundling' of the production, supply and transmission of natural gas. See Case T-849/16 *PGNiG Supply & Trading v Commission* (pending). If eventually cleared, Gazprom would remain the sole owner of that pipeline, as well as the producer and the supplier of natural gas. For more, see Sijbren de Jong, 'Nordstream 2: Alternative Pipeline Facts' EUobserver (Brussels, 20 February 2017) <euobserver.com/opinion/136969> accessed 2 April 2017.

<sup>148</sup> Andrew Rettman, 'US Votes to Sanction EU Firms in Russia Project' EUobserver (Brussels, 25 July 2017) <euobserver.com/foreign/138601> accessed 18 August 2017. The bill is entitled The Countering Iran's Destabilising Activities Act of 2017 (S. 722), and besides Iran covers Russia and North Korea. Despite his opposition to the bill President Trump signed it.

<sup>149</sup> Ibid.

<sup>150</sup> Andrew Rettman, 'Senate Backs Russia Sanctions, Setting Scene for EU Clash' EUobserver (Brussels, 28 July 2017) <euobserver.com/foreign/138637> accessed 18

Given that Russia is currently the EU's main energy supplier, the Union has to search for other possibilities to safeguard its energy demands. Arguably, the most significant opportunity for this would be the conclusion of the extensive EU-USA Transatlantic Trade and Investment Partnership ('TTIP'), and the EU-Canada Comprehensive Economic and Trade Agreement ('CETA'), both covering trade in energy commodities. The USA and Canada have recently managed to secure their internal energy demands by employing new technologies in exploiting unconventional sources and are expected to soon establish themselves as two of the leading energy exporters.

By turning its attention to energy imports from over the Atlantic, the EU seeks to lower its energy dependence on Russia. However, the negotiation of TTIP and ratification of CETA remain, especially regarding energy, highly controversial in light of EU internal measures aimed at promoting environmental protection and offsetting climate change. The EU, which considers natural gas – in reality, less polluting than coal and oil<sup>151</sup> as a 'bridge

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August 2017. The Commission proposed three possible scenarios: (i) demanding the US government to exempt EU companies from the sanctions' regime; (ii) passing an EU law to block US jurisdiction over EU companies; or (iii) imposing retaliatory (e.g. financial) sanctions on US companies. The latest scenario seems the least likely since it would require unanimous support from Member States. Despite Austria and Germany opposing the US bill, the Eastern European (especially Poland and the Baltic states) and the Nordic Member States oppose the Nord Stream 2 project due to its detrimental effect on the EU's dependence on Russian energy imports. For more, see Rettman (n 146).

<sup>151</sup> Belén Balanyá and Pascoe Sabido, 'The Great Gas Lock-in. Industry Lobbying Behind the EU Push For New Gas Infrastructure' Corporate Europe Observatory (Brussels, October 2017) <[corporateeurope.org/climate-and-energy/2017/10/great-gas-lock](http://corporateeurope.org/climate-and-energy/2017/10/great-gas-lock)> accessed 31 October 2017. This report criticises the EU's approach to natural gas as a transitional energy source, claiming that it has 'potentially a bigger carbon footprint than oil and coal' due to the danger of methane leakage, a greenhouse gas more polluting than CO<sub>2</sub>. It also accuses the EU of being 'highly responsive to pressure from industry and Member States, providing policies that give gas significant legislative, political, and financial support'. For instance, the EU provides fast-track procedures for gas infrastructural projects by designating them as 'projects of common interest' (PCI). The Commission holds that gas PCIs are 'needed to achieve diversification and to complete the integration of the energy markets in the EU and beyond, thus enhancing energy security and competitiveness'. See European Commission, 'Questions and answers on the projects of common



fuel', remains heavily dependent on fossil fuel imports and spends more than 1 billion USD on them daily.<sup>152</sup> However, the International Energy Agency has denounced fossil fuels, especially gas that has lost its 'green status', and has endorsed renewable energy as the essential contribution to decarbonisation.<sup>153</sup> The suspected negative environmental impacts of US<sup>154</sup> and Canadian<sup>155</sup> exploitations are arguably contrary to the EU strategy of decarbonising its industry, i.e. minimising fossil fuel imports and switching to renewables.

As argued previously in this article, EU regulatory propensity led to enforcing strict standards of environmental protection in its energy regulation. The eventual positive effects of EU regulatory externalisation in bilateral energy relations with the USA and Canada could emerge if the EU manages to

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interest (PCIs) in energy and the electricity interconnection target' (24 November 2017) <[europa.eu/rapid/press-release\\_MEMO-17-4708\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-4708_en.htm)> accessed 30 November 2017.

<sup>152</sup> Roland Joebstl, 'Who Is Trying to Kill EU Ambition on Renewables and Energy Savings?' EURACTIV (London, 25 November 2016) <[www.euractiv.com/section/energy/opinion/who-is-trying-to-kill-eu-ambition-on-renewables-and-energy-savings/](http://www.euractiv.com/section/energy/opinion/who-is-trying-to-kill-eu-ambition-on-renewables-and-energy-savings/)> accessed 5 December 2016.

<sup>153</sup> Ibid.

<sup>154</sup> For example, while heavily used in the USA, 'fracking' has been banned in several EU Member States. Fracking is a process of horizontal drilling and hydraulic fracturing, which entails water, chemicals and proppants being pumped at high pressure into the well to open fractures in the rock and release shale gas. As a side effect, it causes large amounts of hazardous, smog-forming and climate-altering pollutants are emitted into the air. Fracking also poses a significant threat for underground water supplies through aquifer contamination, and entails risks to public health, an extended surface footprint, and geological depletion of the land. See Luca Gandossi, *An Overview of Hydraulic Fracturing and Other Formation Stimulation Technologies for Shale Gas Production* (Institute for Energy and Transport, EU Publications Office 2013).

<sup>155</sup> Canada holds the second largest tar sands reserves in the world after Saudi Arabia. Oil made from tar sands is one of the most polluting fossil fuels. Due to the energy and water-intensive production process, drilling methods used release 23% more greenhouse gas emissions than conventional oil production, cause deforestation and soil depletion, and pose a health threat. See Arthur Neslen, 'Tar Sands Alarm as US Crude Exports to Europe Rise' The Guardian (London, 8 December 2015) <[www.theguardian.com/environment/2015/dec/08/tar-sands-alarm-as-us-crude-exports-to-europe-rise](http://www.theguardian.com/environment/2015/dec/08/tar-sands-alarm-as-us-crude-exports-to-europe-rise)> accessed 8 December 2016.



incorporate its risk-averse standards in implementing the final versions of the two agreements. However, if or when TTIP and CETA enter into force,<sup>156</sup> differences in regulatory practices in the energy sector (and other related policy areas) may lead to trade disputes between the contracting parties in the WTO. Both agreements will have little to do with traditional trade issues such as tariffs, given that they are already significantly lowered due to the WTO trading rules. Instead, for the most part they will focus on non-tariff barriers, i.e. public interest safeguards such as environmental and health concerns.<sup>157</sup>

For instance, the US and Canadian trade representatives, backed by the world's largest oil companies, have already attacked the EU Fuel Quality Directive for being a 'discriminatory barrier to trade', and have advocated a 'delay in, and possible reconsideration of' the Directive.<sup>158</sup> In addition, US President Trump rejects the concept of human-influenced climate change and recently decided to withdraw from the Paris Agreement. He argued that the Paris commitments would hurt the global competitiveness of the US

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<sup>156</sup> In 2017, the European Commission registered the European citizens' initiative entitled 'Stop TTIP' that demanded the EU to 'repeal the negotiating mandate for TTIP and not to conclude CETA'. See European Commission, 'Press release: European Citizens' Initiative: Commission registers "Stop TTIP" Initiative' <[europa.eu/rapid/press-release\\_IP-17-1872\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1872_en.htm)> accessed 14 July 2017. For a proposal to link environmental law with trade law through integrating the Paris Agreement goals into new EU trade deals (eg, CETA and the currently negotiated JEFTA with Japan) by envisaging trade sanctions or suspension clauses in event of a party failing to meet its emissions targets or UNFCCC commitments, see Mathilde Dupré and Samuel Leré, 'Trade and climate: How the EU can protect the Paris Agreement' EURACTIV (Brussels, 28 February 2018) <[www.euractiv.com/section/climate-environment/opinion/trade-and-climate-how-the-eu-can-protect-the-paris-agreement/](http://www.euractiv.com/section/climate-environment/opinion/trade-and-climate-how-the-eu-can-protect-the-paris-agreement/)> accessed 28 February 2018.

<sup>157</sup> 'Energy Trade in the Trans-Atlantic Trade and Investment Partnership: Endangering Action on Climate Change' (2014) Sierra Club, Business and Human Rights Resource Centre <[www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/Analysis\\_of\\_EU\\_Energy\\_Proposal\\_for\\_TTIP-Final\\_-\\_Sierra\\_C.pdf](http://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/Analysis_of_EU_Energy_Proposal_for_TTIP-Final_-_Sierra_C.pdf)> accessed 10 October 2016.

<sup>158</sup> Mark Dearn, 'EU-US Trade Deal Will Unleash Oil Sands and Fatally Undermine Climate Efforts' *The Guardian* (London, 27 November 2015) <[www.theguardian.com/global-development/2015/nov/27/oil-sands-transatlantic-trade-and-investment-partnership-climate-talks-cop21-paris](http://www.theguardian.com/global-development/2015/nov/27/oil-sands-transatlantic-trade-and-investment-partnership-climate-talks-cop21-paris)> accessed 30 November 2016.

economy,<sup>159</sup> the second biggest polluter in the world after China. At the same time, he announced greater deregulation for domestic oil and gas companies and the revival of the US coal industry. Such an approach arguably disregards the economic rationale of transition to sustainable and renewable energy: for the EU, this strategy is essential for attracting investments, boosting innovation and new technologies, job creation and competitiveness.<sup>160</sup> All the above-mentioned issues remain open for further research and analysis in the context of the external effects of EU energy regulation on bilateral relations.

#### IV. CONCLUDING REMARKS

This article has introduced several inherently complex notions: EU energy regulation with all its complexities and ambiguities, regulatory externalisation as a multifaceted concept, and a patchwork of international

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<sup>159</sup> Peter Teffer, 'US Leaves Paris Climate Deal' EUobserver (Brussels, 1 June 2017) <euobserver.com/environment/138099> accessed 5 June 2017. Previously, the Obama administration had pledged to reduce its greenhouse gas emissions by 26-28% until 2025, compared with 2005 levels. Trump's scepticism resembles the situation surrounding Kyoto Protocol, which was signed by the Clinton administration, but was never ratified in the Congress. The EU responded to the US's announced withdrawal by officially declaring a political commitment to pursue all the Paris Agreement's agreed objectives, and to fight US trade protectionism and isolationism in tackling climate change with a new (and unexpected) ally: China, who is emerging as an important actor in global energy relations. See the report from the recent EU-China summit which has kept climate policy in focus: European Commission, 'EU-China Summit: Moving Forward with our Global Partnership' <europa.eu/rapid/press-release\_IP-17-1524\_en.htm> accessed 29 July 2017.

<sup>160</sup> Despite President Trump's scepticism of climate change and the economic benefits of green energy, there is considerable support from the US private sector and a number of states (California, New York, Washington) and local governments for continued mutual investments in renewable energy between the USA and EU. A 'coal revival' in Europe is likewise highly unlikely, given that '26 out of 28 Member States (all except Poland and Greece) announced that there will be no new investments in coal plants after 2020'. See Alberto Rocamora García, 'From Brussels to Beijing: Is There Room for Optimism in Climate Policy in Trump's Era?' Politheor (Belgrade, 14 August 2017) <politheor.net/from-brussels-to-beijing-is-there-room-for-optimism-in-climate-policy-in-trumps-era/> accessed on 16 August 2017.

actors and institutions that brings together all the basic elements observed. Besides providing a general insight into the contemporary state of EU energy law and policy, the assessment of the topic has been placed in the framework of scholarship discussing and qualifying the regulatory externalisation of EU rules and policies, without entering into a normative evaluation of the social or political desirability of its outcomes.

As presented in the article, EU energy regulation in various instances has had significant extraterritorial effects. Albeit this has occasionally led to positive dynamics, it likewise has drawn many more controversies in a broader international setting. The observed cases have covered arguably the most prominent examples of both the positive and negative external effects of EU energy regulation in different dimensions (global and regional). Overall, these few instances of regulatory externalisation prove that the EU is indeed a super-influential international actor in energy relations, even 'without a [super] state',<sup>161</sup> and, more importantly, without a consolidated internal and external approach to energy policy. Moreover, EU regulatory externalisation is significant since global energy power has remained less dispersed and more concentrated amongst traditionally dominant resource-rich producing countries, where the EU is introducing more multilateralism in the field.

The 'internal-external nexus' is critical for the EU in this area too, since coordination and cohesion currently represent the most pressing challenges for EU energy policy. Internally, there is an apparent lack of serious political will on the part of Member States to incentivise efforts to complete the internal energy market, consolidate energy regulation and ensure its efficient implementation. Politically driven, rather than market-driven, price formation, protectionist ('market-distorting') subsidies, a lack of appropriate consumer information, and a lack of regional interconnection represent some of the greatest obstacles for a functional EU energy market.<sup>162</sup> The entire EU struggles in achieving sufficient mutual solidarity when it comes to particular Member States' energy issues. Notwithstanding the successes in integrating Member States' energy markets, energy policies during the last

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<sup>161</sup> Bradford (n 11) 66.

<sup>162</sup> Gunnar Hoekmark, 'Clean energy package needs market, not just targets' EUobserver (Brussels, 10 November 2017) <euobserver.com/opinion/139832> accessed 13 November 2017.

decade have become 'more national'.<sup>163</sup> Externally, the EU is unable to coordinate its Member States' foreign energy policies and consolidate its own external energy policy to act unanimously at the global level. This 'facilitates divide-and-rule efforts by certain supplier countries',<sup>164</sup> and severely restricts the prospects of successful EU regulatory externalisation.

In addition, it could be that inherently contradictory, yet overlapping interests regarding the implementation of energy policy create insurmountable tensions for an effective external approach. An example would be the perceived incompatibility of the EU's global competitiveness objectives and its environmental aims, which eventually undermines the entire concept of the internal energy market. Another example would be the sacrifice of the EU's foundational values in favour of maintaining energy relations with illiberal and authoritarian regimes. The failure of EU political conditionality and a lack of democratic governance in some of its energy partners negatively affect the prospects of energy cooperation. This mismatch is nothing new. In practice, the EU often struggles with its declared policy goals and values in the face of its economic interests and geopolitical realities. In this, it remains stuck in an Orwellian 'doublethink': simultaneously accepting contradictory values or interests as true and complementary and being unaware of any conflict. Therefore, the trade-off between expanding, competitive energy markets founded on a dominant neoliberal ideology and the need for public intervention in the pursuit of energy policy goals (security, environmental protection, climate change mitigation) should be weighed and eventually reconciled in the future. Another reason for adopting a holistic approach to energy policy is its indirect global socio-political effects: the EU is expected to face an ever-rising influx of migrants fleeing energy poverty, armed conflicts over energy

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<sup>163</sup> Nikolas Wölfling, 'A Successful Energy Union Can Sell Benefits of EU to the Masses' EURACTIV (London, 23 November 2016) <[www.euractiv.com/section/energy/opinion/fridaya-successful-energy-union-can-sell-the-benefits-of-the-eu-to-the-masses/](http://www.euractiv.com/section/energy/opinion/fridaya-successful-energy-union-can-sell-the-benefits-of-the-eu-to-the-masses/)> accessed 29 November 2016.

<sup>164</sup> EU Global Strategy, 'The European Union in a Changing Global Environment' <[europa.eu/globalstrategy/en/european-union-changing-global-environment](http://europa.eu/globalstrategy/en/european-union-changing-global-environment)> accessed 19 December 2016.

resources, environmental depletion, crop failures and global warming, from soon-to-be uninhabitable regions in the Global South.

Similar to other policy areas, the consolidation and externalisation of EU energy policy have not remained unaffected by the contemporary crisis of integration, in times when the idea of the EU itself is under heavy attack. In this context, delegating more regulatory authority to the EU level implies a loss of sovereignty, especially controversial in essential sectors for national legislators such as energy. Energy policy is, in addition, an area in which salient political cleavages between the 'old' core of Western European Member States and the 'new' post-communist Eastern European Member States are perpetuated over issues such as Russian influence or clean energy transition. Thus, as Bradford originally noted in a different context, a growing gap coming from within the EU between 'different visions of the future for the Union',<sup>165</sup> embodied in the rigid internal checks and growing ideological divisions especially in the post-Brexit era, ultimately presents the greatest challenge and impediment for a coherent and efficient EU external regulatory agenda in the energy sector.

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<sup>165</sup> Bradford (n 11) 63.