

KU LEUVEN

FACULTEIT SOCIALE WETENSCHAPPEN

The EU's External Natural Gas Policy – Caught Between National Priorities and Supranationalism

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Sijbren de Jong

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Addendum

In the months following the completion of this thesis, several important events took place. On September 4 2012, the European Commission opened formal proceedings to investigate whether Gazprom might be hindering competition in Central and Eastern European gas markets, in breach of EU antitrust rules. The Commission has concerns that Gazprom may be abusing its dominant market position in upstream gas supply markets in Central and Eastern European Member States, in breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU). The Commission is investigating three suspected anti-competitive practices in Central and Eastern Europe. First, Gazprom may have divided gas markets by hindering the free flow of gas across Member States. Second, Gazprom may have prevented the diversification of supply of gas. Finally, Gazprom may have imposed unfair prices on its customers by linking the price of gas to oil prices.

On 25 October 2012, the proposal by the European Commission to establish an information exchange mechanism on international energy agreements has been adopted by the Council. In its final form, Council Decision No 994/2012/EU of 25 October 2012 leaves the primary responsibility to assess whether an intergovernmental agreement has an impact on the internal energy market or the security of supply in the Union with EU Member States (see paragraph 7.2.2).

THE EU'S EXTERNAL NATURAL GAS POLICY – CAUGHT BETWEEN NATIONAL PRIORITIES AND SUPRANATIONALISM*

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Introduction

The changing security environment following the end of the Cold War led to a widening of the concept of security¹, which caused progressively more issues to be approached from a security point of view. In connection with this, security has also become more prominently visible within the European Union's ('EU' or 'Union') external relations, prompting it to transform itself into a security actor on a variety of terrains, including anti-terrorism and

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¹ Traditionally confined to the military domain, the changing security environment following the end of the Cold War and the ensuing debate on the concept of security, has led it to now also comprise environmental, society (identity), political and economic issues. See, inter alia, B. Buzan, (1997), 'Rethinking Security after the Cold War', *Cooperation and Conflict* 32(5), pp. 5-28; B. Buzan, O. Waever, and J. de Wilde, (1998), *Security: a New Framework for Analysis*, (Boulder/London: Lynne Rienner Publishers) and H.G. Brauch, et al., (eds.), (2008), *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century*, (Berlin, Heidelberg; Springer).

civilian and military operations in the framework of the Common Security and Defence Policy (CSDP), but also increasingly on 'non-traditional' security areas such as energy.²

Energy gained increased prominence within the security domain, not least because of a series of interruptions in the supply of natural gas to the EU in recent years involving Russia and Ukraine – and Brussels' subsequent desire to limit its dependence on Russian natural gas. These recent supply interruptions, coupled with the fact that the Union lacks significant energy resources of its own, make clear that Europe's long term energy security hinges to a large extent on its ability to establish effective dialogues and forms of cooperation with external suppliers.

Precisely, this external energy policy has been the subject of much debate in recent years. A large part of these discussions focus on the state-centred and bilateral nature of energy policy, whereby the dominant opinion is that EU Member States' national priorities often seem to take precedence over an integration of foreign policy objectives at European level. Consequently, many scholars call for increased coherence in external energy relations to allow for institutions and general rules to be followed, as opposed to individual barter deals.³

This thesis is the result of a four year doctoral study on the EU's external relations in the area of natural gas supply with Russia and the former Soviet Republics in Central Asia. The output is based on four peer-reviewed contributions (see ANNEX 4 for the full text articles). The goal of the research is to enhance practical, as well as theoretical understanding on the manner in which the Union forms and enforces its policy on natural gas towards the abovementioned country and region.

Analogous to the Union's stated desire, the main question the project has tried to answer is to assess to what extent Europe manages to formulate and execute such a policy in a coherent manner. Moreover, what are the underlying causes as to why the Union does (not) succeed in doing so?

Based on a number of illustrative cases, including (i) gas crises management, (ii) (planned) pipeline projects and negotiations, and (iii) consumer-producer relations on an institutional level, this paper aims to answer the above questions and put forward an explanation for both the current state of EU natural gas relations with Russia and Central Asia, as well as their

² In recent years, there has been a veritable rise in the number of publications dedicated explicitly to energy and its security implications. See, inter alia, A. Goldthau and J. M. Witte (eds.) (2010), *Global Energy Governance: The New Rules of the Game*, (Washington D.C.: Brookings Institution Press); S. Haghighi, (2007), *Energy Security: The External Legal Relations of the European Union with the Major Oil and Gas Supplying Countries*, (Oxford: Hart Publishing); and J. H. Kalicki and D. L. Goldwyn, (2005), *Energy and Security: Toward a New Foreign Policy Strategy*, (Washington D.C.: Woodrow Wilson Centre Press); and R. Youngs, (2009), *Energy Security: Europe's New Foreign Policy Challenge*, (Abingdon: Routledge).

³ See J. Grätz, (2009), 'Energy Relations with Russia and Gas Market Liberalization', *Internationale Politik und Gesellschaft* 3, p. 69; K. Hóber, (2009), 'Law and Policy in the Russian Oil and Gas Sector', *Journal of Energy & Natural Resources Law* 27(3), p. 423; and R. Youngs, *supra* note 2, pp. 82-84, 86-87, 91 and 96. See also O. Geden et al., (2006), 'Perspectives for the European Union's External Energy Policy. Discourse, Ideas, and Interests in Germany, the UK, Poland and France'. Working Paper FG1. Berlin: Stiftung Wissenschaft und Politik (SWP); T. Romanova, (2008), 'The Russian Perspective on the Energy Dialogue', *Journal of Contemporary European Studies* 16(2), p. 227; A. Checchi, A. Behrens, C. Egenhofer, (2009), 'Long-Term Energy Security Risks for Europe: A Sector Specific Approach'. Working Document No. 309/January 2009. Brussels: Centre for European Policy Studies (CEPS); R. Leal-Arcas, (2009), 'The EU and Russia as Energy Trading Partners: Friends or Foes?', *European Foreign Affairs Review*, 14(3), p. 351; and S. Wood, (2009), 'Energy Security, Normative Dilemmas, and Institutional Camouflage: Europe's Pragmatism', *Politics and Policy* 37(3), p. 619.

future direction. Particular attention is thereby given to the roles played by the division of competences between the EU and its Member States in the field of energy, EU Treaty revisions, the global institutional frameworks on energy governance, and individual natural gas security at EU Member State level.

The paper consists of eight sections. Section one briefly explains the concept of energy security and what is meant by energy security governance. I then turn to a digression of the meaning *of* and role played *by* coherence in the EU's external energy relations. Section three puts forward a brief overview of the state of contemporary literature on EU external energy policy. Section four lays out two theories which I use to explain European integration in the energy sphere. The fifth section discusses the case-selection method and details the reasons why the study focuses on the case in question. Section six explains the research methodology and section seven discusses the main results of the study. The paper ends with some brief concluding remarks.

1: Energy Security Governance

Energy security concerns commonly focus on what is known as 'security of supply', or the 'adequacy of [energy] supply at a reasonable price'.⁴ Historically, the concept of energy security can be traced back to earlier traditions of geopolitics and its focus on the struggle for natural resources. Natural resource exploitation can be a major influence in triggering conflict, as well as having the potential to prolong violent strife. Prominent examples include the enduring conflicts in the Democratic Republic of Congo and the Niger Delta. When compared to geopolitics' broad focus on natural resources and raw materials, energy security is more specifically centred on securing energy supplies.⁵

Within energy security much attention goes to the roles played by those countries well endowed with energy supplies on the one hand and those who are in need of energy on the other.⁶ But, what precisely constitutes energy security? Commonly energy security refers to

⁴ S. Haghighi, (2007), *supra* note 2, p. 14.

⁵ See *inter alia*, G. Baghat, (2008). 'Energy Security: What does it Mean? And How Can We Achieve it?' *Journal of Social, Political & Economic Studies* 33(1), pp. 85-98; B.D. Cole, (2008), *Sea Lanes and Pipelines: Energy Security in Asia*, (Westport Connecticut: Greenwood); A.M. Ferguson, (2008), 'Energy Security: the new cold war', *International Journal of Global Energy Issues* 29(4), pp. 366-370; L. Hughes, (2009), 'The four R's of energy security', *Energy Policy* 37(6), pp. 2459-2461; J. Kalicki, and D. Goldwyn (eds.) (2005), *supra* note 2; B. Kruyt, D.P. van Vuuren, H.J.M. de Vries, and H. Groenenberg, (2009), 'Indicators for energy security', *Energy Policy* 37(6), pp. 2166-2181; T. Mitrova, (2008), 'Energy Security and Evolution of Gas Markets', *Energy and Environment* 19(8), pp. 1123-1130; W. Nuttall, and D.L. Manz, (2008), 'A new energy security paradigm for the twenty-first century', *Technological Forecasting and Social Change* 75(8), pp. 1247-1259; M. Wesley (ed.) (2007), *Energy Security in Asia*, (London/New York: Routledge); G. Winrow, (2008), 'Energy Security in the Broader Mediterranean', *European Security* 17(1), pp. 161-183; United Nations Economic Commission for Europe, *Emerging global energy security risks*, (New York: United Nations, 2007); and S. Zhao, (2008), 'China's Global Search for Energy Security: cooperation and competition in Asia-Pacific', *Journal of Contemporary China* 17(55), pp. 207-227.

⁶ See, *inter alia*, D. Ambrish, (2009), 'The Geopolitics of Energy Security and the Response to its Challenges by India and Germany', *Geopolitics* 14(2), pp. 278-299; Z. Baran, (2007), 'EU Energy Security: Time to End Russian Leverage', *The Washington Quarterly* 30(4), pp. 131-144; F. Chen, and J. Ni, (2008), 'Asian Energy Security: The Role of China and India', *Strategic Analysis* 32(1), pp. 41-55; H.J. Choi, (2009), 'Fuelling Crisis or Cooperation? The Geopolitics of Energy Security in Northeast Asia', *Asian Affairs: an American Review* 36(1), pp. 3-28; G. Hall and T. Grant, (2009), 'Russia, China, and the Energy Security Politics of the Caspian Sea Region after the Cold War', *Mediterranean Quarterly* 20(2), pp. 113-137; A. Hira, and L.G. de Oliveira, (2009), 'No substitute for oil? How Brazil developed its ethanol industry', *Energy Policy* 37(6), pp. 2450-2456; W. Lei and L. Xuejun, (2007), 'China or the United States: which threatens energy security?', *OPEC Review: Energy*

the adequate supply of fossil fuels such as oil, natural gas and coal coupled with additional energy derived from renewable sources and the offsets from increases in energy efficiency. The latter two are of particular importance also from the viewpoint of climate change and in order to reduce the global level of competition over finite oil and natural gas resources.

Oil and natural gas have very different characteristics however. Oil, with its ability to be pumped, refined and transported in barrels across the world does not require a physical link between producer and consumer. In other words, a shipment of oil from for example the Middle East to Europe can just as easily be transported elsewhere as oil transportation is – relatively speaking – not a costly endeavour. In that respect, the oil market constitutes a truly global market. This also means that a disruption in oil supply in one part of the world has potential global ramifications as prices fluctuate as a result of the changing availability of oil.

This situation is different for the market in natural gas. Transportation of natural gas is more costly compared to oil transport and requires the presence of physical infrastructure, *i.e.* pipelines and distribution points, to make its way from producer to consumer. Moreover, gas development in a particular country or region is isolated from other regions because of a lack of easy switching between supply routes. The inert nature of pipelines makes this impossible. This inflexibility and isolated nature of gas development implies that as a consequence the market in natural gas does not constitute a global market, but is rather regional in scope. Its regional impact notwithstanding, a disruption in the supply of natural gas as such does not necessarily have global ramifications.⁷

The variety of topics that underpin energy security makes it difficult to provide for a central definition. However, a concept which is widely accepted and applied by all key actors involved is the abovementioned ‘security of supply’.

This concept is somewhat expanded by the European Commission, who states that:

“energy supply security must be geared to ensuring, for the well-being of its citizens and the proper functioning of the economy, the uninterrupted physical availability of energy products on the market, at a price which is affordable for all consumers (private and industrial), while respecting environmental concerns and looking towards sustainable development [...] Security of supply does not seek to maximise energy self-sufficiency or to minimise dependence, but aims to reduce the risks linked to such dependence. Among the objectives to be pursued are those balancing between and diversifying the various sources of supply (by product and by geographical region).”⁸

Some differentiation has to be made with respect to security of oil supply and security of gas supply as both have a different emphasis. Security of oil supply is largely identical to the concept of security of supply with the adding of ‘reliable’ to it.⁹ Security of gas supply places more emphasis on the satisfaction of demand, by defining it as:

“the guarantee that all gas volumes demanded by non-interruptible (firms or protected) customers will be available at a reasonable price.”¹⁰

Economics & Related Issues 31(3), pp. 215-234; P. Noel, (2008). Beyond Dependence: How to Deal with Russian Gas. ECFR Policy Brief. European Council on Foreign Relations.

⁷ S. Haghighi, (2007), *supra* note 2, p. 13.

⁸ See COM(2000) 769 final of 29 November 2000, p. 2.

⁹ S. Haghighi, (2007), *supra* note 2, p. 14.

¹⁰ G. Luciani, (2004), ‘Security of Supply for Natural Gas Markets. What is it and What is it not?’, IEM International Energy Markets. Fondazione Eni Enrico Mattei, p. 2.

Energy security has been identified as a priority area of pan-European co-operation and where the EU perceives a worrying vulnerability *vis-à-vis* its neighbours in energy supply. In 2002, the Commission stated that:

“[i]f no action is taken in the next 20 to 30 years,... our external energy dependence will rise to a level of 70% on average, going up to 90% in the case of oil products. This situation makes us vulnerable, particularly on account of our economic dependence on certain types of energy, such as oil and gas, and on particular exporting countries, such as Russia for natural gas and the Middle East for oil.”¹¹

For various reasons the cooperation with third countries such as Russia and Central Asia should be seen as constituting a *governance*, rather than government approach. First of all, energy policy is still largely a national competence with a corresponding limited conferral of competences to the supranational level (see *infra*, 7.1.3). There is as such no ‘central authority’ and the EU has relatively few ‘hard’ instruments at its disposal to deal with these states. Secondly, successful cooperation to that effect is further compounded by the fact that the field of energy is dominated by a wide range of different actors including, *inter alia*, states and state bodies, international organisations, private companies, as well as many others. It is for these reasons that energy security should be viewed from a governance perspective, rather than purely as an issue of government.

Based on contributions in the ‘security governance’ literature, particularly those by Webber et al., Krahmann, and Kirchner, one can define ‘energy security governance’ as:

“the management and regulation of [energy supply] issues by multiple and separate authorities [in differing degrees of coordination and cooperation], the interventions of both public and private actors (depending upon the issue), formal and informal arrangements, in turn structured by discourse and norms, and purposefully directed toward particular policy outcomes.”¹²

Energy security governance towards third countries and regions, which – according to the EU – should be based on the Union’s *acquis* and the principles of the Energy Charter Treaty (ECT)¹³ is, on the one hand, based on the desire to have market access in transit and producer countries and to increase their attractiveness for foreign private investors. On the other, it clearly aims for the transformation of oligopolistic or quasi-statist energy sectors in countries like Russia or regions such as Central Asia or the southern Mediterranean in order to liberate energy supply from the control of what are seen to be unstable élites and cartels, in particular to prevent crises such as the ones in 2006 and 2009 (see also *infra*, 3 and 7.2).

Moreover, given the fact that energy security governance thus can to a large extent be considered a foreign policy matter, it should according to the Union abide by its own normative foreign policy doctrine of ‘effective multilateralism’. In 2003, in a bid to strategically steer its foreign and security policy, the EU released the European Security

¹¹ European Commission, 2002, *Energy: Let’s Overcome Our Dependence*, Brussels: European Commission, pp. 2-3.

¹² M. Webber, S. Croft, J. Howorth, and E. Krahmann, (2004), ‘The governance of European Security’, *Review of International Studies* 30, p. 4; E. Krahmann, (2003), ‘Conceptualizing Security Governance’, *Cooperation and Conflict* 38(1), pp. 5-26; and E. Kirchner, (2006), ‘The Challenge of European Security Governance’, *Journal of Common Market Studies* 44(5), pp. 948.

¹³ The Energy Charter Treaty is a legally binding multilateral agreement that has as its aim to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, and so mitigate risks associated with energy-related investment and trade.

Strategy ('ESS')¹⁴, in which it put forward its own *leitmotiv* to guide its external relations, *i.e.* 'effective multilateralism'. According to Ruggie, multilateralism refers to the 'coordinating [of] relations among three or more states in accordance with certain principles that order relations among these states'.¹⁵ Adding the notion of 'effectiveness' presupposes multilateralism to first and foremost produce 'noticeable effects' which, when applied to the EU, refer to the extent to which the Union is able to attain its predetermined policy goals.¹⁶ This is made more likely if decisions taken at EU level succeed in improving the Union's problem solving capacity in the international arena.¹⁷ At the same time, the ability to act effectively requires the EU also to organise itself efficiently in a consistent and coherent manner in cooperation with key actors involved. Taking these two aspects of effectiveness together, one could say effective multilateralism has become the key benchmark criterion for performance in the Union's external relations.

However, precisely the precondition of coherence and consistency is no easy achievement and subject to heated discussions whilst being shrouded by conceptual misunderstandings.

2: The Issue of Coherence

In general when it comes to external representation the EU is often considered a unitary actor and it is mostly perceived as a single bloc by its negotiating partners.¹⁸ The main reason why the EU is often seen as a single actor in international negotiations is that its position is often expressed by an EU negotiator who takes the floor (at a particular forum) on behalf of the Union and/or its Member States. The EU negotiator can either be the European Commission, the Council Presidency or any Member State that represents the Union.¹⁹ The relation between the central EU actor – aiming to be the Union's negotiator, and the Member States can be seen in the form of a *principal-agent* model, where one (set of) actor(s) [the agent, the EU negotiator] is 'acting on behalf of' another (set of) actor(s) [the principals, the EU Member States].²⁰

With respect to energy, security of supply in particular, this situation is very different given it is an area where EU Member States rarely give a mandate to a central EU actor to negotiate an agreement on their behalf. This also implies that contract negotiations in external energy policy are primarily a Member State affair, rather than a European Commission prerogative. A clear lack of legal competences at the EU level lies at the basis of this limited conferral of powers (see also *infra*, 7.1.3). Moreover, foreign policy divergences among Member States

¹⁴ Council of the European Union, A Secure Europe in a Better World, European Security Strategy, Brussels, 12 December 2003.

¹⁵ J. Ruggie, (1993), *Multilateralism matters: the theory and praxis of an institutional form*, (New York: Columbia University Press), p. 8. Here, Ruggie insists that multilateralism represents a *generic institutional form* and is thereby not confined to the study of international institutions (Ruggie, 1993, pp. 10-11).

¹⁶ J. Neyer, (2004), 'Explaining the Unexpected: Efficiency and Effectiveness in European Decision-making', *Journal of European Public Policy* 11, p. 22; J. Wouters, S. de Jong and Ph. De Man (2010), 'The EU's Commitment to Effective Multilateralism in the Field of Security: Theory and Practice', in P. Eeckhout and T. Trimidas (eds.), *Yearbook of European Law*, (Oxford:Oxford University Press), pp. 167-168.

¹⁷ Cf. Scharpf's description of output legitimacy, according to which governments [and the EU alike] derive their legitimacy from their capacity to solve problems requiring collective solutions because they could not be solved through individual action or market exchanges alone. See, F. Scharpf, (1999), *Governing in Europe: Effective and Democratic?*, (Oxford: Oxford University Press), p. 11.

¹⁸ O. Elgström, (2007), 'Outsiders Perceptions of the European Union in International Trade Negotiations', *Journal of Common Market Studies* 45, pp. 949-67.

¹⁹ T. Delreux, (2009), 'Cooperation and Control in the European Union: The Case of the European Union as International Environmental Negotiator', *Cooperation and Conflict* 44(2), p. 190.

²⁰ S. Shapiro, (2005), 'Agency Theory', *Annual Review of Sociology* 31(1), p. 263.

seem to largely prevent them from reaching agreement on a unitary role for the Union. Essentially, such divergences can be traced back to issues of ‘coherence’.

A cardinal principle of EU external relations – the principal reference to coherence with respect to the Union’s external policies can be found in Article 21(3) of the Treaty on European Union (TEU), which states that

“[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect”.²¹

For a concept which takes up such a central position within Europe’s policies, much confusion still seems to reign over what coherence precisely means in an EU policy context.²² Many of the misunderstandings with regard to its meaning stem from the fact that the English language version of the EU’s Treaties uses a rather minimalistic notion of coherence embodied in the term “consistency”, as seen in the passage from the Lisbon Treaty quoted above, whereas the German, French and other versions refer to the stronger term “coherence”.²³ Although coherence and consistency are thus often used interchangeably, the two terms have different meanings. Whereas coherence can be understood as the “action or fact of sticking together” or a “harmonious connection to the several parts of a discourse, system etc., so that the whole hangs together”, consistency should be read as referring to “the quality, state or fact of being consistent”.²⁴ Consistency in this sense refers to the absence of contradiction. Coherence, by contrast, implies positive connections. Consistency thus revolves more around compatibility of policy, while the latter pertains to synergy and adding value. These differences notwithstanding, what both terms have in common is that they hint at the need for coordinated policies in the EU.

Once this conceptual demarcation has been made, it becomes clear that “coherence” is really a generic term that encompasses consistency.²⁵ This clarification also makes it possible to distinguish between two ideal-typical forms of coherence: *coherence in a broad sense*, emphasising the synergetic dimension of EU coordination, and coherence in the narrow understanding of “absence of contradictions”, which we refer to as *consistency*. In making this distinction, I do not follow the English language version of the Treaties, but adopt a conceptual usage of the terms which allows for a more adequate assessment of whether the objectives underpinning the constant reference to coherence and consistency in EU external policies, namely the goal of ensuring the EU acts in unity to attain its policy objectives, is actually fulfilled.²⁶

If I add another dimension to this distinction between narrow and broad conceptions of coherence, a 2x2 matrix emerges, which can usefully be employed to assess EU external coherence empirically (see Figure 1, p. 8). Coherence is a multidimensional concept.

²¹ Note that where it says consistency in the English version of the Treaty, other languages speak of “coherence” (in French: *cohérence*, in German: *Kohärenz*; in Spanish: *coherencia*; in Italian: *coerenza*).

²² S. de Jong and S. Schunz, (2012), ‘Coherence in European Union External Policy before and after the Lisbon Treaty: The Cases of Energy Security and Climate Change’, *European Foreign Affairs Review* 17(2/2), p. 168.

²³ See also footnote 21.

²⁴ S. Duke, (2011), ‘Consistency, coherence and EU external action’, in P. Koutrakos, (2011) (ed.), *European Foreign Policy: Legal and Political Perspectives*, (Cheltenham: Edward Elgar), p. 18.

²⁵ C. Gebhard, (2011), ‘Coherence’, in C. Hill and M. Smith, *International Relations and the European Union*, (Oxford: Oxford University Press), p. 102.

²⁶ A. Missiroli, (2001), ‘European Security: The Challenge of Coherence’, *European Foreign Affairs Review* 6, p. 182.

Horizontally, it refers to coordination among EU policies. In its weak form, horizontal coherence points to (iii) the absence of contradictions within the external positions and activities in different areas of EU foreign policy (and with other policies, if relevant inter-linkages exist) (*horizontal consistency*); in its stronger form, it calls (iv) for the establishment of a synergy between these aspects (*horizontal coherence*). Vertical coherence in turn relates to the interactions between EU and Member State actors. It implies (i) the absence of contradictions between the external position and activities of the EU and those of its individual Member States (*vertical consistency*); and (ii) the establishment of a synergy between these actors' positions and undertakings (*vertical coherence*).²⁷

Figure 1: Conceptualising coherence in EU external policy

	Narrow understanding: consistency	Broad understanding: coherence
Vertical, actor coherence	(I) Absence of contradictions between Member State external actions/positions/initiatives and those of the EU's central actor(s)	(II) Presence of a synergy between EU external actions/positions/initiatives and those of the Member States
Horizontal, policy coherence	(III) Absence of contradictions between external positions/policies within a given domain (and with other, related policies)	(IV) Presence of a synergy between EU external positions/policies within a given domain (and with other, related policies)

The matrix in Figure 1 thus depicts a basic typology of coherence. This typology forms the basis of an in-depth analysis of the degree of *intra-policy* coherence regarding the Union's actions and initiatives within the fields of energy security, natural gas in particular (see *infra*, section 5 for the specific reasons as to why natural gas is the object of analysis).

As highlighted earlier in this section, when it comes to energy security, EU Member States rarely issue a mandate to a central EU actor to negotiate an agreement on their behalf. This implies that vertical coherence becomes a potential area of concern. The analysis therefore focuses on the two dimensions of vertical coherence only, analysing in-depth the interaction between EU Member States on the one hand, and EU institutions and EU Member States on the other. An analysis of *intra* European Commission dynamics thus remains outside of the focus of this project. Testing horizontal coherence with *all* other fields of EU policy-making (e.g. energy and economy) – would surely represent an interesting, but wide-reaching analysis going beyond the scope of this contribution. Although the normative objective of the Treaties (Art. 7 TFEU) stipulates such maximum coherence, I concentrate my enquiry on the crucial aspect of cooperation between Member States and EU institutions within the – already vast – issue area selected.²⁸

Bearing in mind the EU's normative goal to live up to its principle of 'effective multilateralism' (see *supra*, 1), the analysis therefore systematically covers quadrants I and II of the matrix, engaging in a comparative analysis of EU and Member State actions on natural gas vis-à-vis Russia and Central Asia (see *infra*, section 5 on the selection of Russia and Central Asia as the primary case) to check for apparent signs of contradiction in their stated objectives or actions (quadrant I). To establish whether synergies have actually been exploited

²⁷ C. Gebhard, (2011), *supra* note 25, p. 107; S. Duke, (2011), *supra* note 24, pp. 21-22.

²⁸ S. de Jong and S. Schunz, (2012), *supra* note 22, pp. 169-170.

between actors, the Union's external policy performance first needs to be understood: did it reach its objectives through enhanced unity and coordination (quadrant II)?²⁹

In carrying out the analysis, vital information is drawn from an in-depth stakeholder consultation among key-experts involved in EU external energy relations. This information is complemented by document analysis and observation research (see *infra*, 6 and ANNEX 3). The aim is to use the information gathered throughout the research to explain (i) how external policy on natural gas is formed; (ii) which factors determine the eventual outcome at EU level; and through this shed light on (iii) the (future) direction and pace of European integration in this field.

As highlighted in the introduction, much of the current literature on EU external energy policy points to the lack of coherence and labels it as problematic. To shed more light on the current state of the literature, the following section provides a brief overview to that effect.

3: Current Literature on EU External Energy Policy

As made clear above, despite manifold statements pointing to the advantages of multi-actor institutionalism, EU Member States have not always used their linkages and combined resources built through integration to effectively apply a greater combined weight.³⁰ Some claim that this multiplicity of voices is the main reason as to why the EU has largely failed to develop a coherent and strategic approach to the reality of its dependence on Russian natural gas.³¹ The European Commission is keen to point out in its 2020 Energy Strategy that, in practice, national initiatives do not leverage the strength of the size of the EU market and could better express the EU interest.³²

A range of energy initiatives which were put forward since the early 2000s, and especially since 2006, to overcome this problem did not prosper in the end.³³ Such proposals included for the European Commission to be vested with institutional competences over external energy issues;³⁴ and for a mandatory 'energy security clause' to be inserted into third country agreements.³⁵ The absence in practice of said proposals, leads the European Parliament (EP) to acknowledge there is still a lack of 'critical awareness' within the Union that an EU-led approach (former Community approach) is the way forward.³⁶ For the EU it is important that – in order to overcome this practice – that it formalises the principle whereby Member States act in the benefit of the EU as a whole in bilateral energy relations with key partners.³⁷

According to many authors the pursuit of individual barter deals inadvertently creates possibilities for élites in supplier countries to pursue their own 'reciprocity rules', *i.e.* not limiting demands to capital, arguing more substantial trade-offs are necessary in order to get

²⁹ *Ibid*, p. 170.

³⁰ S. Wood, (2009), *supra* note 3, p. 619.

³¹ R. Leal-Arcas, (2009), *supra* note 3, p. 351.

³² COM(2010) 639 final of 10 November 2010, p. 17.

³³ R. Youngs, (2009), *supra* note 2, p. 27.

³⁴ European Parliament, Report on towards a common European foreign policy on energy of 11 September 2007, point 29.

³⁵ Such a clause would lay down a code of conduct and prohibition of disruption due to commercial disputes, and explicitly outline measures to be taken in the event of unilateral disruption, or any change in the terms of the contract or in the terms of supply by one of the partners. See European Parliament, non-legislative resolution, 3 February 2009, INI/2008/2239; European Parliament, Report on towards a common European foreign policy on energy, *supra* note 34, point 31.

³⁶ European Parliament, Report on towards a common European foreign policy on energy, *supra* note 34; R. Youngs, (2009), *supra* note 2, p. 27.

³⁷ COM(2010) 639 final, *supra* note 32, pp. 17-18.

things done, such as asset swaps. The monopolistic and quasi-statist character of such energy markets thus remains unchanged – potentially creating a vicious circle which is hard to break.³⁸ Moreover, the myriad of individual Member State action blurs the view of third countries on what the EU really wants to pursue in its external energy policy.³⁹

Literature which points to the lack of coherence present in the Union's external energy policy is abundantly available. However, only recently research has delved more into the background of divergent EU Member State action on external energy matters. According to some of these authors, many of the difficulties in the EU's external energy policy stem from a different order of priorities within the Union itself, including, EU Member States' national preferences over their energy mix, historical ties, and relative energy market position.⁴⁰

The present research project has as its aim to raise both the practical, as well as theoretical understanding on the manner in which the Union forms and enforces its policy on natural gas towards Russia and Central Asia. To guide and support the latter goal, the next section outlines two theories of European integration that were used as a tool for explaining the pace and manner by which integration of energy policy occurs at European level.

4: Energy and European Integration

Integration in the energy sphere can essentially be looked at from two different, yet interrelated angles; the functioning of the EU internal market on the one hand, and the integration and forming of the Union's external energy policy on the other. The manner and pace by which integration occurs in these two distinct areas of energy policy are very different from one another. However, intra-EU integration long preceded the integration in the EU's external relations and hence insights from the former can contribute to the latter. To that effect, this section first offers a theory that allows us to explain the integration in the EU's internal sphere, before addressing another theory which potentially sheds more light on the Union's external realm.

4.1: Supranational Governance

Energy lay at the heart of European integration from the very beginning as demonstrated by the Treaty establishing the European Coal and Steel Community (ECSC)⁴¹ and the Treaty establishing the European Atomic Energy Community (EURATOM).⁴² After the ECSC Treaty expired in 2002, the areas covered by it continued to operate under the Treaty

³⁸ See J. Grätz, (2009), *supra* note 3, p. 69; K. Hóber, (2009), *supra* note 3, p. 423; and R. Youngs, (2009), *supra* note 2, pp. 82-84, 86-87, 91 and 96. See also O. Geden et al., (2006), *supra* note 3; T. Romanova, (2008), *supra* note 3, p. 227; S. Wood, (2009), *supra* note 3, p. 617; A. Checchi, A. Behrens, C. Egenhofer, (2009), *supra* note 4; and A. Goldthau, (2010), 'Energy Diplomacy in Oil and Gas' in A. Goldthau and J. M. Witte, *supra* note 2, p. 31.

³⁹ S. Peyrouse, (2009), 'Business and Trade Relationships between the EU and Central Asia'. EUCAM Working Paper 1, p. 11. Interview with official from Embassy of Azerbaijan in Brussels, 13 September 2010.

⁴⁰ R. Alcaro and E. Alessandri, (2010), 'Engaging Russia: Prospects for a Long-Term European Security Compact', *European Foreign Affairs Review* 15(1), p. 196; E. Kirchner and C. Berk, (2010), 'European Energy Security Co-operation: Between Amity and Enmity', *Journal of Common Market Studies* 48(4), pp. 867-877; S. Wood, (2009), *supra* note 3, p. 619.

⁴¹ Treaty establishing the European Coal and Steel Community and Annexes I-III, Paris, 18 April 1951. Available at: <http://eur-lex.europa.eu/en/treaties/index.htm>. Accessed on 21 September 2012.

⁴² For the most recent version, see Consolidated Version of the Treaty Establishing the European Atomic Energy Community, OJ C 84/1 of 30 March 2010.

establishing the European Community (TEC)⁴³. The TEC in turn was later amended by the Lisbon Treaty and renamed the Treaty on the Functioning of the European Union⁴⁴ (TFEU), which came into force on 1 December 2009.

Under the TEC, integration in the energy sphere predominantly occurred within the context of the completion of the internal market.⁴⁵ From a theoretical point of view, it is useful here to make the distinction between what is known as negative and positive integration.⁴⁶ The measures taken within the context of the internal market seem to correspond primarily to the first category. Negative integration pertains to the removal of barriers, such as for example customs duties, quotas and other quantitative restrictions on the free movement of goods, persons, services and capital between EU Member States. Positive integration on the other hand refers to the establishment of a market by means of legislation and the construction of common policies at European level.⁴⁷ Whereas negative integration is promoted by the European Commission in its role as ‘agenda-setter’ and through the case-law of the European Court of Justice (ECJ), positive integration relies primarily on the explicit approval of the Council and increasingly, the European Parliament.⁴⁸

The measures taken with regard to the internal market correspond to such negative integration and seem to be explainable from the viewpoint of what Sandholtz and Stone Sweet have dubbed *supranational governance*. The authors posit that the point of the European Community (EC) was to facilitate intra-EC exchange. They emphasise the role of transnational exchange (e.g. trade, investment, the development of European groups, -

⁴³ Currently the Treaty is no longer in force. For its most recent version, see Consolidated Version of the Treaty Establishing the European Community, OJ C 325/33 of 24 December 2002.

⁴⁴ For the most recent version, see Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 83/47 of 30 March 2010.

⁴⁵ Measures taken include inter alia Directive 96/92/EEC of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27/20 of 30 January 1997; Regulation 1228/2003/EC of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L 176/1 of 15 July 2003; Directive 98/30/EC of 22 June 1998 concerning the common rules for the internal market in natural gas, OJ L 204/1 of 21 July 1998; Directive 2004/67/EC of 24 April 2004 concerning measures to safeguard security of natural gas supply, OJ L 127/92 of 29 April 2004; Regulation No 1775/2005/EC of 28 September 2005 on conditions for access to the natural gas transmission networks, OJ L 289/1 of 3 November 2005 and Directive 2005/89/EC of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ L 33/22 of 4 February 2006; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in gas and repealing Directive 2003/55/EC, OJ L 211/94 of 14 August 2009; Regulation 713/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211/1 of 14 August 2009; and Directive 2009/72/EC of 13 July 2009 concerning common rules for the market in electricity and repealing Directive 2003/54/EC, OJ L 211/55 of 14 August 2009. A new Regulation has been proposed by the Commission to replace Directive 2004/67/EC concerning measures to safeguard security of natural gas supply in July 2009. After a tough round of negotiations, the regulation was eventually adopted in October 2010. See Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295 of 12 November 2010.

⁴⁶ C.f. F.W., Scharpf, (1996), ‘Negative and Positive Integration in the Political Economy of European Welfare States’, in: G. Marks, F.W., Scharpf, P.C. Schmitter and W. Streeck, *Governance in the European Union*, (London: Sage), pp. 15-39; and F. W. Scharpf, (1999), *Governing in Europe: Effective and Democratic?*, (Oxford: Oxford University Press).

⁴⁷ F. G. Snyder, (2004), ‘European Integration’, in: *Encyclopedia of Law and Society: American and Global Perspectives*, (Thousand Oaks, London/New Delhi), p.1.

⁴⁸ F. W. Scharpf, (1999), *supra* note 46, p. 71.

networks, and associations) in triggering processes that generate movement toward increased supranational governance and produce or reinforce supranational rule-making.⁴⁹

The three elements comprising the theory are (i) the development of a transnational society, (ii) the role of supranational organisations with meaningful autonomous capacity to pursue integrative agendas and (iii) the focus on European rule-making to solve international policy externalities.⁵⁰ These elements imply the possibility of functional ‘spillover’, or the spread of supranational competences to new, but related policy areas, when it has become clear that this expansion is necessary to attain predefined goals as laid down in the Treaties. Haas described this as an ‘expansive logic of sector integration’ whereby the integration of one sector leads to ‘technical’ pressures pushing states to integrate other sectors.⁵¹ For example, in order to allow the completion of the internal market, it is necessary to extend its functioning to goods and services, including energy.

The theory partly connects to earlier *neofunctionalism* by Haas⁵², as the authors embrace his insight that supranational policy making generates a ‘dynamic process of institutionalisation’ where over time supranational rules and rule-making processes evolve in ways that are not predictable from the outset when those rules are created.⁵³ Haas defined integration as

“the process whereby political actors... are persuaded to shift their national loyalties, expectations, and political activities to a new and larger center.”⁵⁴

However, they do not share Haas’s view in full as they leave open the extent to which loyalties and identities of actors shift from the national to the European level.⁵⁵ They see European governance along the lines of a spectrum that spans from intergovernmental politics on the one end and supranational politics on the other; the issue area under consideration determining where along the line it stands.⁵⁶ Looking at how the internal energy market is formed from the point of view of supranational governance, it seems that pressures to enable the smooth operation of the internal market, allow us to explain why internal energy policy has been able to allow for EC-level coordination, rules and dispute resolution.⁵⁷ The EU’s external energy policy is a wholly different story however and seems less predictable from the point of view of supranational governance, and rather seems to follow a more intergovernmental logic.

4.2: Liberal Intergovernmentalism

Most basically put, Liberal Intergovernmentalism (LI) rests on two prime assumptions: (i) states are the dominant actors, and (ii) states are rational. This means that states attain their goals through intergovernmental negotiation and bargaining, rather than through a centralised authority making and enforcing decisions. At the same time this implies that states as actors calculate the utility of alternative courses of action and choose the one that maximises (or

⁴⁹ A. Stone Sweet and W. Sandholtz, (1998), ‘Integration, Supranational Governance, and the Institutionalization of the European Polity’, in W. Sandholtz and A. Stone Sweet (eds.), *European Integration and Supranational Governance*, (Oxford: Oxford University Press), p. 2.

⁵⁰ *Ibid.* p. 6.

⁵¹ E.B. Haas, (1958), *The Uniting of Europe: political, Social, and Economic Forces 1950-1957*, (Stanford California: Stanford University Press), p. 383.

⁵² E. B. Haas, (1961), ‘International Integration: The European and the Universal Process’, *International Organization* 15, pp. 366-392.

⁵³ A. Stone Sweet and W. Sandholtz, (1998), *supra* note 49, pp. 6 and 16-18.

⁵⁴ E. B. Haas, (1961), *supra* note 52, p. 367.

⁵⁵ A. Stone Sweet and W. Sandholtz, (1998), *supra* note 49, p. 6,

⁵⁶ *Ibid.*, p. 8.

⁵⁷ *Ibid.*, p. 14.

satisfies) their utility under the circumstances, rendering collective outcomes the result of aggregated individual actions based on an efficient pursuit of these preferences.⁵⁸

The fundamental goals of – states or ‘state-preferences’ – are neither fixed nor uniform; they vary among states and within the same state across time and issues according to issue-specific societal interdependence and domestic institutions.⁵⁹ The outcome of negotiations between EU Member States depends on the relative bargaining power of the actors involved. The actors which would benefit least from a cooperative agreement and more from the status quo are generally in a stronger position than those who would benefit most and can thus demand concessions from the latter.⁶⁰ When agreement is reached under LI theory, states deliberately confer authority to supranational organisations capable of acting against any shift in preferences of governments that signed up to the deal; and institutions incorporate unintended, and unwanted consequences under conditions of uncertainty.⁶¹

According to the theory, the variation in the extent of delegation and pooling of sovereignty per individual issue reflects the issue-specific concerns of national governments about each other’s ability to comply with the substantive deals reached. Following this, LI posits that integration’s irreversibility has not so much to do with international regimes, but rather with the evolution and adaptation of national preferences and institutions themselves.⁶²

The extent to which Member States would benefit from a cooperative approach in external energy policy, or rather prefer to keep the status quo depends to a large extent on their perceived necessity for change. For example, the degree of dependency on a single energy supplier could act as a potential determinant for the extent to which Member States would benefit from a common approach in energy. With some Member States at almost 100% dependency, it would be of great benefit to them to reach agreement on projects that enable diversification of suppliers and transit routes. Conversely, if Member States are in a position where their domestic energy markets are well interconnected with other states and their energy mix is sufficiently diversified, the incentive to reach such an agreement would be far less strong. This in turn would enable these states to demand concessions in other areas from those states where the need for change is perceived to be higher.

Furthermore, it is not unimaginable that in cases where Member States have well functioning relations with third country suppliers, there would be some reluctance on their part to engage in cooperative agreements that could alter the way external energy policy is conducted at the European level. Conversely, for Member States where the perceived need for more ‘EU coordination’ is greatest in order to increase their bargaining power vis-à-vis those same suppliers, they are most likely the ones who would press the hardest for more supranational involvement (see *infra*, 7.1, 7.2 and concluding remarks).

This intergovernmental bargaining based on asymmetrical interdependence between states, dominates except in circumstances where transaction costs are high and information is

⁵⁸ A. Moravcsik and F. Schimmelfennig, (2009), ‘Liberal Intergovernmentalism’, in: A. Wiener and T. Diez, *European Integration Theory*, (Oxford: Oxford University Press), p. 68.

⁵⁹ A. Moravcsik, (2008), ‘The New Liberalism’, in: C. Rues-Smit and D. Snidal, (eds.), *The Oxford Handbook of International Relations*, (Oxford: Oxford University Press), pp. 234-254.

⁶⁰ A. Moravcsik and F. Schimmelfennig, (2009), *supra* note 58, p. 71.

⁶¹ This reasoning follows the logic of regime theory, c.f. R. Keohane, (1984), *After Hegemony. Cooperation and Discord in the World Political Economy*, (Princeton, N.J.: Princeton University Press); and c.f. P. Pierson, (1996), ‘The Path to European Integration: a Historical Institutional Analysis’, *Comparative Political Studies* 29(2), pp. 123-163.

⁶² A. Moravcsik, (1998), *The Choice for Europe. Social Purpose and State Power From Messina to Maastricht*, (Ithaca, NY: Cornell University Press), p. 493.

asymmetrical; then supranational actors may have relatively more influence.⁶³ It is not unthinkable for example that after the two recent gas supply interruptions, such external shocks led to situations where the supply of information was highly asymmetrical, warranting a stronger role for a supranational EU actor to arrive at a solution to the crisis (see *infra*, 7.1 and 7.2).

Criticism to the theory stated that LI was unable to explain everyday decision-making and would be limited to Treaty negotiations, overlooking any ‘unintended’ or ‘undesired’ consequences that occur as a result of Treaty amendments.⁶⁴ However, according to LI theory institutions are there to accommodate unintended or undesired consequences. Moreover, LI theory seems actually to match everyday EU decision-making relatively well, as in any EU legislative process, the Presidency aims for arriving at informal consensus, negotiating with reluctant states until an agreement is reached.⁶⁵

The above two theories illustrate that research on the integration of the EU’s external energy policy should not only focus on the external dimension, but also consider developments within the EU’s internal market, given the links between the two realms of energy policy. Decisions taken within the framework of the internal market for example set the rules and standards to which third countries must comply when they would like to invest within the EU. Similarly, agreements with third country suppliers alter the ‘energy mix’ within the internal market and affect the levels of ‘dependency’ of individual Member States, which can affect their behaviour on certain dossiers. Therefore, an important part of this research is to test the extent to which elements of external energy policy – in this case, natural gas security – correspond, or fail to correspond to the theories of supranational governance and liberal intergovernmentalism.

With this in mind, the next section briefly details the method of data collection and analysis that that was applied throughout the project.

5: Case Selection

The importance of energy security renders regions such as Central Asia, the Persian Gulf, west Africa, north Africa and countries such as Russia, Sudan, Venezuela, Bolivia, Brazil, and Indonesia all as key to ensure regional and/or global security of energy supply. At the same time, the world’s largest energy consuming regions and countries such as north America, the EU and wider Europe, Japan, Australia, and finally newcomers India and China put an enormous pressure on the distribution of these scarce energy resources.

The following section puts forward a mechanism through which a selection from this population of potential cases can be made.

5.1: Selection Criteria

The global dimension of energy security implies that many regions can be considered as a priority in terms of securing supplies, transit routes, alternative sources of energy, and so on. But, is this the same in terms of security? Should all issues pertaining to particular regions be approached by the EU with the same rigor as if they all represented key security threats? And,

⁶³ A. Moravcsik and F. Schimmelfennig, (2009), *supra* note 58, p. 77.

⁶⁴ J. Peterson, (1995), ‘Decision-making in the European Union: Towards a Framework for Analysis’, *Journal of European Public Policy* 2(1), pp. 69-93; G. Garrett and G. Tsebelis, (1996), ‘An Institutional Critique of Intergovernmentalism’, *International Organization* 50(2), pp. 269-299; and M.A. Pollack, (2005), ‘Theorizing the European Union: International Organization, Domestic Polity, or Experiment in New Governance’, *Annual Review of Political Science* 8, pp. 357-398.

⁶⁵ A. Moravcsik and F. Schimmelfennig, (2009), *supra* note 58, p. 74.

what magnitude do these security issues represent? In other words, how should the Union act when dealing with these issues?

In order to answer these questions, one should first of all have clearly in mind what constitutes a security threat for the EU. Specifically, this would entail that the security of the Union should be directly or indirectly at stake; presenting either a direct threat to (a) *fundamental principles, norms and values*⁶⁶ that lie at the heart of the EU's existence, to (b) *basic human needs* or (c) *critical societal functions* the Union is expected to warrant⁶⁷, or (d) an indirect threat in the sense that *inaction or policy incoherence* on part of the EU towards a country/region vital for its energy security would result in the undermining of its security of supply in the long term, *i.e.* there is a clear need for coherent external energy security governance.

Second, not all types of energy are equally essential for Europe's energy security. Currently, oil and gas imports constitute the greatest source of energy dependency for the EU and both are indispensable types of fuel. As section 1 highlighted however, these two types of energy pose very different characteristics – the oil market being a truly global market, whereas the gas market is primarily regional in scope. The disruptive impact of oil crises on global oil prices notwithstanding – it is gas market's inert nature, due to their need for physical infrastructure, which causes gas supply interruptions to have a more severe regional impact mainly because of the limited possibilities for fuel switching. Therefore, gas supply interruptions in regions that are highly dependent on natural gas as their primary source of fuel, impact more severely on those region's energy security (in the immediate to short term) than do global oil price shocks.

The pivotal role played by natural gas in the EU's energy mix, the recent supply interruptions between Russia and Ukraine, and the Union's subsequent calls for diversification of energy sources and routes in Central Asia have clearly illustrated the security implications of natural gas dependence for the EU.

Taken together it are (i) the nature of the security threat to the EU and the need for coherent external energy security governance, and (ii) the extent to which natural gas is a key source of energy that serve as case selection criteria.

5.2: Selected Case

Naturally, there is a high degree of variation on these criteria. These differences notwithstanding however, only those cases where the threat to European security is said to be high, where there is a clear need for external energy security governance and where natural gas is the dominant source of energy are considered for in-depth research. Employing this logic has led to the selection of the following combined case: *Russia and Central Asia*.

⁶⁶ Art. 2 TEU reads that “[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

⁶⁷ B. Buzan, (1983), *People, States and Fear: The National Security Problem in International Relations*, (Brighton: Wheatsheaf); B. Buzan, O. Waever, and J. de Wilde, (1998), *supra* note 1; B. Sundelius, (2005), ‘Disruptions – Functional Security for the EU’, in A. Missiroli (ed.), *Disasters, Diseases, Disruptions: A New D-Drive for the European Union*. Chaillot Paper 83, (Paris: European Union Institute for Security Studies), pp. 67-84; C. Pursainen, (2009), ‘The Challenges for European Critical Infrastructure Protection’, *Journal of European Integration* 31(6), p. 726.

The EU, together with the Commonwealth of Independent States (CIS) countries, is Russia's main consumer of natural gas and will likely remain so until 2030.⁶⁸ As such, guaranteed uninterrupted supply and transit is imperative. The interruptions in the supply of Russian natural gas to the EU in 2006 and 2009 as a result of a dispute between Russia and Ukraine therefore proved a direct threat to the EU's security of energy supply. Crises such as these call for an overhaul of existing arrangements that safeguard the supply of natural gas to the EU and the establishment of new effective crisis prevention and response mechanisms to rule out potential repeat scenarios. However, as illustrated above (see *supra*, 2 and 3), divergences between EU Member States and institutions alike on how to deal with Russia on energy matters are seen as largely undermining a coherent approach to deal with the reality of the Union's dependence on Russian natural gas.

Firmly linked to EU-Russia energy ties are the relations of both powers with Central Asia. With its vast hydrocarbon reserves and location in the heart of the Eurasian continent, Central Asia is of crucial importance for the long-term energy security of the EU and other important players such as Russia and China; and subsequently the stage for a fierce competition over its resources. As a result, Central Asia was designated to be the region of choice for several large scale European infrastructural projects (collectively dubbed the 'Southern Corridor') that would bring Central Asian gas to EU markets in late 2008.⁶⁹ The plan consists of a set of pipelines which circumvent Russia and Ukraine, the most well-known of which is the EU-supported 'Nabucco' project, a planned natural gas pipeline stretching from the Caspian via Turkey, Bulgaria, Romania and Hungary onwards to Austria. Two smaller pipelines, the Italy-Turkey-Greece Interconnector (ITGI) and the TransAdriatic Pipeline (TAP), complement the pack (see *infra* 7.2 on pipeline projects and negotiations).⁷⁰

However, Europe is not the only one interested in Central Asia's gas. The main competitor in the region is the Russian-led South Stream project. South Stream is a proposed pipeline to transport Russian natural gas via the Black Sea to Bulgaria and further to Italy and Austria. The project would partly replace the planned extension of the Blue Stream pipeline from Turkey through Bulgaria and Serbia to Hungary and Austria, and it is seen as a direct rival to the Nabucco pipeline.

Vital for the European projects to succeed is to gain access to the vast Central Asian gas reserves. However, negotiations with governments in the region are proving highly cumbersome. Complicating matters more, the EU's efforts to support Nabucco seem to be hampered by internal competition from the ITGI and TAP projects who compete with Nabucco for (part of) the pipeline route. On top of that, Nabucco's chances are undermined further by the participation of several EU Member States in the South Stream project⁷¹ and

⁶⁸ Energy Dialogue EU-Russia, the Tenth Progress Report, Moscow, November 2009, p. 5.

⁶⁹ See COM(2008) 781 final of 13 November 2008, pp. 4-5. On the developments from 2000 until late 2008, see also F. Baumann, (2010), 'Europe's Way to Energy Security – The Outer Dimension of Energy Security: From Power Politics to Energy Governance', *European Foreign Affairs Review* 15, pp. 82-83.

⁷⁰ The Nabucco consortium consists of Bulgarian BEH, Turkish Botas, Hungarian FGSZ, OMV from Austria, German RWE, and Romanian Transgaz. The Italy-Turkey-Greece Interconnector (ITGI) aims to expand the Turkish national grid for transmitting natural gas to Italy and Turkey, build pipelines between Turkey and Greece, and between Greece and Italy. The former pipeline has by now been built and became operational in 2007. The project consortium consists of a joint-venture between Italian Edison and Greek DEPA. The Trans Adriatic Pipeline is a proposed pipeline project to transport natural gas from the Caspian and Middle East regions via a new gas transportation route starting in Greece via Albania and the Adriatic Sea to Italy and further to Western Europe. Its shareholders are Swiss EGL, Norwegian Statoil and German E.ON-Ruhrigas.

⁷¹ South Stream is managed by the South Stream AG consortium which consists of Russian Gazprom and Italian ENI, with French EDF having taken a stake in the project in late 2010. Other EU Member

the increased activity in the region of ‘new powers’ such as China.⁷² Other projects which are relevant to the discussions on Nabucco and South Stream are projects such as the recently finished Central Asia-China pipeline from Turkmenistan via Uzbekistan and Kazakhstan all the way to China;⁷³ and the Trans-Caspian pipeline that if built would transport natural gas from Kazakhstan and Turkmenistan to Central Europe, thus bypassing Russia and Iran.

6: Data and Measurement

As mentioned in the introduction, the main question this research project has tried to answer is to what extent Europe manages to formulate its external policy on natural gas vis-à-vis Russia and Central Asia in a coherent manner. Moreover, what are the underlying causes as to why the Union does (not) succeed in doing so?

To answer this question, an extensive analysis was carried out of relevant policy documents including, *inter alia*, European Council Conclusions; Council of the EU documents (Programmes and Strategies, Council Conclusions, Working Group reports, Common Foreign and Security Policy (CFSP) statements); European Commission documents (Communications, White and Green Papers, Legislative Proposals); coupled with many other sources – official documents that are released by international and regional organisations, secretariats, dialogues and partnerships in which the EU participates, Treaty provisions and relevant legislation (see *infra*, ANNEX 3).

This primary ‘information on paper’ was complemented by a thorough stakeholder consultation (see also *infra*, ANNEX 3). A total of 38 semi-structured (1-1,5hr long) interviews were conducted among EU civil servants (Commission, Council, and European Parliament); EU Member State officials (energy attachés from EU Member State Permanent Representations in Brussels); officials from non-EU states (among Russian, Ukrainian and Azeri representatives tasked with energy at their respective embassies in Brussels); and officials from or who take part in relevant international and regional organisations and forums (Energy Charter Secretariat, and the World Bank). For each interview, a detailed transcript was drawn up. These transcripts were subsequently analysed to retrieve differences, similarities and trends in the data.

Finally, the data collected through primary sources and the stakeholder consultation was checked against relevant secondary literature drawn from a range of scientific databases, catalogues and websites, including: Libis, Librisource, Web of Science, College of Europe Library Bruges, Springer Link and J-Stor, Wiley Interscience, Econlit, Sciencedirect, EBSCOhost and Metapress. Relevant legal information has been primarily obtained from EUR-Lex, PreLex, European Commission Libraries Catalogue (ECLAS), Westlaw, Hein Online and the Peace Palace Library in The Hague, the Netherlands.

States that participate within the project to varying degrees are Austria, Bulgaria, Greece, Hungary, Romania and Slovenia.

⁷² China’s main natural gas fields are located in the Western and North-central part, far away from the population and industrial centres in the East and South-east. To offset this imbalance, the West-East pipeline was built. However, to keep up with the pace of growth, China is increasingly looking abroad for its energy supply. Given its relative geographical proximity and vast natural gas supplies, China is therefore turning to Central Asia for securing its energy demands.

⁷³ See BBC News 14 December 2009, ‘China President opens Turkmenistan Pipeline’, Available at: <http://news.bbc.co.uk/2/hi/asia-pacific/8411204.stm>. Accessed on 21 September 2012.

7: Key-Findings

Attempts at forming a coherent EU external approach on natural gas first arose when the collapse of the Soviet Union prompted the opening up of new nearby energy markets in its former Republics. By early 2000, the Commission viewed the EU's rising dependence on natural gas imports as a justification for developing a common external approach on energy.⁷⁴ In the years that followed – particularly after the 2006 gas crisis between Russia and Ukraine – the Commission intensified its calls⁷⁵, leading to (i) the adoption of an Action Plan, (ii) a seemingly united EU towards Russia at the informal Lahti EU Summit of 20 October 2006 and (iii) a full-scale report by the European Parliament Committee on Foreign Affairs on a common European foreign policy on energy.⁷⁶

Following the row between Russia and Ukraine in 2006, Brussels placed diversification of its gas suppliers and transit routes at the top of the agenda – culminating in plans to construct the “Southern Gas Corridor”. As highlighted in paragraph 5.2, the plan consists of a set of pipelines which aim to circumvent Russia and Ukraine. Barely two months after the launch of these plans, had a second – much more severe – interruption of gas transit through Ukraine occurred in January 2009. The two-week long crisis, which left large parts of south-eastern Europe without gas, again badly exposed a need for diversification of energy sources (see *infra*, 7.1). However, the reality is that the EU possesses few competences on energy matters that go beyond the internal market (see *infra*, 7.1.3). This causes Member States to often operate unilaterally when it comes to external gas relations – despite paying tribute to calls from Brussels for more coherent external action.⁷⁷

This brief overview demonstrates the EU's continuous attempts to achieve a greater degree of vertical coherence in its external gas policy. The real challenge at the moment is whether the EU will actually succeed in diversifying its gas supply and transit relations without its attempts being undermined by incoherent policy choices, both horizontally as well as vertically.⁷⁸ As the Commission noted in November 2010, it is particularly important in this respect that the EU formalises the principle whereby Member States act in the benefit of the Union as a whole in bilateral energy relations with key partners, including, and in particular, Russia.⁷⁹

Through an analysis of gas crises management (7.1), (planned) pipeline projects and negotiations (7.2), and consumer-producer relations on an institutional level (7.3), the next section assesses whether the Union is in fact achieving its goal of forming and enacting a coherent external policy on natural gas, and why (not).

⁷⁴ COM(2000) 769, pp. 2-3.

⁷⁵ See, *inter alia*, COM(2006) 105 final of 8 March 2006; COM(2006) 590 final of 12 October 2006; and European Commission and the Secretary General of the Council of the European Union/High Representative for Common Foreign and Security Policy. (2006). ‘An External Policy to Serve Europe's Energy Interests’.

⁷⁶ Finland's EU Presidency, ‘Transcript of the second press conference for the informal meeting of Heads of State and Government’, Lahti, 20 October 2006. Available at: http://www.eu2006.fi/NEWS_AND_DOCUMENTS/OTHER_DOCUMENTS/VKO42/EN_GB/11613_83205709/INDEX.HTM. Accessed on 21 September 2012.; European Parliament resolution of 26 September 2007 on towards a common European foreign policy on energy (2007/2000/INI), Doc. A6-0312/2007; See also F. Umbach, (2008), ‘Die EU-Energiestrategien’, Bundeszentrale für Politische Bildung. Available at: http://www.bpb.de/themen/V86QPM,0,Die_EUEnergiestrategien.html. Both Accessed on 21 September 2012.

⁷⁷ S. de Jong and S. Schunz, (2012), *supra* note 22., p. 171.

⁷⁸ *Ibid.*, p. 172.

⁷⁹ COM(2010) 639 final, *supra* note 32, p. 17. See also F. Baumann, (2010), *supra* note 69, p. 83.

7.1: Coherence in Gas Crises Management

On 1 January 2009, natural gas deliveries from Russia to Ukraine were halted. Reported shortages and a cut in supplies to other European countries followed a few days later. In a two week span, in what was one of the coldest winters in decades, the EU experienced one of the largest interruptions in its energy supply to date. In January 2006, a similar crisis between the two countries had resulted in falling pressures and non-delivery of gas reports by European companies. A 'new years gas tussle' thus seemed to become the rule, rather than the exception, prompting concerns on whether existing energy security arrangements and instruments are adequate.⁸⁰

7.1.1: The EU's Handling of the January 2009 Crisis

Following the events on January 1st 2009, Commission President Barroso warned that both countries' reputation as reliable partners was at stake. He insisted a stable and long-term solution had to be found and sent a 'fact finding mission' to Moscow and Kiev.⁸¹ In spite of the overall quick response by the EU and other organisations to condemn the events, this initial 'bilateral diplomacy' proved ineffective in terms of preventing the crisis from escalating further.⁸²

Six days into the crisis, French President Sarkozy and German Chancellor Merkel joined angry calls for Russia to resume supplies as gas shortages and heating rationing threatened to spread from eastern to central Europe and beyond.⁸³ Responding to the growing unrest, both the EU Presidency and the Commission intensified their efforts to facilitate a solution, which resulted in a monitoring agreement between Ukraine, Russia and the EU on 9 January, 2009. The agreement provided for independent monitors from all the involved parties to oversee gas transit on Russian and Ukrainian territory.⁸⁴

⁸⁰ See, *inter alia*, S. Haghighi (2007), *supra* note 2, p. 357; J. Perovic and R. Orttung, (2007), 'Russia's Energy Policy: Should Europe Worry?', *Russian Analytical Digest* (RAD) 18, p. 2; J. Stern, (2006), *The Russian-Ukrainian gas crisis of January 2006*, Oxford Institute for Energy Studies (OIES), p. 14; J. Grätz, (2009), *supra* note 3; and J. Perovic, (2008), 'Russian Energy Power Abroad', *RAD* 33, p. 2.

⁸¹ Statement from the President Barroso and Commissioner Piebalgs on the agreement for gas monitoring, EU Press Release, Doc. IP/09/33, Brussels, 11 January 2009.

⁸² S. de Jong, J. Wouters and S. Sterkx, (2010), 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon', *European Foreign Affairs Review* 15(4), pp. 520-521.

⁸³ Telegraph.co.uk, 'Europe shivers as Russia ignores calls to restore gas', 9 January 2009. Available at: <http://www.telegraph.co.uk/news/worldnews/europe/russia/4206720/Europe-shivers-as-Russia-ignores-calls-to-restore-gas.html>. Accessed on 21 September 2012. See also, BBC News, 'Europe homes freeze amid gas row', 9 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7819429.stm>. Accessed on 21 September 2012; And BBC News, 'Europeans struggle to keep warm', 8 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7817780.stm>. Accessed on 21 September 2012.

⁸⁴ S. Pirani, J. Stern and K. Yafimava, (2009), *The Russo-Ukrainian gas dispute of January 2009: a comprehensive assessment*, OIES, p. 46; Commission Staff Working Document, SEC(2009) 977, *The January 2009 Gas Supply Disruption to the EU: An Assessment*, p. 4. See also BBC News, 'Ukraine making gas crisis worse', 10 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7821880.stm>. Accessed on 21 September 2012; and BBC News, 'Energy fuels new 'Great Game' in Europe', 9 June 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/8090104.stm>. Accessed on 21 September 2012; Monitoring team starts work in Kiev and Gas Coordination Group urges Naftogaz and Gazprom to resume gas deliveries immediately, EU Press Release, Doc. IP/09/24, Brussels, 9 January 2009; and BBC News, 'Accord signed in Russia gas row', 11 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7822093.stm>. Accessed on 21 September 2012.

Around the same time, the EU Council's Gas Coordination Group (GCG) raised production in several Member States⁸⁵, increased withdrawal from storage to maximum capacity in the most heavily affected areas⁸⁶, stepped up imports from diversification of sources and routes both inside and outside the EU⁸⁷, and limited consumption for industry in Bulgaria, Slovakia and temporarily for large consumers in Hungary.⁸⁸ The overall effectiveness of these mitigation measures notwithstanding, additional Norwegian supplies could not reach eastern Europe due to a lack of interconnections, as well as differing standards of gas.⁸⁹ Moreover, problems existed in terms of quality of available information. Limitations on consistent information, and exchange of data between gas companies were all obstacles in making most of available market potential.⁹⁰ In particular, the market was hampered by inadequate information on cross-border gas flows and a lack of transparent information on the flow of gas into the EU.⁹¹

The EU's hopes that the monitoring mission would allow gas flows to resume were quickly dashed by Russian claims that Ukraine had blocked gas deliveries to Europe.⁹² What followed was a swift move by European industry in an attempt to end the dispute. After Naftogaz declared to Gazprom that a significant amount of technical gas would be needed to restart the system before transit to Europe could be restarted, on 15 January 2009 a group of companies set about creating a means to provide the finance for such gas. A consortium was created consisting of Eurogas⁹³ members ENI, Gdf/Suez, E.ON/Ruhrgas, RWE, Wingas, OMV and non-member Gazprom.⁹⁴ The consortium would provide the finance for gas to restart the transit network until the two sides had reached a long-term settlement, after which a mechanism provided for repayment of funds to the companies involved.⁹⁵

⁸⁵ Production was raised in the Netherlands, UK, Romania and Poland, as well as in non-Member States Norway, Algeria and Libya to compensate the loss of Russian gas, to the maximum capacity of production and transport means. Europe is said to have lost up to 30% of its gas imports at this time.

⁸⁶ Storage sharing at this point in time was already implemented in two cases: Austria and Slovenia and Hungary Serbia. Czech Republic left its stored volume in Slovakia for its domestic needs as it was very heavily impacted.

⁸⁷ Imports from alternative suppliers increased, namely Norway and Libya, along with increased Russian imports via Belarus and Turkey. By 10 January Ukraine announced the delivery of gas from their own reserves to Moldova and Bulgaria. Greece was said to be confident its Liquefied Natural Gas (LNG) terminal would enable it to cope with the crisis. Fuel switching took place, particularly towards fuel oil for heating and coal for power production in Austria, Slovakia, Greece, Poland, Bulgaria, and Romania. Also, extra commercial deliveries were delivered from neighbouring countries in the case of Austria, Hungary and the Czech Republic.

⁸⁸ See BBC News, 'Gas cut: How Europe is coping', 8 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7815113.stm>. Accessed on 21 September 2012.

⁸⁹ European Regulators Group for Electricity and Gas (ERGEG) advice on Russia-Ukraine Gas Dispute, Brussels, 10 February 2009, p. 2. Available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/PRESS_RELEASES/2009. Accessed on 21 September 2012.

⁹⁰ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, p. 523.

⁹¹ Commission Staff Working Document, *supra* note 84, p. 10.

⁹² Pirani, (2009), 'The Russo-Ukrainian Gas Dispute, 2009', *RAD* 53, p. 3.

⁹³ Eurogas promotes, *inter alia*, the interests of its membership, companies, national federations and associations involved in the European gas trade.

⁹⁴ MSNBC World News 'Putin weighs in as Europe gas crisis continues' 15 January 2009. Available at: <http://www.msnbc.msn.com/id/28678240/>. Accessed on 21 September 2012. See also I. Traynor, (2009), 'Anger at German award for Russia's Vladimir Putin amid gas crisis', *Guardian* 16 January 2009. Available at: <http://www.guardian.co.uk/world/2009/jan/16/anger-at-german-award-for-putin>. Accessed on 21 September 2012. Traynor remarks that this agreement was bound to encourage criticism that Moscow and Gazprom succeeded in dividing the EU through dealing with its biggest west European clients, Germany and Italy, and thus bypass the countries of central and southern Europe which are the main victims of the crisis.

⁹⁵ See S. Pirani, et al., (2009), *supra* note 84, p. 48.

On 17 January 2009, Russia hosted a high level summit in Moscow, with the participation of representatives from the EU, Russia and Ukraine.⁹⁶ This resulted in an agreement between Russian Prime Minister Putin and Ukrainian Prime Minister Timoshenko on 19 January 2009.⁹⁷ Gas flows to Europe were reinstated the following day.⁹⁸

7.1.2: Critical Appraisal of EU Interventions

By the complexity of the January 2009 crisis, it is clear that neither companies nor governments can have access to all relevant information. In fact, research into the EU's handling of the crisis showed that a lack of a well-functioning exchange of up-to-date, reliable and consistent information between gas companies, as well as inadequate and fragmented information on cross-border flows served to undermine full effectiveness of solidarity measures.⁹⁹

Moreover, no adequate coordination existed of the various plans within gas regions, nor sufficient transparency of arrangements in Member States (such as maintaining certain levels of gas in storage), which could have consequences in terms of gas flows to or from neighbouring countries.¹⁰⁰ Next to the inadequate coordination of emergency plans, EU mitigation efforts were further hampered by the limited interconnectedness of Europe's pipeline system. Gas Infrastructure Europe (GIE) – a representative organisation to the EU institutions gathering operators of gas infrastructures across Europe – noted that not all transmission operators could adequately adapt gas flow patterns in their networks (e.g. by reversing the flow of gas) and so deal with an alternated gas flow situation resulting from the dispute.¹⁰¹

Looking at political interventions, what immediately came into play was the ineffectiveness of statements made by the EU.¹⁰² Although, the Commission's initial reaction was swift – the monitoring agreement was quickly established –, there proved little to monitor in the end. The Commission's bilateral diplomacy proved ineffective in preventing the crisis from escalating as neither Russia, nor Ukraine acted on the EU's statements. In fact, it was not until industry got actively involved that the dispute was finally settled.¹⁰³

⁹⁶ BBC News, 'EU to attend gas summit in Moscow', 15 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7830517.stm>. Accessed on 21 September 2012.

⁹⁷ BBC News, 'Gas to flow' after Moscow deal', 18 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7834796.stm>. Accessed on 21 September 2012.

⁹⁸ See Commission Staff Working Document, *supra* note 84, p. 4; S. Pirani, et al., (2009), *supra* note 84, pp. 25-26; S. Pirani (2009), *supra* note 92, p. 3; and I. Gazizullin, (2009), 'A Ukrainian Perspective of the 2009 Gas Dispute', *ISS Opinion*, EUISS. See also BBC News, 'Russia opens gas taps to Europe, 20 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7839053.stm>. Accessed on 21 September 2012.

⁹⁹ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, pp. 520-525.

¹⁰⁰ Examples of situations where actions in one Member State inadvertently placed another under strain, include measures on gas flows during emergency situations taken in Italy which nearly prevented alternate flows of gas from reaching Slovenia. See Commission Staff Working Document, *supra* note 84, p. 10; Interview with official from EU Member State Permanent Representation, 23 April 2010.

¹⁰¹ Gas Infrastructure Europe, GIE views regarding the prevention and management of gas crises, Doc. Ref: 09GIE130, 30 April 2009, p. 2. Available at: <http://www.gie.eu.com/adminmod/show.asp?wat=GIE%20views%20on%20SoSversion%2030%20avril%20final.pdf>, p. 6.

¹⁰² Interview with official from EU Member State Permanent Representation, 19 April 2010. See also S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, p. 528.

¹⁰³ *Ibid.*, p. 528.

The industrial consortium was set up by gas companies and backed up by national leaders – Prime Minister Berlusconi of Italy and German Chancellor Angela Merkel, together with Russian Prime Minister Putin are said to have been particularly influential, with the Commission allegedly not having played a role.¹⁰⁴ In terms of consistency and coherence in external relations however, this public ‘interfering’ by leaders from Member States and European companies did not aid the EU’s aim to speak with one voice to all relevant parties concerned.¹⁰⁵

Overall, differences in types of interventions set aside, the EU’s actions seem to have been undermined in particular by deficits in coherence between Member State actions and those at EU level, particular with respect to the coordination of emergency plans and mitigation measures. Building on this observation, the advantages for the Union to act more coherently seem to lie in a combination of prevention, coupled with the ability to pose a credible and unified response to crisis situations. If coherence in external action could be ensured, for example through verification at EU level of Member States’ bilateral deals with third country suppliers the chances for such deals to serve the interests of the Union as a whole, rather than individual Member States, would be significantly enhanced.¹⁰⁶

In the long term such verification would allow the benefits of both supply contracts and infrastructural deals to accrue more equally within the Union. This could potentially limit the occurrence of differing technical standards and clauses that constrain information sharing between gas companies, and so improve the level of interconnectedness of the internal market. In turn, this would then have the effect of improving the possibility for a well-informed and coordinated response to a supply interruption.¹⁰⁷ In September 2011 in fact, the European Commission proposed exactly such a mechanism. Member States reactions to the proposal were mixed however (see *infra*, 7.2.2).

For the Union to be able to act more coherently in its emergency response in the future, institutional developments may act as catalysts or turning points towards achieving this aim. In the next section, I assess whether such implications can be derived from the entry into force of the Treaty of Lisbon.

7.1.3: Crisis Management under the Treaty of Lisbon

Under the Lisbon Treaty, energy remains a shared competence¹⁰⁸, but for the first time it is given its own Title¹⁰⁹, consisting of the three-limbed new Art. 194 of the Treaty on the Functioning of the European Union (TFEU). Situating the ‘Union policy on energy’ explicitly ‘in the context of the establishment and functioning of the internal market’ and ‘with regard

¹⁰⁴ S. Pirani, et al., (2009), *supra* note 84, p. 48; MSNBC, *supra* note 94; I. Traynor, (2009), *supra* note 94.

¹⁰⁵ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, p. 529.

¹⁰⁶ *Ibid.*, pp. 529-530.

¹⁰⁷ *Ibid.*, p. 530.

¹⁰⁸ Art. 4(2)(i) TFEU. However, one has to note here that the Union’s exclusive competence to ‘establish the competition rules necessary for the functioning of the internal market’ based on Art. 3(1)(b) TFEU also stretches into the internal energy market. See also S. Fischer, (2009), ‘Energie- und Klimapolitik im Vertrag von Lissabon: Legitimationsverweiterung für wachsende Herausforderungen’, *Integration 1*, p. 54. It may be added that this also extends to some of the external aspects of the energy policy, see Art. 3(2) TFEU. It is however necessary here to point to some limitations. According to Art. 194(2) second para. TFEU measures necessary to achieve the objectives of Art. 194(1) TFEU “...shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c) TFEU.”

¹⁰⁹ Title XXI, ‘Energy’, of Part Three, ‘Union policies and internal actions’, TFEU.

for the need to preserve and improve the environment', the policy's objectives are clearly outlined: (i) to ensure the functioning of the energy market, (ii) to ensure security of energy supply in the Union, (iii) to promote energy efficiency, energy saving and the development of new and renewable forms of energy, and (iv) to promote the interconnection of energy networks.¹¹⁰

In the past, energy was an objective under the Treaties, yet no specific legal basis existed to take appropriate measures to that effect, Arts. 95¹¹¹ and 308¹¹² of the Treaty Establishing the European Community (TEC) were often used. Some argue that the Lisbon's creation of an energy Title may strengthen the Union's self-perception as an energy actor and gradually turn European energy politics into a more *natural* undertaking, as Member States which are traditionally 'wary' of increased 'Europeanisation' in this field could become more convinced of the possible added value of European energy policy.¹¹³ But such a chain of events is by no means certain. It presupposes both increased concerted external action in the energy field and that the benefits of such actions outweigh actions taken at Member State level (see also *infra*, 7.2.2 on the effects of the entry into force of the Lisbon Treaty).¹¹⁴

The account of the crisis indicated that recourse to effective, and above all, coherent EU diplomacy had resulted in a speedier resolution of the crisis. The analysis showed that the effectiveness of such diplomacy was more a question of 'effective bilateralism' rather than multilateralism – thus contradicting the EU's own *leitmotiv* for external action. This however does not mean that the Union should not aim to make more effective use of multilateral instruments at its disposal, seek their reform, or move for increased 'multilateralisation' of bilateral areas, where appropriate.¹¹⁵ Art. 21(1), second para., of the post-Lisbon TEU clearly states that

“[t]he Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations [...] It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.”¹¹⁶

Taking into account that increased coherence and resolve is desired in the EU's external relations, the Lisbon Treaty's creation of a new High Representative/Vice-President (HR/VP), who is both part of the Council¹¹⁷ as well as the Commission¹¹⁸, assisted by the Union's own diplomatic corps, the European External Action Service (EEAS)¹¹⁹, seems to have been inspired to tackle precisely this challenge.¹²⁰

¹¹⁰ Art. 194(1) TFEU.

¹¹¹ Art. 95 TEC allowed for measures that had as their object the establishment and functioning of the internal market.

¹¹² Art. 308 TEC provided for an additional legislative competence if action was proven necessary to attain one of the objectives of the Community, in the course of the operation of the common market, and the Treaty did not provide the necessary powers.

¹¹³ S. Fischer, (2009), *supra* note 108, p. 58; interview with official from the Permanent Representation of the Czech Republic to the EU on 19 April 2010.

¹¹⁴ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, p. 531.

¹¹⁵ *Ibid.*, pp. 533-534.

¹¹⁶ Art. 21(1) second paragraph TEU.

¹¹⁷ Pursuant to Art. 18(3) TEU the HR presides over the Foreign Affairs Council.

¹¹⁸ Pursuant to Art. 18(4) TEU the HR is one of the Vice-Presidents of the Commission and shall ensure the consistency of the Union's external action. The HR shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. The HR thereby effectively took over the portfolio of hitherto External Relations Commissioner.

¹¹⁹ Pursuant to Art. 27(3) TEU '[i]n fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General

The HR/VP's 'double hat' was coined in order to bridge the Union's external economic and political relations. With regard to the creation of the EEAS, this caused some authors to question whether its reach should extend to all aspects of external relations, or whether it should be confined to external political relations.¹²¹ Under 'normal circumstances' (*i.e.* in a situation of uninterrupted energy supply) it seems clear that the HR/VP does not have direct authority over EU external energy policy.¹²² However, there is reason to believe that this could change under 'abnormal circumstances', such as in the event of a severe supply interruption like in January 2009, especially when such circumstances carry foreign and security policy implications.¹²³

The Council Decision establishing the organisation and functioning of the European External Action Service reads in Article 2(1) that the EEAS shall support the HR/VP

"in fulfilling his mandates as outlined, notably, in Articles 18 and 27 TEU:
 – in fulfilling his mandate to conduct the Common Foreign and Security Policy ("CFSP") of the European Union, including the Common Security and Defence Policy ("CSDP"), to contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council and to ensure the consistency of the Union's external action;
 – in his capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council;
 – in his capacity as Vice-President of the Commission for fulfilling within the Commission the responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union's external action, without prejudice to the normal tasks of the services of the Commission."¹²⁴

The broad formulation of this provision seems to imply that energy (or parts thereof) may well fall under the remit of the HR/VP and the EEAS. This is definitely the case insofar it constitutes a CFSP matter, thus falling under the responsibility of the HR/VP, a situation quite likely if a crisis contains not purely economic, but also political and security elements. Furthermore, in her role as Vice-President of the Commission, the HR/VP is responsible for 'coordinating other aspects of the Union's external action'¹²⁵, which ultimately also includes energy.¹²⁶

Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States'.

¹²⁰ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, p. 534.

¹²¹ G. Grevi and F. Cameron, (2005), 'Towards an EU Foreign Service'. Issue Paper 29. Brussels: European Policy Centre (EPC), p. 3.

¹²² S. Andoura, L. Hancher and M. van der Woude, (2010), 'Towards a European Energy Community: A Policy Proposal'. Paris: Notre Europe, p. 13; interviews with officials of EU Member State Permanent Representations, 22 and 23 April 2010.

¹²³ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, p. 535.

¹²⁴ Council Decision establishing the organisation and functioning of the European External Action Service, Council Doc. 11665/1/10 REV 1, Brussels 20 July 2010, ANNEX, pp. 1-6; S. Vanhoonacker and N. Reslow, (2010), 'The European External Action Service: Living Forwards by Understanding Backwards', *European Foreign Affairs Review* 15(1), pp. 7-8; S. Duke, (2009), 'Providing for European-Level Diplomacy after Lisbon: The Case of the European External Action Service', *The Hague Journal of Diplomacy* 4, pp. 218-219; J. Lieb and A. Maurer, (2007), 'The 'how' of the EEAS: variables, priorities and timelines', in: G. Avery et al., (2007). 'The EU Foreign Service: how to build a more effective common policy'. Working Paper No. 28. Brussels: EPC, p. 67; A. Centioni and J. Rawlinson, 'External Action Service: where are we?' *The Euros*, 22 March 2010, p.2. Available at: <http://www.theeuros.eu/External-Action-Service-where-are,3597?lang=en>. Accessed on 21 September 2012.

¹²⁵ See also Art. 18(4) TEU.

¹²⁶ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, p. 535.

With respect to external representation, the extent to which an issue is dominated by either security or technical / market aspects, is likely to determine whether the President of the European Council (at the highest political level), the HR/VP, supported by the EEAS and aided by the Union delegations abroad, or the Commission takes the lead. Close cooperation between both the HR/VP and the Commissioner is crucial here.¹²⁷ The wording ‘at the highest level’ indicates that it is the task of the President of the European Council – without prejudice to the powers of the HR/VP – to represent the Union in case such diplomatic actions take place at the level of Heads of State and Government.¹²⁸

However, the decision between what constitute ‘security’ and ‘technical or market’ elements is subject to a fierce interinstitutional debate, as the creation of the EEAS prompted the Commission to worry that its role could be (partly) relegated to providing technical assistance, whereas the Council worried over a loss of influence of Member States over EU foreign policy.¹²⁹ In any event, in times of a supply interruption carrying both economic, political and security consequences, it could be expected that the HR/VP – supported by the EEAS – will take up a more prominent role in diplomatic efforts aimed at resolving a dispute, with the Commission providing assistance where appropriate. When diplomatic action at the level of foreign heads of state or government is required, the President of the European Council will come into play.¹³⁰

The analysis of the January 2009 crisis showed two clear loopholes in the EU’s current strategy to resolve supply crises: (i) the fragmented character of information on the internal market and the coordination thereof in terms of emergency plans; and (ii) the sometimes haphazard manner by which bilateral diplomacy is conducted. The Treaty offers the Union a distinct set of actors and structures that could make for a more ambitious solution to the first problem, and solve the second problem at the same time. When a crisis occurs that carries foreign and security implications, it should thus be the task of the HR/VP or, at the highest level, the President of the European Council, assisted by the EEAS, to engage in diplomatic efforts on behalf of the EU with the aim of striking a political agreement to the crisis and ensure full consistency and coherence. Yet, their combined efforts should be based on EU-wide information on the Union’s internal market, provided by emergency plans coordinated at Union level under the auspices of the Commissioner for Energy.¹³¹

To that effect, clear rules of cooperation between the President of the European Council, HR/VP, President of the Commission and Energy Commissioner, and Member States could go a long way for the EU to enhance its ability to adequately resolve a crisis such as in January 2009.¹³²

7.2: Coherence in Pipeline Projects and Negotiations

The Russia-Ukraine crises triggered Europe to rethink its existing energy security arrangements. After the first crisis in 2006, the European Commission claimed “Europe needs

¹²⁷ Interviews with officials from EU Member State Permanent Representations, 19 and 22 April 2010.

¹²⁸ Pursuant to Art. 15(6) second para. TEU ‘[t]he President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy’.

¹²⁹ See G. Avery, (2009), ‘Europe’s foreign service: from design to delivery’. Policy Brief November 2009. Brussels: EPC, p. 3; A. Centioni and J. Rawlinson, *supra* note 124, p. 2; S. Vanhoonacker and N. Reslow, (2010), *supra* note 124, p. 7.

¹³⁰ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, pp. 536-537.

¹³¹ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, pp. 537-538.

¹³² *Ibid.*, pp. 538.

a clearer and more collective and cohesive policy on security of energy supply”.¹³³ The March 2006 European Council acted promptly, calling for the definition of an ‘energy policy for Europe’, on account of security risks affecting producing and transit countries.¹³⁴ In light of security of supply, the Commission, Member States and the European Council all emphasised that in its external policy, Europe should speak with a single voice and intensify diversification efforts with respect to external and local sources, suppliers and transport routes.¹³⁵ Taking an in-depth look at the execution of the Union’s desire to diversify, this paragraph analyses the degree to which EU and Member State actions have been in line with their stated aims and synergetic altogether.

7.2.1: The Coherence in EU Gas Diversification Actions Prior to the Lisbon Treaty

Member States’ actual implementation of the above policies was much different however. Rudely awoken to its dependence on the transit of gas through ‘unreliable’ states such as Ukraine and Belarus, Germany struck a deal with Gazprom in early 2006 to construct a direct pipeline between Germany and Russia underneath the Baltic Sea, thus circumventing Ukraine. Construction on the ‘Nord Stream’ project officially began on 9 April 2010, with the first technical gas flowing through the pipe on 6 September 2011.¹³⁶ In equal fashion, Gazprom managed to negotiate deals in many other EU Member States, with particularly noteworthy ones signed in Bulgaria, Hungary and Austria to roll out its South Stream project – the main rival to Nabucco.¹³⁷

When the second Russia-Ukraine crisis left large parts of Europe in the cold for almost two weeks in 2009¹³⁸, the European Commission was quick to call for the rapid development of infrastructure, and the diversification of energy sources and supply routes.¹³⁹ Given that Gazprom managed to sign up almost all of Nabucco’s consortium members¹⁴⁰, some observers concluded that Russia is in fact winning the ‘pipeline race’.¹⁴¹

¹³³ Andris Piebalgs EU Energy Commissioner Speaking Notes welcoming the agreement between Gazprom and Naftogaz. Joint Press Conference with Mr. Bartenstein, Austrian Federal Minister for the Economy and Labour, Brussels, 4 January 2006, p. 2. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/1&format=HTML&aged=0&language=EN&guiLanguage=en>. Accessed on 21 September 2012.

¹³⁴ European Council, (2006), ‘Presidency Conclusions’. Brussels, 23-24 March 2006, pp.4 and 13.

¹³⁵ *Ibid.*, p. 14. See also COM(2006) 590 final of 12 October 2006, p. 2; and Council of the European Union, (2006). ‘2717th Transport, Telecommunications and Energy Council Meeting’. Brussels, 14 March 2006, pp. 6-7.

¹³⁶ See EUobserver, ‘Russia pledges future gas supplies to Europe’, 13 February 2006. Available at: <http://euobserver.com/?aid=2088>; Euractiv, ‘Russia starts filling Nord Stream gas pipe’, 6 September 2011. Available at: http://www.euractiv.com/energy/russia-starts-filling-nord-stream-gas-pipe-news-507308?utm_source=EurActiv%20Newsletter&utm_campaign=2d469af32b-my_google_analytics_key&utm_medium=email. Both Accessed on 21 September 2012; S. de Jong and S. Schunz, (2012), *supra* note 22, pp. 172-173.

¹³⁷ Under these deals, Gazprom acquired greater market access in return for maintaining supplies to these countries on a bilateral basis. See A. Cohen, (2009a), ‘Russia: The Flawed Energy Superpower’ in G. Luft and A. Korin (eds.), *Energy Security Challenges for the 21st Century*, (Santa Barbara CA: ABC-CLIO, LLC), p. 94; R. Youngs, (2009), *supra* note 2, p. 82.

¹³⁸ See S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 82, pp. 511-538.

¹³⁹ Statement of President Barroso on the resolution of the Ukraine-Russia Gas Dispute, Press Point, Doc. Speech 09/12 (Brussels, 20 January 2009). Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/12&format=HTML&aged=0&language=EN&guiLanguage=en>. Accessed on 21 September 2012.

¹⁴⁰ Nabucco’s shareholders are Bulgarian Energy Holding (Bulgaria), Botas (Turkey), MOL (Hungary), OMV (Austria), RWE (Germany) and Transgaz (Romania).

¹⁴¹ S. de Jong and S. Schunz, (2012), *supra* note 22, p. 173; K. Barysch, (2010), ‘Should the Nabucco pipeline project be shelved?’, Centre for European Reform Policy Brief, p. 10; J. Bush, (2009),

In terms of vertical coherence, the impact of the 2006 and 2009 Russia-Ukraine crisis on both occasions served to get the EU Institutions and its 27 Member States to agree on the proposed solutions, *i.e.* the need to diversify natural gas suppliers and transit routes, and for Europe to present a united position externally. This would suggest that in a narrow view, the positions of all actors were consistent. However, in terms of the execution thereof, significant discrepancies exist between the positions of the European Commission and European Parliament on the one hand, and those of the Council and EU Member States on the other. Whereas the Commission and Parliament firmly advocated diversifying natural gas supplies and transit routes away from Russia, Member States in many instances seem to have in fact strengthened their energy ties to Gazprom. These Member States thus opted for the deepening of existing arrangements, rather than a more long-term – and in the eyes of many EU Member States a more financially and politically risky – undertaking to diversify through the acquisition of Caspian gas instead.¹⁴²

The fact that many central and eastern European Member States possess few gas pipeline interconnections other than eastwards and do not have the financial means to construct new routes, should be taken into account when judging these decisions. It is this fact that likely caused Poland and the Baltic states in particular to be incensed about the deal between Gazprom and German E.ON-Ruhrigas and BASF to construct Nord Stream.¹⁴³ Having been denied the role of transit states as a result, these states labelled the project a flagrant example of quick bilateral geopolitics, lacking any form of solidarity, where discussions at the EU level had largely been absent.¹⁴⁴

In response, Germany and Italy – the latter of who is Gazprom's main partner in the South Stream project – rather view Nord Stream as a purely industry driven project between commercial undertakings which should not necessarily be discussed at Council level.¹⁴⁵ In summary, when taking a broad understanding of vertical coherence, Member State actions have largely undermined the positions of the European Commission and the European Parliament concerning diversification of natural gas suppliers and transit routes.¹⁴⁶

The limited vertical coherence in the period preceding the Lisbon Treaty's entry into force can essentially be traced back to the fact that the EU possesses few competences on energy outside of the internal market. As decisions regarding the energy mix fall under the exclusive competence of the Member States, the Russia-Ukraine crises prompted many of the Union's members to seek individual – bilateral, rather than multilateral – solutions to the challenges posed by the interruptions. To alter this situation, the Commission instead has argued that energy policy should rather be given its own legal basis, requesting measures to be taken *in connection* with related policies on the environment and the EU internal market, but not based on the latter's provisions in the treaties.¹⁴⁷

As discussed in paragraph 7.1.3, the Lisbon Treaty's new energy Title was perceived by some as something that could strengthen the Union's own self-perception as an energy actor and

'Russia's South Stream Project Gets a Boost', Spiegel Online 19 May 2009. Available at: <http://www.spiegel.de/international/business/0,1518,625697,00.html>; P. Escobar, (2008), 'Relax and float south stream', Asia Times online 14 March 2008. Available at: http://www.atimes.com/atimes/Central_Asia/JC14Ag01.html. Both Accessed on 21 September 2012.

¹⁴² S. de Jong and S. Schunz, (2012), *supra* note 22, pp. 173-174.

¹⁴³ *Ibid.*, p. 174.

¹⁴⁴ Interviews with officials from EU Member State Permanent Representations, 23 April, 13 May, 7 June, 23 April and 19 April 2010.

¹⁴⁵ Interviews with officials from EU Permanent Member State Representations, 2 July and 24 June 2010.

¹⁴⁶ S. de Jong and S. Schunz, (2012), *supra* note 22, p. 174.

¹⁴⁷ *Ibid.*, pp. 174-175.

turn energy politics into a more natural undertaking at EU level. An analysis of the EU's efforts on realising its Southern Gas Corridor in the post-Lisbon era therefore indicates the extent to which the Union managed to improve its coherence and whether such a synergetic development toward an EU energy policy can realistically be expected.¹⁴⁸

7.2.2: The Coherence in EU Gas Diversification Actions After Lisbon's Entry into Force

In its original form, Nabucco – the Southern Corridor's flagship project – intends to source its gas from Azerbaijan's Shah Deniz gas field, of which the second exploration phase reserved 10 billion cubic metres (bcm) per year for Europe.¹⁴⁹ The problem is however that the two other Southern Corridor projects, ITGI and TAP, are equally vying for the same contract. A second issue is that Shah Deniz contains an insufficient amount of gas to fill Nabucco's capacity of 31bcm/yr. ITGI and TAP however – running at 12 bcm/yr and at an initial capacity of 10 bcm/yr¹⁵⁰, respectively – could easily be filled.¹⁵¹ The State Oil Company of Azerbaijan Republic (SOCAR) claims it is only willing to pay for gas transit as if Nabucco were running at full capacity.¹⁵² However, at a fixed transit tariff and when running at only one third of its potential, Nabucco carries a higher per unit transit cost compared to a full pipe, a cost that ultimately has to be borne by someone. Naturally, the other Southern Corridor projects were quick to emphasise that Nabucco does not justify investment for a pipeline with a 31 bcm capacity, and that ITGI and/or TAP could serve as the first step for the eventual full construction of the Southern Corridor.¹⁵³

However, on 21 February 2012 SOCAR announced it no longer considered ITGI for the Italian pipeline option, thus leaving the pipeline out of the competition. For the northern section across Turkey and onwards to Austria, Nabucco received competition from a new pipeline project launched by UK oil major BP. The South-East Europe Pipeline (SEEP), as it is called, would run from western Turkey across Romania and Bulgaria to Hungary's western frontier with a capacity of 10bcm per year. Using mostly existing infrastructure, it comes at a fraction of the estimated € 10 billion needed for Nabucco.¹⁵⁴

To make matters worse for Nabucco, the Shah Deniz consortium announced in June 2012 it would no longer consider the full Nabucco project an option for shipping gas to Europe, as Turkey and Azerbaijan would build the stretch from Azerbaijan through to Turkey themselves (the project is known as the 'Trans-Anatolian gas Pipeline (TANAP)'). Beyond that section, BP and SOCAR claimed they were now considering only two options for the pipeline's route

¹⁴⁸ *Ibid.*, p. 175.

¹⁴⁹ Shah Deniz was discovered in 1999 and constitutes the country's largest offshore gas field at over 1 trillion cubic metres of gas. The project – led by BP – has been producing gas since 2006. Phase one is estimated at a maximum production rate of 8.6 bcm per year. Phase two is estimate to deliver an additional 16 bcm per annum of gas, thus almost tripling the field's overall production.

¹⁵⁰ TAP is extendable to 20bcm/yr.

¹⁵¹ See P.K. Baev and I. Øverland, (2010), 'The South Stream versus Nabucco pipeline race: geopolitical and political stakes in mega-projects', *International Affairs* 86(5), p. 1082; S. de Jong, (2011a), 'The Nabucco Pipeline: Turkey and Europe's Drive towards Diversification', *REVOLVE Magazine* Summer Issue, Turkey Report, p. 27.

¹⁵² See R. ten Hoedt, (2010), 'We do not Want to Depend on Only One Pipeline', *European Energy Review* 15 November 2010, p. 2. Available at: <http://www.europeanenergyreview.eu/index.php?id=2528>. Accessed on 21 September 2012.

¹⁵³ Interview with official from EU Member State Permanent Representation, 24 June 2010; Euractiv, 'Italy's Edison promotes cheaper version of Nabucco', 27 April 2010. Available at: <http://www.euractiv.com/en/energy/italy-s-edison-promotes-cheaper-version-nabucco-news-485149>; Euractiv, 'Nabucco in 'David vs. Goliath' battle for Azeri gas', 10 December 2010. Available at: <http://www.euractiv.com/energy/nabucco-david-vs-goliath-battle-news-500465>. Both Accessed on 21 September 2012.

¹⁵⁴ S. de Jong and S. Schunz, (2012), *supra* note 22, p. 176.

to Austria – a smaller pipeline from the Nabucco consortium, known as ‘Nabucco West’, and the TransAdriatic Pipeline.¹⁵⁵ Nabucco West is an alternative to *Nabucco Classic*, a shorter version of the pipeline which would run from the Turkish-Bulgarian border – rather than the Turkish-Georgian border under the Nabucco Classic scenario – to the vicinity of the gas hub at Baumgarten near Vienna, Austria. The pipeline passes through Bulgaria, Romania and Hungary before it reaches Austria.¹⁵⁶ Following these developments, the South-East Europe Pipeline was scrapped. The EU instead issued a statement in which it expressed its faith in the Nabucco classic scenario, which to its understanding was still on the table.¹⁵⁷ Russia, in an attempt to make use of the confusion, claimed Nabucco was unlikely to survive the summer due to Azerbaijan having only a small amount of gas to fill Nabucco, well short of its 31bcm capacity.¹⁵⁸

On the whole, such statements and traces of ‘intra-EU competition’ are not doing the Southern Corridor project any favours. Rather, they play into the hands of third countries and undermine the Union’s negotiating position.¹⁵⁹ Early 2011, the European Council therefore repeated that there is a need for improvements in the coherence of the Union’s external energy relations. It invited the HR to take full account of the energy security dimension in her work, and called upon the Commission to submit new proposals.¹⁶⁰ On 7 September 2011, the Commission issued its new Communication on security of supply and international cooperation. Among other things, it proposes to set up an information exchange mechanism on international energy agreements between Member States and third countries, including those still under negotiation. Furthermore, it suggests that such agreements can also be negotiated at EU level if they have a large bearing on the Union’s energy policy objectives, and where there is a clear common EU added-value. A recent example of a case where there is such an added value would be the Council mandate bestowed on the Commission to start talks with Azerbaijan and Turkmenistan on a legal framework for a TransCaspian pipeline.¹⁶¹

Initial reactions to the proposals were however rather mixed. Known supporters of a common EU external energy policy, such as the former European Parliament President Jerzy Buzek and Polish MEP Jacek Saryusz-Wolski greatly welcomed the proposals.¹⁶² Others however, were not so enthusiastic. Giles Chichester, the Conservative spokesman on energy within the European Parliament, condemned the proposal as “the worst kind of meddling”, adding that energy arrangements are “Britain’s own business, not the Commission’s”. Kjetil Tungland, the managing director of TAP, added that Brussels’ first step should rather have been to

¹⁵⁵ Euractiv, ‘Gas pipeline deal sidelines original Nabucco project’, 28 June 2012. Available at: <http://www.euractiv.com/energy/tanap-gas-pipeline-shelves-nabuc-news-513593>. Accessed on 21 September 2012.

¹⁵⁶ Nabucco Gas Pipeline, ‘Nabucco West Scenario’. Available at: <http://www.nabucco-pipeline.com/portal/page/portal/en/press/Nabucco%20West%20Scenario>. Accessed on 21 September 2012.

¹⁵⁷ Euractiv, ‘BP punches Nabucco below the belt’, 29 May 2012. Available at: <http://www.euractiv.com/energy/bp-punches-nabucco-belt-news-512994>. Accessed on 21 September 2012; Euractiv, ‘Gas pipeline deal sidelines original Nabucco project’, *supra* note 155.

¹⁵⁸ A. Forostenko, (2012), ‘Nabucco unlikely to survive summer’, the Voice of Russia, 28 May 2012. Available at: http://english.ruvr.ru/2012_05_28/76277417/. Accessed on 21 September 2012.

¹⁵⁹ Interview with official from Embassy of Azerbaijan in Brussels, 13 September 2010.

¹⁶⁰ European Council, (2011). ‘Conclusions’. Brussels, 4 February 2011, point 11.

¹⁶¹ COM(2011) 539 final of 7 September 2011, pp. 4-5. See also Council of the European Union, (2011). ‘The Council gives go-ahead for negotiations on Trans-Caspian Pipeline System’. Council Doc. 14095/11 PRESSE 307. Brussels, 12 September 2011.

¹⁶² Euractiv, ‘EU attempts to speak with one voice on energy’, 8 September 2011. Available at: <http://www.euractiv.com/energy/eu-attempts-speak-voice-energy-news-507462#comments>; J. Kanter, ‘European Union Seeks Power to Block Bilateral Energy Deals’, the New York Times 7 September 2011. Available at: <http://www.nytimes.com/2011/09/08/business/global/eu-seeks-power-to-block-bilateral-energy-deals.html>. Both accessed on 21 September 2012.

“develop a cost-effective pipeline that will be ready to bring the [gas] volumes currently under discussion to the Union as soon as they become available”.¹⁶³

Whereas the European Parliament wanted to move even beyond the Commission proposal, essentially obliging Member States to involve the Commission, a majority of Member States did not support the proposal. As a result, it was watered down in order to gather majority support.¹⁶⁴ Indeed, the diluted proposal grants Member States the right to keep their agreements with third countries confidential, sharing the information with the Commission, yet keeping it confidential from other Member States. Also, Member States are not obliged to submit the content of their agreements to the Commission. It is primarily the responsibility of the Member State to assess whether an intergovernmental agreement has an impact on the internal energy market or the security of supply in the Union.¹⁶⁵ According to Krišjānis Kariņš MEP, who is the EU rapporteur for the proposal, the proposal in its original form was supported by Poland and the Union’s smaller Member States. Countries such as Germany, Italy, France, the Netherlands and the UK advocated firmly against and were in favour of watering down the proposal, leaving the decision to whether or not to include the Commission to Member State discretion instead.¹⁶⁶

Looking at the above analysis and paragraph 7.1.2, it is clear that Lisbon’s creation of a specific legal basis for energy with detailed objectives and new actors such as the HR and EEAS had sparked high hopes for a more coherent EU external energy policy. Indeed, at his initial Parliamentary hearing in 2010, European Commissioner for Energy, Günther Oettinger, stated he would work towards greater ‘Europeanisation’ of energy policy and aim to move away from bilateral agreements such as Nord Stream.¹⁶⁷ Oettinger’s enthusiasm was echoed by a majority in the European Parliament and central and eastern EU Member States alike.¹⁶⁸ However, scepticism remained about whether Oettinger’s ties to Europe’s energy ‘big boys’ (notably Germany and France) would render void such claims.¹⁶⁹ These initial post-Lisbon events pointed thus to some degree of vertical coherence in the views of the Commission, the European Parliament and the central and eastern European Member States. Yet, Europe’s larger Member States still have positions inconsistent with these policies. This not only undermines the EU’s broad vertical coherence, but even its consistency.¹⁷⁰

In fact, the Commission’s September 2011 set of proposals touch upon the core of this issue: should the EU wish to end ‘bilateral deals’ such as Nord Stream, it is faced with groupings of

¹⁶³ Euractiv, ‘EU attempts to speak with one voice on energy’, *supra* note 162.

¹⁶⁴ Euractiv, ‘Large countries oppose EU Gazprom deals scrutiny’, 12 September 2012. Available at: <http://www.euractiv.com/energy/largest-eu-countries-oppose-gazp-news-514739>. Accessed on 21 September 2012.

¹⁶⁵ European Parliament, (2012), ‘Report on the proposal for a decision of the European Parliament and of the Council setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy’ (COM(2011)0540 – C7-0235/2011 – 2022/0238(COD)). Committee on Industry, Research and Energy, points 4,7 and 9 recital, pp.8-10.

¹⁶⁶ Euractiv, ‘Large countries oppose EU Gazprom deals scrutiny’, *supra* note 164.

¹⁶⁷ European Parliament, Summary of the hearing of Günther Oettinger – Energy, 14 January 2010. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100113IPR67198>. Accessed on 21 September 2012.

¹⁶⁸ Council of the European Union, (2010). ‘Summary of the meeting of the Committee on Industry, Research and Energy (ITRE)’. Council Doc. 5460/10. Brussels, 14 January 2010, pp. 1 and 3.

¹⁶⁹ European Parliament, Anhörung von Günther H. Oettinger, Designiertes Kommissionsmitglied Energie – Verbatim Report, Question posed by Claude Turmes MEP, p. 9. See also, H. Belin, (2010), ‘Günther Oettinger: a friend of industry’, *European Energy Review* 18 January 2010. Available at: http://www.europeenergyreview.eu/site/pagina.php?id_mailing=29&toegang=6ea9ab1baa0efb9e19094440c317e21b&id=1630. Accessed on 21 September 2012.

¹⁷⁰ S. de Jong and S. Schunz, (2012), *supra* note 22, p. 178.

Member States which favour different approaches in natural gas relations vis-à-vis third states. Asked about whether the Commission could play a greater role in terms of coordination, some of the Union's larger Member States are swift to point to the Union's lack of competences, claiming (energy) foreign policy is first and foremost a Member State responsibility.¹⁷¹ Some of the Member States who joined after 2004 indeed also point to the split in competences between EU and Member State level, however they equally refer to the extent to which Member States are unwilling to confer theirs – leaving the Commission sometimes unable to deliver on its promises.¹⁷² The Southern Corridor is a good example. Three years after the entry into force of the Lisbon Treaty, intra-EU competition has rendered Nabucco – the one pipeline among the three with the most favourable overall impact on European energy security – an unlikely candidate to wheel in a crucial Azeri gas contract. Views 'from the outside in' seem to underline this belief.¹⁷³ When asked, third states confirm that Member States promoting this or the other pipeline, followed by the Commission ushering its support for yet another, makes it difficult for third country suppliers to understand what the EU's long-term goals are in its external energy policy.¹⁷⁴

In summary, where some of the Union's central and eastern Members are positive towards a larger role for the European Commission¹⁷⁵, countries such as France, Germany, the UK, Italy and the Netherlands¹⁷⁶ are not too eager on having their sovereignty limited, as they view their market size, level of interconnectedness through multiple gas pipelines, and energy sector's power as a sufficient defence against any threat posed by external dependency.¹⁷⁷ Different energy exposures are largely seen as preventing a strengthened commitment to the external dimension of European energy policy.¹⁷⁸ It seems therefore that the central and eastern European Member States feel they need the support of the European Commission to keep up with the bigger Member States when it comes to energy.¹⁷⁹

It was therefore to be expected that Member States who possess strong multinational energy companies (German E.ON and RWE, French GDF, Italian ENI, Dutch Gasunie, Anglo-Dutch Shell, British BP, to name only a few) would do away with the Commission's proposal to grant it more powers. The strength of these companies enables them to turn complicated infrastructure projects such as Nord Stream and South Stream into reality.¹⁸⁰ When taking a broader understanding of coherence, the belief that such projects should preferably be

¹⁷¹ Interviews with officials from EU Member State Permanent Representations, 10 and 24 June 2010.

¹⁷² Interviews with officials from EU Member State Permanent Representations; interview with official from European Commission DG Energy, 26 March 2010.

¹⁷³ S. de Jong and S. Schunz, (2012), *supra* note 22, p. 178.

¹⁷⁴ Interview with official from Embassy of Azerbaijan in Brussels, 13 September 2010.

¹⁷⁵ Interview with official from EU Member State Permanent Representation, 10 June 2010; R. Jozwiak, (2011), 'EU Wants More Oversight Of Energy Deals', Radio Free Europe Radio Liberty 7 September 2011. Available at: http://www.rferl.org/content/eu_wants_more_oversight_of_energy_deals/24321007.html. Accessed on 21 September 2012.

¹⁷⁶ Interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010; interviews with officials from EU Member State Permanent Representations, 13 May and 5 May 2010. See also K. Barysch, (2010), *supra* note 141, p. 4.

¹⁷⁷ E. Kirchner and C. Berk, (2010), *supra* note 40, p. 868; K. Barysch, (2010), *supra* note 141, p. 4; interviews with officials from European Parliament Directorate-General Internal Policies, 30 March 2010; interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010; interview with official from EU Member State Permanent Representation, 5 May 2010.

¹⁷⁸ Interview with official from European Commission DG Energy, 26 March 2010. See also A. Macintosh, (2010), 'Security of Europe's Gas Supply: EU Vulnerability'. CEPS Policy Brief No. 222, November 2010; F. Baumann, (2010), *supra* note 69, p. 83; and R. Youngs, (2009), *supra* note 2, p. 34.

¹⁷⁹ Interviews with officials from European Commission DG Energy, 11 and 26 March 2010; R. Jozwiak, (2011), *supra* note 175.

¹⁸⁰ S. de Jong and S. Schunz, (2012), *supra* note 22, p. 179.

industry driven, rather than discussed at Council level, undermines the potential for synergies to trickle down and raise the impact of EU energy security initiatives beyond their immediate region of implementation.¹⁸¹

7.3: Consumer-Producer Relations at Institutional Level

The global market in hydrocarbons has undergone radical change in the course of the last 60 years. Today's markets are truly global in scope, with the involvement of a wide range of different actors. Specifically for Europe, the end of the Cold War meant that a drop in crude oil prices sparked hopes for a global, free, transparent, and open oil market bereft of national prerogatives.¹⁸² The dissolution of the Soviet Union prompted the opening up of hitherto more reclusive oil and natural gas markets in Central Asia. Spurred by the need for reliable and affordable energy resources in western Europe on the one hand, and for investment in these former Soviet Republics on the other, a process was initiated that led to the European Energy Charter Declaration.¹⁸³ The subsequent development and signing of the Energy Charter Treaty (ECT) in 1994¹⁸⁴ marked the first and only intergovernmental energy agreement aimed at investment protection that consists of legally binding rules, is backed up by a dispute settlement mechanism and contains detailed principles on transit (see *infra*, 7.3.).¹⁸⁵

On a global level, it is broadly understood that under the World Trade Organization's (WTO) rules, the production of energy goods falls under the purview of the General Agreement on Tariffs and Trade (GATT), whilst energy related services fall within the scope of the General Agreement on Trade in Services (GATS).¹⁸⁶ Not all goods or services fall explicitly within one of the two categories however. A good example is electricity, which under the Harmonized Systems Code List is qualified as a good¹⁸⁷, yet the transmission and distribution of electricity and related services qualify as a service and thus falls under the GATS.¹⁸⁸ This confusion notwithstanding, ultimately the above energy commodities are integrated under the purview of the WTO.

However, much has changed in the course of the last two decades as many new players have entered the 'global game' and concerns over climate change have risen to the top of the

¹⁸¹ Interviews with officials from EU Member State Permanent Representations, 10 and 24 June and 2 July 2010.

¹⁸² C. Van der Linde, C.W. Perlot and F. Hoogeveen (2006), 'Tomorrow's Mores: The Future Geopolitical System and the Structure of the International Oil Market', *Politica Exterior* 20, p.5

¹⁸³ See The Energy Charter Treaty and Related Documents, p. 209. Available at: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf#page=211, p. 209. Accessed on 21 September 2012.

¹⁸⁴ *Ibid.* pp. 37-161.

¹⁸⁵ See A. Goldthau and J. M. Witte (eds.) (2010), *supra* note 2; S. Haghighi, (2007), *supra* note 2, pp. 188-189. See also G. Carbonnier and S. de Jong, (2012), 'The Global Governance of Energy and Development', in G. Ziccardi-Capaldo (eds.), *Global Community: Yearbook of International Law and Jurisprudence 2011 Volume I*, (Oxford: Oxford University Press), p. 45.

¹⁸⁶ World Trade Organization, Energy Services. Background Note by the Secretariat, Doc No. S/C/W/52 para. 36 (1998). Also see O. Nartova, (2009), Trade in Energy Services Under WTO Law: The Impact of Competition Policies', PhD thesis, University of Bern; S. Matteoti, (2010), Oil Supply Management Practices of OPEC under the World Trade Organization Rules and the National Competition Laws, PhD thesis, University of Bern.

¹⁸⁷ HS Code 2716.

¹⁸⁸ See T. Cottier, G. Malumfashi, S. Matteotti-Berkutova, O. Nartova, J. de S pibus & Z. Bigdeli, (2010). Energy in WTO law and policy 2, p. 7. Available at: http://www.wto.org/english/res_e/publications_e/wtr10_7may10_e.pdf. Accessed on 21 September 2012; W-Chen Shih, (2009), 'Energy Security, GATT/WTO, and Regional Agreements', *Natural Resources Journal* 49, pp. 440 & 444.

international policy agenda. Such new players include, *inter alia*, major National Oil Companies (NOCs), commodity traders, and powerful intermediary companies.¹⁸⁹ This profound change of the global energy landscape has radically accentuated the different meanings producers and consumers attach both to the governability of global energy flows, as well as to the concept of energy security. Whereas the EU and US frame energy security primarily as a response to an unwelcome dependence on external suppliers¹⁹⁰, Russia on the other hand sees energy security in terms of unconditional state sovereignty over natural resources, reformed transit dispute mechanisms and a guarantee that access to international energy markets is non-discriminatory and competitive.¹⁹¹

Next to these differing interpretations between producers and consumers, the meanings attached to energy security are further contested depending on whether a country in question is an export-, import-, or transit state. Furthermore, the way in which a country defines energy security to a large extent hinges on its own 'energy situation', *i.e.* the composition of its national energy mix and the extent of dependency on particular suppliers.¹⁹² The next paragraph discusses these differences in interpretation in more detail.

7.3.1: Producer- Consumer- and Transit States

Indeed, the aforementioned definition of security of supply (see *supra*, 1) originates primarily from a consumer perspective. A supplier state would likely be more concerned about sustained demand and price stability so that its national budget can count on a reliable flow of revenues.¹⁹³ In this regard, one also should not neglect the pressures on exporting nations to comply with domestic supply obligations in light of their own economic expansion and population growth.¹⁹⁴ Similarly, a transit state's primary energy security concerns are more likely to revolve around ensuring a reliable flow of revenues, either from transit fees or through a percentage of gas shipped as a payment in kind. The importance of revenues generated from transit is well reflected in the frequently troublesome negotiations between

¹⁸⁹ S. de Jong, (2011b), 'Towards Global Energy Governance: How to Patch the Patchwork', in: G. Carbonnier (eds.), *International Development Policy: Energy and Development*, (Basingstoke: Palgrave MacMillan/Graduate Institute Geneva), p.22.

¹⁹⁰ The 2003 European Security Strategy reads "[e]nergy is a special concern for Europe. Europe is the world's largest importer of oil and gas. Imports account for about 50% of energy consumption today. This will rise to 70% in 2030. Most energy imports come from the Gulf, Russia and North Africa". See Council of the European Union, *supra* note 14, p. 3. The 2008 Report frames energy security in a similar fashion, but gives the issue a more central position within the document; illustrative of its rising importance. See Council of the European Union, Report on the Implementation of the European Security Strategy, Council Doc. S407/08, Brussels, 11 December 2008. The 2010 US' National Security reads "[w]e must transform the way that we use energy—diversifying supplies, investing in innovation, and deploying clean energy technologies. By doing so, we will enhance energy security, create jobs, and fight climate change". See National Security Strategy, Washington: the White House, May 2010, p. 10.

¹⁹¹ See President of Russia, *A Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles)*, President of Russia, 21 April 2009. On this proposal, see also: A. Bochkarev, (2010), Redrawing the global energy blueprint. *European Voice*, 12 February. Available at: <http://www.europeanvoice.com/article/2010/02/redrawing-the-global-energy-blueprint/67151.aspx>. Accessed on 21 September 2012.

¹⁹² S. de Jong, (2011b), *supra* note 189, p. 24.

¹⁹³ F. Baumann, (2010), *supra* note 69, p. 88; D. Yergin, (2006), 'Ensuring Energy Security', *Foreign Affairs* 85(2), p. 71.

¹⁹⁴ G. Luft and A. Korin, (2009), 'Energy Security: In the Eyes of the Beholder', In: G. Luft and A. Korin (eds.), *Energy Security Challenges for the 21st Century*, (Santa Barbara CA: ABC-CLIO, LLC), p. 6.

Ukraine and Russia over transit fees for natural gas destined for Europe (see *supra*, 7.1).¹⁹⁵ A significant part of a transit state's energy security policy is therefore aimed at the consolidation, enhancement and utilisation of its strategic geographical position in between suppliers and consumers.¹⁹⁶

Overall, the debate on energy security is often viewed as one of competition between states, where one state's security comes at the expense of another. Much of this belief is fuelled by consumer nations' attempts to frame energy security in terms of a heightened vulnerability vis-à-vis supplier states.¹⁹⁷ This causes the state in question to be portrayed as if it were at the mercy of opportunistic behaviour of suppliers. The continued haggling between Russia, Ukraine and Belarus seem to go some way in strengthening this argument – not least from a European point of view. However, such reasoning ignores important interdependencies between consumer and supplier nations in terms of supply and demand. More importantly even, it begets the institutional dimension that underpins the relation between suppliers and consumers. One should not forget that market rules and international institutions increasingly structure global energy relations.¹⁹⁸

Concerted action with the aim to influence global energy relations is too often organised from either a consumer, or a producer point of view alone. This has resulted in a fragmented contemporary global energy landscape that contains a patchwork of institutions, organisations and fora, where it proves difficult to unite both sides. Add the rise of Brazil, Russia India and China (or the 'BRICs' as they have become known) plus energy concerns of developing nations, and the image becomes even more complex.¹⁹⁹

The question therefore is to what extent existing institutional architecture can contribute to a move away from zero-sum *competition*, to positive-sum energy *cooperation*? To answer that question, the following paragraph analyses an institutional framework of particular relevance to EU-Russia/Central Asia energy relations; the Energy Charter Treaty.²⁰⁰

¹⁹⁵ In June 2010 another crisis broke out, this time between Belarus and Russia as a result of outstanding payments on part of Belarus. See EUobserver, 'Russia to cut supplies to Belarus', 21 June 2010. Available at: <http://euobserver.com/9/30328>. Accessed on 21 September 2012; and Euractiv, 'Russia orders Belarus gas supplies cut', 21 June 2010. Available at: <http://www.euractiv.com/en/energy/russia-orders-belarus-gas-supplies-cut-news-495439>. Accessed on 11 June 2012. The dispute sent bilateral diplomacy roaring with a quick response on both the Russian and EU side, careful not to harm ongoing deliveries to the European market. See EUobserver, 'Russia launches EU gas communications blitz', 21 July 2010. Available at: <http://euobserver.com/9/30332>. Accessed on 21 September 2012.

¹⁹⁶ S. de Jong, (2011b), *supra* note 189, pp. 24-25.

¹⁹⁷ Essentially, such attempts by policy-makers can be labeled 'securitisation' moves. Energy issues are framed as extremely urgent, *i.e.* as security threats, and become policy priorities that should be dealt with immediately (and by extraordinary means). It is important to stress that this is (i) a subjective process, as it is the choice of political actors – by means of security discourse – to move policy issues into the realm of security, as well as (ii) an intersubjective process, since the (successful) securitisation of a policy issue depends on the approval of society at large. See B. Buzan, O. Waever and J. De Wilde, (1998), *supra* note 1, pp. 21-25.

¹⁹⁸ A. Goldthau and J. M. Witte, (2010), 'Rules and Institutions in Global Energy', in A. Goldthau and J.M. Witte, *supra* note 2, p. 2.; Al-Faisal, Prince T. 2009. Don't be Crude: Why Barack Obama's energy-dependence talk is just demagoguery. *Foreign Policy*, p. 2. Available at: http://www.foreignpolicy.com/articles/2009/08/17/dont_be_crude. Accessed on 21 September 2012.

¹⁹⁹ S. de Jong, (2011b), *supra* note 189, p. 26.

²⁰⁰ *Ibid.*

7.3.2: The Energy Charter Treaty

The Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects was signed in December 1994 and entered into force in April 1998.²⁰¹ It represents a legally binding multilateral energy agreement that has as its aim to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, and so mitigate risks associated with energy-related investment and trade.²⁰² The Treaty provides extensive protection, arguably the most important of which is that against expropriation through for example nationalisation of industries – a feat not uncommon in the energy world.²⁰³

The ECT is open for signature to all countries; *i.e.* producer-, consumer- and transit states, industrialised, emerging and developing nations alike can all become Parties to the Treaty. Indeed, quite a number of countries have done so, including important Central Asian producer and transit states such as Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.²⁰⁴ Issues over the effectiveness of the Treaty's dispute resolution mechanism and the representativeness of its member base remain however.²⁰⁵

Its 'open character' notwithstanding, the ECT is primarily a European consumer creation, which is to some extent reflected by the emphasis placed on issues which could be seen as primarily important to consuming nations, which include next to the aforementioned protection against expropriation, a strong emphasis on non-discriminatory practices concerning investment by other Contracting Parties and ensuring that transit is free from interruptions.²⁰⁶ ECT members are obliged to refrain from discriminatory practices concerning foreign investments by other Contracting Parties to the Treaty.²⁰⁷ This provision however only grants this protection to investments which are already made. In other words, regarding the process of making investments, there is only a "best endeavours" requirement to grant non-discriminatory treatment.²⁰⁸ On transit, the Treaty prescribes detailed rules, obliging its members to take the necessary measures to facilitate the transit of energy, consistent with the principle of uninterrupted transit, and to secure established energy flows.²⁰⁹ Pursuant to said principle, ECT members are under an obligation not to let transit be interrupted as a result of a conflict with another member.²¹⁰

Precisely, the obligation to allow uninterrupted transit to occur was broken by Ukraine in 2006 and 2009. In spite of the ECT's primary role being to ensure investment protection and provide for a clear and reliable investment climate, the EU did not resort to issuing public

²⁰¹ For The Energy Charter Treaty and Related Documents, see: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf. Accessed on 21 September 2012.

²⁰² S. de Jong, (2011b), *supra* note 189, p. 33.

²⁰³ Art. 13 ECT.

²⁰⁴ Y. Selivanova, (2010), 'Managing the Patchwork of Agreements in Trade and Investment', in: A. Goldthau and J.M. Witte, *supra* note 2, p. 62.

²⁰⁵ S. de Jong, (2011b), note 189, p. 34.

²⁰⁶ *Ibid.*

²⁰⁷ Art. 10(1) ECT.

²⁰⁸ Art. 10(2) ECT. Negotiations on a supplementary treaty concerning protection at the pre-investment stage were initiated in 1995, which ultimately led to the formulation of a text for such an agreement. In the end political issues within the Charter prevented the conclusion of the agreement. See Y. Selivanova, (2010), *supra* note 204, p. 64; S. Haghighi, (2007), *supra* note 2, p. 195.

²⁰⁹ Art. 7(1) ECT.

²¹⁰ *Ibid.*, Art. 7(5) ECT obliges ECT members to "...secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties." A core element of this principle is to prevent non-transit related issues (*i.e.* commercial issues) from having a negative impact on transit volumes.

statements which denounced Ukraine's breach of the Charter's transit provisions on non-interruption and non-reduction of transit flows. In light of the Union's overarching aim to conduct 'effective multilateralism', it is peculiar to say the least as to why the EU did not use the Charter's full potential. Indeed, doing so could have exerted stronger pressure on one of the parties to the dispute (in the form of public scrutiny) to push for a resolution of the conflict.²¹¹ It could have sent a signal that the EU took a violation of an international agreement by one of its contracting parties very seriously, thus providing the Treaty with a potential early role in resolving the conflict.²¹²

A possible reason as to why this was not done is that, in recent years, Russia has become increasingly critical over the protection of producer countries' interests under the Treaty, ultimately leading to Moscow's refusal to ratify the Treaty²¹³ – in spite of the ECT's recognition of sovereignty over energy resources.²¹⁴ The Treaty was however applied provisionally, until on 20 August 2009, Russia officially stated it intended to terminate provisional application.²¹⁵

The ECT's transit Protocol²¹⁶, which is currently still under review, would significantly boost the regulatory oversight of energy transit within Eurasia. However, as explained above, transit is a delicate issue between producer and consumer countries, causing negotiations to be long and inconclusive. The main cause for Russia's refusal is its opposition to opening up its network to lower cost gas from Central Asian countries, a lack of access to the European market, and the fact that the ECT's transit protocol would not apply between European countries (the EU being defined as a single economic space) which Russia saw as a discriminatory practice.²¹⁷ Since Russia views full ECT implementation, among other things, as a 'free entry' to its energy production and transport infrastructure and it is unconvinced

²¹¹ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, p. 529.

²¹² C.f., P. Stevens, (2003), 'Cross-Border Oil and Gas Pipelines: Problems and Prospects'. Joint UNDP/World Bank Energy Sector Management Assistance Programme. Washington D.C.: UNDP/World Bank, pp. 21 and 44. Here, Stevens argues that the consequences of violating an international agreement are much more serious than those resulting from not adhering to a bilateral agreement.

²¹³ S. de Jong, J. Wouters and S. Sterkx, (2010), *supra* note 82, p. 529.

²¹⁴ The Treaty states that the Contracting Parties "...recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law". See Art. 18(1) ECT. Art. 18(4) ECT nuances this provision slightly by stating that "[t]he Contracting Parties undertake to facilitate access to energy resources, inter alia, by allocating in a non-discriminatory manner on the basis of published criteria authorizations, licenses, concessions and contracts to prospect and explore for or to exploit or extract energy resources".

²¹⁵ The Energy Charter Secretariat was notified on 20 August 2009 of Russia's desire to terminate provisional application. See <http://www.encharter.org/index.php?id=414>. Accessed on 21 September 2012. Note that during the crisis, the EU could have referred to Art. 45 of the Treaty, which states that even without ratification, the Treaty is provisionally applicable, provided that it does not contradict existing domestic legislation. This in turn implies that referral to the Article in relation to Russia would have been possible. In fact, this has recently been confirmed by a special international commercial tribunal, set up for the Yukos case, that on 30 November 2009 ruled that the ECT is binding on Russia. See Euractiv, 'Court rules against Russia in Yukos case', 1 December 2009. Available at: <http://www.euractiv.com/en/energy/court-rules-russia-yukos-case/article-187869>. Accessed on 21 September 2012.

²¹⁶ Final Act of the Energy Charter Conference with respect to the Energy Charter Protocol on Transit (Draft) of 31 October 2003. Available at: http://www.encharter.org/fileadmin/user_upload/document/CC251.pdf. Accessed on 21 September 2012.

²¹⁷ S. Haghighi, (2007), *supra* note 2, p. 348; R. Youngs, (2009), *supra* note 2, pp. 80-81; and T. Bordachev, (2003), 'Europe's Russia Problem: Immediate Concerns and Long-Term Prerequisites', in: I. Kempe, (ed.), *Prospects and Risks Beyond EU Enlargement, Eastern Europe: Challenges of a Pan-European Policy*, (Opladen: Leske & Budrich), p. 88.

whether this is a positive trade-off in terms of assets and regulatory protection; this means EU's prime supplier of natural gas will continue to remain outside of the power of the Treaty in the event of a calamity, unless its 'producer concerns' are adequately dealt with.²¹⁸

²¹⁸ Interview with official of Energy Charter Secretariat, Brussels, 13 October 2010.

8: Concluding Remarks

Starting from the premise that the EU aims to act in line with its principle of ‘effective multilateralism’, free from contradictions between EU and Member State objectives and actions, and through the utilisation of synergies between the actors involved, this paper has provided an analysis of the level of coherence in the EU’s external natural gas relations with Russia and Central Asia.

Several conclusions can be drawn. First, the analysis showed that energy security is a multilayered concept, consisting of much more than the traditional view of security of supply of ensuring that energy is available at a reasonable price. Differences in the definition of energy security between producer-, consumer- or transit countries determine to a great extent the way in which external relations with the EU are framed (see *supra*, 7.3.1). The ‘hard’ elements of energy security also came to the fore as, for the Union itself – particularly when confronted with a crisis – the role of sufficient interconnectors to nearby markets can not be overstated enough (see *supra*, 7.1.2). In recent years, the EU is becoming more aware that it needs to step up its investments in order to make the European gas market more interconnected. At times of financial austerity measures however, the financing thereof remains an obstacle to say the least.

Second, from a theoretical point of view, EU Member States follow much closer the logic of liberal intergovernmentalist theory rather than supranational governance when it comes to decision-making on EU external natural gas relations. The fact that the central and eastern European states are more in favour of EU coordination on natural gas matters has in this context little to do with a real preference for supranational involvement, but much more with a calculation of available courses of action and a selection of the one that maximises their utility under the circumstances at hand (see *supra*, 7.2.2). Nonetheless, the observable fact that Europe seems split in ‘west’ and ‘east’ when it comes to involvement of the European Commission, does indicate that a kind of ‘*energy iron curtain*’ haunts European decision-makers.

Third, the analysis in paragraph 7.1 demonstrated that during the January 2009 crisis, the EU’s actions were – both in terms of a narrow and broad view on coherence – at times contradictory and one could not speak of any apparent synergy between them. The EU faced an inadequate coordination of the various emergency plans within gas regions at national level, insufficient transparency of arrangements in Member States (such as maintaining certain levels of gas in storage), which could have consequences in terms of gas flows to or from neighbouring countries, further hampered by a lack of adequate gas interconnections. Also, bilateral diplomacy by the European Commission proved largely ineffective and it was not until Member States conducted their own interventions that the crisis was resolved.

Moreover, when looking at the possibilities for an ‘effective multilateralist’ intervention, the analysis in paragraph 7.3 pointed out that the Union is faced with an instrument – the Energy Charter Treaty – which, due to the absence of Russia, it cannot adequately use as a multilateral tool in which all its Member States, neighbouring supplier-countries and transit states are unified. This means that – as could be witnessed during the January 2009 gas crisis – EU Member States do not necessarily act in concert as ECT Contracting Parties whenever there is a future problem with the supply of Russian gas (see *supra*, 7.1.1 and 7.1.2). Moreover, a lack of such a multilateral ‘safety net’ strengthens the perceived necessity for EU Member States to ensure their own energy security, leading to a further accentuation of existing divides within the European natural gas market. Unable to match the financial and geopolitical clout of the Union’s larger Member States, central and eastern European Member States continue to call on the European Commission to ‘Europeanise’ external energy policy,

yet resorting to bilateral deals with Gazprom if such ‘calls’ are left unanswered due to opposition from Germany, Italy, the Netherlands and the United Kingdom in particular (see *supra*, 7.2.2).

The Lisbon Treaty reform intended to strengthen the (vertical) coherence of the Union’s external action and to increase the probability that the EU achieves its long-term goals. The analysis of EU pipeline projects and negotiations showed that the Union’s lack of competences beyond the internal market undermined vertical coherence both in the aftermath of the Russia-Ukraine crises and with respect to the Southern Corridor (see *supra*, 7.2.1 and 7.2.2). Lisbon’s creation of a specific legal basis for energy may have inspired hopes for greater coherence in external energy relations, yet the fact remains that energy is still an area of shared competence where EU Member States hold the ultimate say over their energy mix.²¹⁹

Although Member States pay tribute to institutional efforts to improve external coherence, they still regularly go their own way when it comes to natural gas security, thereby limiting the occurrence of potential synergies with energy security initiatives taken by different actors and at different levels. Thus faced with confined legal powers and a division among Member States as to whether the Commission should be granted greater oversight of external gas relations, Brussels’ options are limited. To date, the HR and EEAS appear to have little to no authority to alter this state of affairs in energy policy. Although desirable from the viewpoint of improving external vertical (and horizontal) coherence, their inclusion seems unlikely as long as influential EU Member States continue to assert their competences in this field.²²⁰

The conclusion that no coherence gains were made through the Lisbon Treaty reform might just be the snapshot picture of EU external natural gas policy at this moment in the history of its integration. It may however also point to a broader trend of renewed Member State reluctance to the communitarisation of foreign policy, even in domains where much suggests that a common defence of positions would lead to desirable synergies. In this context, one can ask whether the institutional reforms of the Treaty actually serve the purpose of their creation - or if they do just the opposite. Whilst Lisbon’s designation of the HR and EEAS was meant to move EU external policies beyond the purely cooperative governance mode into some form of centralisation, the analysis indicates that in the area of energy, where there are few possibilities for the EU to ‘force’ Member States to comply if they choose otherwise, the two institutions make cooperation actually *less* likely. A certain degree of consistency had been reached at the outset of policy formation since the Treaty of Maastricht for energy policy, which had been experiencing a gradual integration among institutions through internal market and environmental legislation. Awareness that additional integration in external relations was needed for the Union to attain its goals was thus clearly present among Member States. This incremental integration dynamic, while by no means stable, appears to have been interrupted by the new Treaty, with the HR and the EEAS provoking, in the first instance, negative responses against further integration. If generalised and persistent, the Lisbon Treaty may thus have the perverse effect of legally cementing the status quo of incoherence in EU external policies.²²¹

²¹⁹ S. de Jong and S. Schunz, (2012), *supra* note 22, p. 185.

²²⁰ *Ibid.*, p. 186.

²²¹ *Ibid.*, pp. 186-187.

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ANNEX 1: English Language Summary

‘The EU’s External Natural Gas Policy – Caught Between National Priorities and Supranationalism’, studies EU external relations in the area of natural gas supply with Russia and the former Soviet Republics in Central Asia. The primary question the thesis tries to answer is to assess to what extent Europe manages to formulate and execute its policy on natural gas towards Russia and Central Asia in a coherent manner. Moreover, what are the underlying causes as to why the Union does (not) succeed in doing so? The aim of answering the above questions is to put forward an explanation for both the current state of EU natural gas relations with Russia and Central Asia, as well as their future direction.

In order to aid an assessment of the future direction of EU natural gas relations with Russia and Central Asia, two theories of European integration are applied: (i) supranational governance theory and (ii) liberal intergovernmentalist (LI) theory. According to the former, the integration of one sector leads to ‘technical’ pressures pushing states to integrate other sectors. Based on this theory, it seems that pressures to enable the smooth operation of the internal market, allow us to explain why internal energy policy has been able to allow for European Community-level coordination, rules and dispute resolution. According to LI theory, external energy policy by contrast rather seems to follow a more intergovernmental logic whereby states attain their goals through intergovernmental negotiation and bargaining, rather than through a centralised authority making and enforcing decisions. The outcome of negotiations between EU Member States depends on the relative bargaining power of the actors involved. The actors which would benefit least from a cooperative agreement and more from the status quo are generally in a stronger position than those who would benefit most and can thus demand concessions from the latter. Thus, the extent to which Member States would benefit from a cooperative approach in external energy policy, or rather prefer to keep the status quo depends to a large extent on their perceived necessity for change.

Europe’s long term energy security depends largely on its ability to establish effective dialogues and forms of cooperation with external suppliers. Thus partly a foreign policy matter, energy security should, according to the EU, abide by its normative foreign policy doctrine of ‘effective multilateralism’. The ability to act effectively however also requires the Union to organise itself efficiently in a consistent and coherent manner in cooperation with key actors involved. Although coherence and consistency are often used interchangeably, the two terms have different meanings. Whereas, consistency merely refers to the absence of contradiction, coherence, by contrast, implies positive connections and is a much broader concept. Combining the notion of coherence with the EU’s normative goal to live up to its principle of ‘effective multilateralism’, this thesis systematically engages in a comparative analysis of EU and Member State actions on natural gas vis-à-vis Russia and Central Asia to check for apparent signs of contradiction in their stated objectives or actions (consistency). To establish whether synergies have actually been exploited between actors, the Union’s external policy performance first needs to be understood: did it reach its objectives through enhanced unity and coordination (coherence)?

Empirically, three cases are examined in detail: (i) gas crises management, (ii) (planned) pipeline projects and negotiations, and (iii) consumer-producer relations on an institutional level. Particular attention is thereby given to the roles played by the division of competences between the EU and its Member States in the field of energy, EU Treaty revisions, the global institutional frameworks on energy governance, and individual natural gas security at EU Member State level. In carrying out the analysis, vital information is drawn from an in-depth stakeholder consultation among key-experts involved in EU external energy relations. This information is complemented by document analysis and observation research. The information gathered throughout the research is used to (i) explain how external policy on natural gas is formed; (ii) which factors determine the eventual outcome at EU level; and

through this shed light on (iii) the (future) direction and pace of European integration in this field.

Coherence in Gas Crisis Management

On 1 January 2009, natural gas deliveries from Russia to Ukraine were halted. Reported shortages and a cut in supplies to other European countries followed a few days later. In January 2006, a similar crisis between the two countries had resulted in falling pressures and non-delivery of gas reports by European companies. An analysis of the January 2009 crisis shows that a lack of a well-functioning exchange of up-to-date, reliable and consistent information between gas companies, as well as inadequate and fragmented information on cross-border flows served to undermine full effectiveness of emergency measures. On the political level, the Commission's bilateral diplomacy proved ineffective in preventing the crisis from escalating as neither Russia, nor Ukraine acted on the EU's statements.

Two clear coherence deficits in the EU's resolve can be discerned: (i) the fragmented character of information on the internal market and the coordination thereof in terms of emergency plans; and (ii) the sometimes haphazard manner by which bilateral diplomacy is conducted. The Lisbon Treaty offers the Union a distinct set of actors and structures that could make for a more ambitious solution to the first problem, and solve the second problem at the same time. When a crisis occurs that carries foreign and security implications, it should be the task of the High Representative (HR) or, at the highest level, the President of the European Council, assisted by the European External Action Service (EEAS), to engage in diplomatic efforts on behalf of the EU with the aim of striking a political agreement to the crisis and ensure full consistency and coherence. Yet, their combined efforts should be based on EU-wide information on the Union's internal market, provided by emergency plans coordinated at Union level under the auspices of the Commissioner for Energy.

Coherence in Pipeline Projects and Negotiations

In terms of coherence, the impact of the 2006 and 2009 Russia-Ukraine crisis on both occasions served to get the EU Institutions and its 27 Member States to agree on the need to diversify natural gas suppliers and transit routes, and for Europe to present a united position externally. This would suggest that in a narrow view, the positions of all actors were consistent. However, in terms of the execution thereof, significant discrepancies exist between the positions of the European Commission and European Parliament (EP) on the one hand, and those of the Council and EU Member States on the other. Whereas the Commission and EP firmly advocated diversifying natural gas supplies and transit routes away from Russia by attracting gas from the Caspian and Central Asia, Member States acted differently.

Germany struck a deal with Gazprom in early 2006 to construct a direct pipeline between the two nations underneath the Baltic Sea. Similarly, many central and eastern European Member States in fact strengthened their ties to Gazprom. What undoubtedly influenced this decision is the fact that many central and eastern European Member States possess few gas pipeline interconnections other than eastwards and do not have the financial means to construct new routes. Overall, when taking a broad understanding of coherence, Member State actions have largely undermined the positions of the European Commission and the EP concerning diversification of natural gas suppliers and transit routes prior to the Lisbon Treaty's entry into force. The limited coherence in this period is essentially related to the fact that the EU possesses few competences on energy outside of the internal market. As decisions regarding the energy mix fall under the exclusive competence of the Member States, the Russia-Ukraine crises prompted many of the Union's members to seek individual – bilateral, rather than multilateral – solutions to the challenges posed by the interruptions. To alter this situation, the Commission instead has argued that energy policy should rather be given its own legal basis, requesting measures to be taken *in connection* with related policies on the environment and

the EU internal market, but not based on the latter's provisions in the treaties. The Lisbon Treaty fulfilled this desire.

Lisbon's creation of a specific legal basis for energy with detailed objectives and new actors such as the HR and EEAS had sparked high hopes for a more coherent EU external energy policy. The European Commission, the EP, as well as a majority of central and eastern European EU Member States were in favour of greater 'Europeanisation' of energy policy and a stated a desire to move away from bilateral agreements. This pointed to some degree of coherence in the views of the above mentioned actors. Yet, Europe's larger Member States still hold positions inconsistent with these policies. This not only undermines the EU's coherence, but even its consistency. Diversification efforts are a good example. Three years after the Treaty's entry into force, intra-EU competition has rendered Nabucco – the one pipeline among three initiatives with the most favourable overall impact on European energy security – an unlikely candidate to wheel in a crucial gas contract from Azerbaijan. When asked, third states confirm that Member States promoting this or the other pipeline, followed by the Commission ushering its support for yet another, undermines the EU's negotiating position.

In summary, where some of the Union's central and eastern Members are positive towards a larger role for the European Commission, countries such as France, Germany, the UK, Italy and the Netherlands are not too eager on having their sovereignty limited, as they view their market size, level of interconnectedness through multiple gas pipelines, and energy sector's power as a sufficient defence against any threat posed by external dependency. Different energy exposures are largely seen as preventing a strengthened commitment to the external dimension of European energy policy. It seems therefore that the central and eastern European Member States feel they need the support of the European Commission to keep up with the bigger Member States when it comes to energy. When taking a broader understanding of coherence, the belief held by the larger EU Member States that (large) infrastructural projects should preferably be industry driven, rather than discussed at Council level, undermines the potential for synergies to trickle down and raise the impact of EU energy security initiatives beyond their immediate region of implementation.

Consumer-Producer Relations at Institutional Level

Of particular relevance to EU-Russia/Central Asia energy relations on an institutional level is the Energy Charter Treaty (ECT). The ECT represents a legally binding multilateral energy agreement that has as its aim to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, and so mitigate risks associated with energy-related investment and trade. On the transit of energy, the ECT obliges its members not to let transit be interrupted as a result of a conflict with another member. Precisely, this obligation was broken by Ukraine in 2006 and 2009. During both crises, the EU did not resort to issuing public statements which denounced Ukraine's breach of the Charter's transit provisions on non-interruption and non-reduction of transit flows.

In light of the Union's overarching aim to conduct 'effective multilateralism', it is peculiar why the EU did not invoke the ECT. Doing so could have sent a signal that the Union took a violation of an international agreement by one of its contracting parties very seriously, thus providing the Treaty with a potential early role in resolving the conflict. A possible reason as to why this was not done is that Russia refused to ratify the Treaty – in spite of the ECT's recognition of sovereignty over energy resources. The Treaty was however applied provisionally, until on 20 August 2009, Russia officially stated it intended to terminate provisional application.

Conclusions

From a theoretical point of view, EU Member States follow much closer the logic of liberal intergovernmentalist theory rather than supranational governance when it comes to decision-making on EU external natural gas relations. The fact that the central and eastern European states favour EU coordination on natural gas matters has in this context little to do with a real preference for supranational involvement, but much more with a calculation of available courses of action and a selection of the one that maximises their utility. Nonetheless, the observation that Europe seems split in ‘west’ and ‘east’ when it comes to involvement of the European Commission, does indicate that a kind of ‘*energy iron curtain*’ haunts European decision-makers.

An analysis of the EU’s crisis management efforts during the January 2009 gas crisis showed that the EU’s actions were – both in terms of a narrow and broad view on coherence – at times contradictory and one could not speak of any apparent synergy between them. Moreover, recourse to ‘effective multilateral’ interventions was rendered troublesome due to the absence of Russia from the ECT. This means that – as seen during the January 2009 gas crisis – EU Member States do not necessarily act in concert as ECT Contracting Parties whenever there is a future problem with the supply of Russian gas. Moreover, a lack of such a multilateral ‘safety net’ strengthens the perceived necessity for EU Member States to ensure their own energy security, leading to a further accentuation of existing divides within the European natural gas market.

Lisbon’s creation of a specific legal basis for energy may have inspired hopes for greater coherence in external energy relations, yet the fact remains that energy is still an area of shared competence where EU Member States hold the ultimate say over their energy mix and often go their own way when it comes to natural gas security. This limits the occurrence of potential synergies with energy security initiatives taken by different actors and at different levels. To date, the HR and EEAS appear to have little to no authority to alter this state of affairs. Although desirable from the viewpoint of improving external coherence, their inclusion seems unlikely as long as influential EU Member States continue to assert their competences in this field.

The conclusion that no coherence gains were made through Lisbon might just be the snapshot of EU external natural gas policy at this moment in the history of its integration. It may however also point to a broader trend of renewed Member State reluctance to the communitarisation of foreign policy, even in domains where much suggests that a common defence of positions would lead to desirable synergies. This begs the question whether the Treaty reforms actually serve the purpose of their creation – or if they do just the opposite. Whilst the designation of the HR and EEAS was meant to move EU external policies beyond the purely cooperative governance mode into some form of centralisation, the analysis indicates that in the area of energy, where there are few possibilities for the EU to ‘force’ Member States to comply if they choose otherwise, the two institutions make cooperation actually *less* likely. A certain degree of consistency had been reached at the outset of policy formation since the Treaty of Maastricht for energy policy, which had been experiencing a gradual integration among institutions through internal market and environmental legislation. Awareness that additional integration in external relations was needed for the Union to attain its goals was thus clearly present among Member States. This incremental integration dynamic, while by no means stable, appears to have been interrupted by the new Treaty, with the HR and the EEAS provoking, in the first instance, negative responses against further integration. If generalised and persistent, the Lisbon Treaty may thus have the perverse effect of legally cementing the status quo of incoherence in EU external policies.

ANNEX 2: Nederlandstalige Samenvatting

‘The EU’s External Natural Gas Policy – Caught Between National Priorities and Supranationalism’, bestudeert de externe betrekkingen van de EU op het gebied van aardgas met Rusland en de voormalige Sovjetrepublieken in Centraal Azië. De centrale vraag die deze thesis tracht te beantwoorden is in hoeverre Europa er in slaagt haar beleid op het gebied van aardgas richting Rusland en Centraal Azië op een coherente manier vorm te geven. Bovendien, wat zijn de onderliggende redenen waarom de Unie hier (niet) in slaagt? Het doel van het beantwoorden van bovenstaande vraag is om een verklaring te kunnen geven voor zowel de huidige staat van EU betrekkingen met Rusland en Centraal Azië op het gebied van aardgas, alsook de mogelijke toekomstige oriëntatie van deze relaties.

Ter ondersteuning van de analyse aangaande de toekomstige richting van EU externe betrekkingen op dit gebied, wordt gebruik gemaakt van twee theorieën op het gebied van Europese integratie: (i) supranational governance theorie en (ii) liberal intergovernmentalist (LI) theorie. Volgens de eerste theorie, zorgt integratie van de ene beleidssector voor ‘technische’ druk op staten om integratie van andere sectoren toe te staan. Hierop voortbordurend lijkt het dat druk om de EU interne markt goed te laten functioneren er voor heeft gezorgd dat intern energiebeleid de regels, procedures en logica van coördinatie op het niveau van de Europese Gemeenschap is gaan volgen. Extern energiebeleid, aldus LI theorie, volgt echter een andere logica waarbij staten hun doelen nastreven middels intergouvernementele onderhandelingen, in plaats van door een centrale autoriteit die beslissingen kan afdwingen. De uitkomst van onderhandelingen tussen EU lidstaten hangt af van de relatieve onderhandelingspositie van de betrokken actoren. Die actoren die het minst profiteren van een coöperatieve overeenkomst, en meer van de status-quo, bevinden zich doorgaands in een sterkere onderhandelingspositie ten opzichte van die actoren die juist het meest zouden profiteren en kunnen zodoende concessies verlangen van laatstgenoemden. Dit betekent dat de mate waarin lidstaten zouden profiteren van een coöperatieve overeenkomst op het gebied van extern energiebeleid, of juist van het behouden van de status-quo, afhangt van de lidstatelijke gepercipieerde noodzaak voor verandering.

De energieveiligheid van Europa op lange termijn hangt voor een groot deel af van de mate waarin de EU er in slaagt om effectieve dialogen en samenwerking aan te gaan met externe leveranciers. Als zodanig valt energie deels onder EU buitenland beleid. Dat betekent volgens de logica van de EU dat beleid omtrent energie veiligheid zou moeten voldoen aan de buitenland beleid doctrine van ‘effectief multilateralisme’. Een noodzakelijke voorwaarde om effectief te kunnen optreden is echter dat de Unie zichzelf ook efficiënt organiseert op een consistente en coherente manier in samenwerking met alle betrokken actoren. Coherentie en consistentie worden weliswaar vaak door elkaar gebruikt, maar hebben een verschillende betekenis. Waar consistentie refereert naar de afwezigheid van contradicties, verwijst coherentie naar het bestaan van positieve connecties en is als zodanig een veel breder concept. Door de notie van coherentie te combineren met het normatieve principe van ‘effectief multilateralisme’, voert deze thesis een systematische analyse uit van EU en lidstatelijke beslissingen/acties op het gebied van aardgas richting Rusland en Centraal Azië en checkt of contradicties voorkomen in de gestelde doelen of acties (consistentie). Teneinde te onderzoeken of van synergieën tussen actoren is geprofiteerd wanneer dit mogelijk was, is het allereerst nodig om te bepalen of de EU haar doelen behaald heeft door middel van verhoogde eenheid en coördinatie (coherentie).

Drie cases worden bekeken: (i) het managen van gas crises, (ii) (geplande) pijpleidingsprojecten en onderhandelingen, en (iii) de relaties tussen gas consumerende en producerende landen op institutioneel niveau. Speciale aandacht wordt hierbij gegund aan de rol van de bevoegdheidsverdeling tussen de EU en haar lidstaten op het gebied van energie, EU verdragsrevisies, het globale institutionele raamwerk op het gebied van energie, en energieveiligheidsoverwegingen met betrekking tot aardgas van individuele EU lidstaten. Bij

het uitvoeren van de analyse is belangrijke informatie vergaard door middel van een stakeholder consultatie onder experts die betrokken zijn bij EU externe energie relaties. Deze informatie is vervolgens aangevuld door onderzoek van documenten en participerende observatie. De informatie die tijdens het onderzoek is vergaard wordt gebruikt om (i) uit te leggen hoe extern beleid op het gebied van aardgas wordt vormgegeven; (ii) welke factoren de uiteindelijke uitkomst bepalen op EU niveau; en (iii) door middel van de uitkomst hiervan een licht te werpen op de (toekomstige) richting en snelheid van Europese integratie op energiegebied.

Coherentie op het gebied van Gas Crises Management

Op 1 Januari 2009 werden de gasleveranties tussen Rusland en Oekraïne onderbroken. Tekorten en onderbrekingen in leveranties aan andere Europese landen volgden enkele dagen later. Een vergelijkbare onderbreking in Januari 2006 resulteerde in dalende gasdruk en berichten van niet geleverd gas door Europese gas bedrijven. Een analyse van de crisis in Januari 2009 toont aan dat een combinatie van een gebrek aan een goed functionerende uitwisseling van up-to-date, betrouwbare en consistente informatie tussen gasbedrijven, en inadequate en gebrekkige informatie over grensoverschrijdende gas flows, de effectiviteit van noodmaatregelen hebben ondermijnd. Op politiek niveau bleken bilaterale diplomatieke interventies van de Europese Commissie ineffectief en ontoereikend om een escalatie te voorkomen, omdat Rusland noch Oekraïne hier positief op reageerden.

De analyse toont twee specifieke gebreken met betrekking tot de coherentie van EU optreden: (i) de gefragmenteerde aard van de informatievoorziening omtrent de interne energiemarkt en de gebrekkige coördinatie van noodplannen; en (ii) de ad-hoc manier waarop bilaterale diplomatieke interventies werden vormgegeven. Het Verdrag van Lissabon voorziet in een specifieke set van actoren en structuren die een oplossing kunnen bieden voor zowel het eerste, als het tweede probleem. Indien een energieonderbreking plaats vindt met consequenties op het gebied van buitenlands- en veiligheidsbeleid, zou het de taak moeten zijn van de Hoge Vertegenwoordiger (HV), of op het allerhoogste niveau, de President van de Europese Raad, geassisteerd door de European External Action Service (EEAS), om namens de EU te trachten de crisis te beëindigen zodat volledige consistentie en coherentie kan worden gewaarborgd. Echter, hen beider optreden dient te allen tijde te zijn gebaseerd op volledige informatie, voorzien middels noodplannen die zijn gecoördineerd op EU niveau onder de supervisie van de Europese Commissaris voor energie.

Coherentie in Pijpleidingprojecten en Onderhandelingen

Wat coherentie betreft zorgden de crises van 2006 en 2009 tussen Rusland en Oekraïne er voor dat de EU instellingen en haar 27 lidstaten het eens werden over de noodzaak om het aantal gasleveranciers en aanvoerroutes naar de EU te diversifiëren. Ook bestond overeenstemming over de noodzaak voor Europa om eenstemmig naar buiten toe op te treden. Dit suggereert dat in enge zin de posities van alle betrokken actoren waren verenigd. Echter, met betrekking tot de uitvoering van bovenstaand 'akkoord' bestonden significante verschillen tussen de posities van de Europese Commissie en het Europees Parlement (EP) aan de ene kant en die van Raad van de EU en EU lidstaten aan de andere kant. Waar de Commissie en het EP zich hard maakten voor diversificatie van gas leveranties en aanvoerroutes waar Rusland niet bij betrokken was door gas aan te trekken uit het Kaspische Zee gebied en Centraal Azië, kozen lidstaten voor een totaal andere benadering.

Begin 2006 sloot Duitsland een overeenkomst met Gazprom voor de aanleg van een directe pijpleiding tussen de twee landen, onder de Oostzee. Verscheidene Centraal- en Oost Europese lidstaten volgden dit voorbeeld en verstevigden hun banden met Gazprom. Wat ongetwijfeld een rol speelde bij deze beslissing is het feit dat veel Centraal- en Oost Europese lidstaten weinig gaspijpleidingverbindingen hebben anders dan oostwaarts en niet over de

financiële middelen beschikten om zelf nieuwe verbindingen aan te leggen. Overall, wanneer coherentie in brede zin wordt belicht, hebben lidstatelijke acties voorafgaand aan de inwerkingtreding van het Verdrag van Lissabon grotendeels de posities van de Europese Commissie en het EP ondermijnd aangaande diversificatie van gas leveranciers en aanvoerroutes. De gebrekkige coherentie in deze periode is in essentie terug te voeren op het gebrek aan een EU bevoegdheid op het gebied van energie op aangelegenheden die de interne markt ontstijgen. Omdat beslissingen omtrent de keuze van de energie mix onder de exclusieve bevoegdheid van lidstaten vallen, zorgden de crises tussen Rusland en Oekraïne er voor dat veel lidstaten individuele – bilaterale, in plaats van multilaterale – oplossingen zochten tegen de gas interrupties. Teneinde deze tendens een halt toe te roepen, zette de Europese Commissie zich in voor de creatie van een eigen wettelijke basis voor energie, zodat maatregelen wat betreft energie in het vervolg konden worden genomen *in samenhang* met gerelateerde beleidsterreinen als milieu en de EU interne markt, en niet louter op basis van de provisies voor de interne markt. Het Verdrag van Lissabon beantwoordde dit verlangen.

De creatie van een specifieke wettelijke basis voor energie met gedetailleerde doelstellingen en nieuwe actoren zoals de HV en de EEAS stemde velen hoopvol dat EU extern energie beleid in de toekomst coherenter zou worden vormgegeven. De Europese Commissie, het EP, alsook een meerderheid van Centraal en Oost Europese lidstaten waren een voorstander van een verdere ‘Europeanisering’ van energie beleid en gaven aan dat zij graag af zouden willen van de bilaterale contracten. Dit wees op een zekere mate van coherentie in de standpunten van bovengenoemde actoren. Echter, Europa’s grotere lidstaten behielden posities die inconsistent waren met het beleid voorgestaan door de Europese Commissie, het EP en een meerderheid van de Centraal en Oost Europese lidstaten. Dit ondermijnt niet enkel EU coherentie, maar ook consistentie. Maatregelen die zijn genomen ter bevordering van diversificatie bevestigen dit beeld. Drie jaar na de inwerkingtreding van het Verdrag van Lissabon, is de Nabucco pijpleiding – de pijpleiding uit drie initiatieven met de meest gunstige impact op Europese energie veiligheid – als gevolg van intra-EU concurrentie een onwaarschijnlijke kandidaat om een cruciaal gas contract van Azerbeidjaan te bemachtigen. Derde landen geven aan dat doordat lidstaten de ene pijpleiding aanprijzen, gevolgd door de Europese Commissie die een ander verhaal vertelt, de onderhandelingspositie van de EU wordt ondermijnd.

Samenvattend, waar sommige van de Centraal en Oost Europese lidstaten positief staan tegenover een grotere rol voor de Europese Commissie, zijn landen als Frankrijk, Duitsland, Groot Brittannië, Italië en Nederland niet enthousiast over een beperking van hun soevereiniteit. Zij zien de omvang van hun binnenlandse markt, mate van verbondenheid door middel van verschillende gas pijpleidingen, en de kracht van hun energiesector als voldoende beveiliging tegen de dreiging van import afhankelijkheid. Verschillen in de mate van blootstelling aan importafhankelijkheid onder EU lidstaten worden grotendeels verantwoordelijk gehouden voor de gebrekkige steun voor de centralisering van de externe dimensie van Europees energiebeleid. Uit de analyse komt als zodanig naar voren dat de Oost Europese lidstaten denken de steun van de Europese Commissie nodig te hebben om gelijke tred te kunnen houden met de grotere lidstaten wat energie aangaat. Bovendien, wanneer coherentie in bredere zin wordt bekeken, ondermijnt de gedachte van de grotere EU lidstaten dat (grote) infrastructurele projecten idealiter (enkel) zouden moeten worden geleid door de industrie, in plaats van dat deze op EU Raadsniveau moeten worden besproken, de mogelijkheid voor potentiële synergieën om zich te manifesteren en zo de impact van energieveiligheidsmaatregelen te verspreiden over een groter geografisch gebied.

Relaties tussen Consumerende en Producerende Landen op Institutioneel Niveau

Van bijzonder belang voor EU-Rusland/Centraal Aziatische energie betrekkingen op institutioneel niveau is het Energy Charter Treaty (ECT). Het ECT vertegenwoordigt een wettelijk bindend multilateraal energie verdrag dat als doel heeft het versterken van

wetgeving op het gebied van energie en het beperken van risico's voor energiegerelateerde handel en investeringen, door middel van het creëren van een gelijke set aan regels waar aan door alle participerende overheden gehoor moet worden gegeven. Voor wat betreft de doorvoer van energie schrijft het ECT voor dat lidstaten een verplichting hebben om energie doorvoer ongehinderd te laten plaatsvinden, ook ten tijde van een conflict met een andere lidstaat. Precies deze verplichting werd door Oekraïne geschonden tijdens de crises in 2006 en 2009. Tijdens beide crises gebruikte de EU het ECT niet voor het maken van publieke statements die duidelijk konden maken dat Oekraïne zich schuldig maakte aan de schending van de ECT provisies wat betreft de niet-onderbreking van energie doorvoer.

Dit is opmerkelijk gezien vanuit het doel van de EU om 'effectief multilateralisme' te bedrijven in haar buitenlands beleid. Indien de Unie dit wel had gedaan, had ze een signaal af kunnen geven dat ze een schending van een internationale overeenkomst door een lidstaat als een ernstige overtreding beschouwt. Zodoende had het ECT een potentieel vroege rol bij de oplossing van het conflict kunnen spelen. Een mogelijke reden waarom de EU dit niet deed, ligt in het feit dat Rusland altijd heeft geweigerd om het ECT te ratificeren – ondanks de erkenning binnen het ECT van staatssoevereiniteit over energiebronnen. Het verdrag is lang provisioneel toegepast, tot Rusland op 20 Augustus 2009 aangaf dat het officieel de provisionele toepassing van het verdrag zou opschorten.

Conclusies

Vanuit een theoretisch oogpunt lijken EU lidstaten veel meer de logica te volgen van liberal intergovernmentalist theorie, in plaats van supranational governance wanneer het aankomt op beslissingen over EU extern beleid op het gebied van aardgas. Het feit dat Centraal en Oost Europese lidstaten een voorkeur hebben voor EU coördinatie op het gebied van aardgas heeft in deze context weinig te maken met een oprechte voorkeur voor supranationaal beleid, maar veel meer met een berekenende tactiek waarbij die strategie wordt gekozen die het maximale gewin oplevert. Desalniettemin kan de observatie dat Europa is verdeeld in 'West' en 'Oost' wanneer het gaat om de gewenste betrokkenheid van de Europese Commissie op het gebied van gasbeleid, worden gezien als een indicatie dat een soort 'ijzeren energie gordijn' Europese beslissingmakers parten speelt.

Een analyse van de maatregelen die de EU tijdens de gasonderbreking van Januari 2009 nam toont aan – zowel gezien vanuit een smalle als een brede interpretatie van coherentie – EU acties soms tegenstrijdig waren en een synergie grotendeels ontbrak. Bovendien, werd 'effectief multilateraal' optreden bemoeilijkt door de absentie van Rusland binnen het kader van het ECT. Dit betekent – zoals waarneembaar tijdens de crisis van Januari 2009 – dat EU lidstaten niet noodzakelijkerwijs gemeenschappelijk als lidstaat van het ECT optreden wanneer zich een probleem voordoet met de levering van Russisch aardgas. Bovendien betekent de afwezigheid van een dergelijk 'multilateraal vangnet' dat het beeld bij EU lidstaten dat zij zelf verantwoordelijk zijn voor hun eigen energieveiligheid wordt versterkt, wat op haar beurt weer leidt tot een verdere accentuering van bestaande verdeeldheid binnen de Europese gas markt.

De creatie van een specifieke wettelijke basis voor energie door het Verdrag van Lissabon zorgde voor hoop dat de mate van coherentie in EU extern optreden op het gebied van energie zou verbeteren. Echter, feit blijft dat energie nog altijd een gedeelde bevoegdheid is waar lidstaten nog altijd het laatste woord houden over hun eigen energie mix en vaak op eigen houtje opereren wanneer het aankomt op beslissingen over energieveiligheid aangaande aardgas. Dit beperkt de mogelijkheid voor het voorkomen van synergieën met energieveiligheidsinitiatieven die zijn ondernomen door andere betrokken actoren op de verschillende politieke niveaus. Tot op heden lijken de HV en de EEAS weinig tot geen beslissingsbevoegdheid te hebben op het gebied van energie om deze situatie te veranderen. Hoewel wenselijk vanuit het oogpunt van verbetering van externe coherentie, lijkt het

onrealistisch dat deze twee actoren een rol van betekenis zullen gaan spelen in de toekomst omdat dit wordt tegengehouden door invloedrijke EU lidstaten.

De conclusie dat coherentie niet is verbeterd door het Verdrag van Lissabon kan worden gezien als een momentopname van de huidige staat van Europese integratie op het gebied van energie. Het kan echter ook zo zijn dat dit wijst op een bredere trend van hernieuwde weerstand van EU lidstaten tegen supranationale invloeden op buitenlands beleid, zelfs op gebieden waar veel bewijs suggereert dat dit eigenlijk zou leiden tot gewenste synergieën. Dit roept de vraag op of de hervormingen van het Verdrag van Lissabon eigenlijk wel datgene bereikt hebben waarvoor ze bedoeld waren, of dat juist het tegenovergestelde is bewerkstelligd. Waar de creatie van de HV en de EEAS bedoeld waren om EU extern beleid een zekere centralisatie te geven, geeft de analyse in de thesis aan dat op het gebied van energie (waar de EU weinig wettelijke bevoegdheden heeft om beslissingen af te dwingen als lidstaten anders willen) de twee actoren supranationale samenwerking eigenlijk minder waarschijnlijk maken. Sinds de inwerkingtreding van het Verdrag van Maastricht was een zekere mate van consistentie qua beleidsvorming op energiegebied bereikt. Energiebeleid onderging een graduele integratie onder de verschillende EU actoren door middel van beslissingen aangaande EU interne markt en milieuwetgeving. Een besef onder EU lidstaten dat additionele integratie op extern gebied noodzakelijk was voor de Unie om haar doelen effectief na te kunnen streven, was zeker aanwezig. Deze stapsgewijze dynamiek, hoewel instabiel, lijkt te zijn onderbroken door de inwerkingtreding van het Verdrag van Lissabon. De HV en de EEAS roepen in eerste aanleg enkel weerstand op tegen verdere integratie. Indien veralgemeniseerd en persistent, lijkt het Verdrag van Lissabon daarmee het perverse effect te hebben gehad dat het de status-quo van incoherentie in EU extern beleid wettelijk heeft verankerd.

ANNEX 3: Stakeholder Consultation

The Origins of an EU External Energy Policy (document analysis)

- Processes of European Integration:
 - o Role of the European Communities and Treaty developments
 - o Development of EU competencies on energy related topics
- Role of influential/tipping events:
 - o Crises (oil crisis 1973, gas supply interruptions 2006, 2009 in particular)
- Subsequent policy development:
 - o Internal: Legislative acts
 - Development of the internal energy market
 - Current division of competences between the EU and its Member States
 - o External: energy security governance
 - Which forms of energy security governance exist and on which levels of cooperation?
 - Which actors are involved?

Stakeholder Consultation (1)

- Indicative Questions for European Commission, Council of the EU, EU Parliament and EU Member States
 - o What are the key issues in external energy cooperation both for your country and for the EU as a whole?
 - o Does EU policy adequately reflect the issues at stake in external energy policy vis-à-vis Russia/Central Asia?
 - If so, please illustrate. If not please argue why not.
 - o Do the positions taken by the Commission, Council and the European Parliament accurately reflect the issues at stake in external energy policy vis-à-vis Russia/Central Asia?
 - If so, please illustrate. If not please argue why not
 - o In what way(s) does your Member State support EU efforts to articulate a common energy policy towards Russia/Central Asia?
 - o With respect to external energy relations, with which Member States do you share similar interests and often form coalitions during Council/COREPER meetings?
 - o Could you give concrete examples of situations where you did not share the same interests with other Member States during Council/COREPER meetings?
 - o Are there examples of successful coordination between the EU and its Member States (*i.e.* successful accommodation of national concerns)?
 - o Are there examples of unsuccessful coordination between the EU and its Member States?
 - If so, please illustrate as to why this was an unsuccessful case
 - o Are there any bottlenecks in the coordination process of the Union's external energy policy towards Russia/Central Asia between the various actors/institutions (Commission, Council, Member States, Presidency)?
 - Could you perhaps provide examples of successful cases where bottlenecks were overcome and cases where they persisted?
 - o To what extent do existing bilateral relations between Member States and Russia/Central Asia weigh on the (in)ability to arrive at a common energy policy?
 - Could, you perhaps provide examples of conflict between EU policies and bilateral relations?
 - o Could you provide possible suggestions or insights for mechanisms that can be developed in the context of the EU's external energy policy towards Russia/Central Asia to ensure that the EU has a single voice in its external relations?
 - o How do you think the changes brought by the Lisbon Treaty are likely to impact on the possibilities for the EU to speak with one voice in external energy policy towards Russia/Central Asia (e.g. HR/VP for CFSP, creation of the EEAS etc.)?
 - o Specifically, what impact do you think the insertion of the solidarity clause will have on the ability for the Union to handle energy supply interruptions, such as in January 2009?

Stakeholder Consultation (2)

- Third States
 - What are in your view the (current) key issues in external energy cooperation between your country and the EU?
 - In your opinion, does EU policy adequately reflect the key issues at stake in external energy cooperation with your country?
 - Do the positions taken by the Commission, Council and the European Parliament accurately reflect the issues at stake in external energy policy vis-à-vis Russia/Central Asia?
 - If so, please illustrate. If, not please argue why not.
 - In what way(s) does your country support EU efforts to articulate a common energy policy (*i.e.* a unified energy policy with a single external voice)?
 - With respect to external energy relations, with which EU Member States does your country often share similar interests?
 - Could you give concrete examples of situations where your country did not share the same interests as the EU with respect to mutual cooperation?
 - Are there examples of successful cooperation between your country and the EU (*i.e.* cases where there was a successful accommodation of national concerns)?
 - Are there examples of unsuccessful cooperation between your country and the EU?
 - If so, please illustrate as to why this was an unsuccessful case
 - To what extent do existing bilateral relations between EU Member States and your country weigh on the EU's (in)ability to arrive at a common energy policy?
 - What impact do you think the changes brought by the Lisbon Treaty will have on the possibilities for the EU to speak with one voice in external energy policy towards Russia/Central Asia (e.g. HR/VP for CFSP, creation of the EEAS etc.)?
 - Specifically, what impact do you think the insertion of the solidarity clause will have on the ability for the Union to handle energy supply interruptions, such as in January 2009?

ANNEX 4: Peer-Reviewed Publications

De Jong, S. and Schunz, S., (2012), 'Coherence in European Union External Policy before and after the Lisbon Treaty: The Cases of Energy Security and Climate Change', *European Foreign Affairs Review* 17(2/2), pp. 165-187.

De Jong, S., (2011b), 'Towards Global Energy Governance: How to Patch the Patchwork', in: G. Carbonnier (eds.), *International Development Policy: Energy and Development*, (Basingstoke: Palgrave MacMillan/Graduate Institute Geneva), pp. 21-43.

De Jong, S., Wouters J., and Sterkx, S., (2010), 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon', *European Foreign Affairs Review* 15(4), pp. 511-538.

Wouters, J., de Jong, S., and De Man, Ph., (2010), 'The EU's Commitment to Effective Multilateralism in the Field of Security: Theory and Practice', in P. Eeckhout and T. Trimidas (eds.), *Yearbook of European Law*, (Oxford:Oxford University Press), pp.164-189.

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Coherence in European Union External Policy before and after the Lisbon Treaty: The Cases of Energy Security and Climate Change

Sijbren DE JONG & Simon SCHUNZ^{*}

The creation of the Treaty of Lisbon sparked high hopes for a greater level of coherence within the application of European Union (EU) external policies. Now, more than two years after its entry into force, the question remains to what extent the Treaty actually succeeded in fostering greater external unity. Through a systematic analysis of EU and Member State actions in the areas of EU external energy and climate policies, both prior and immediately after the Treaty's arrival, this article aims to critically evaluate whether Lisbon is able to live up to the initial expectations.

1 INTRODUCTION

Regularly, the overarching aim of treaty revisions in the European Union (EU) has been to streamline its day-to-day operation, turning the EU into a more efficient and effective apparatus, both internally and externally. Over time, coherence – or the lack thereof – has become one of the most commonly cited obstacles hindering the proper functioning of the EU's policies.¹ When the heads of state and government adopted the 2001 Laeken Declaration, setting the agenda for the latest round of treaty reforms culminating in the Lisbon Treaty, one of the key questions they wanted the reformers to address was, 'How should the coherence of European foreign policy be enhanced?'.² Both the Constitutional Treaty and its successor, the Lisbon Treaty, did indeed contain

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¹ C. Gebhard, 'Coherence', in *International Relations and the European Union*, ed. C. Hill & M. Smith (Oxford: Oxford University Press), 102.

² European Council, 'Laeken Declaration on the Future of the European Union', (Brussels, 15 Dec. 2001).

manifold incentives for boosting the Union's ability to act as a foreign policy actor by improving the overall coherence of its actions directed at the external sphere. Besides creating novel institutions, such as the High Representative for Foreign Affairs and Security Policy (HR), who is both part of the Council³ as well as the Commission,⁴ assisted by the Union's own External Action Service (EEAS),⁵ it introduced numerous references and legal provisions that were to strengthen 'good' institutional and policy practice aimed at coherence.⁶ The principal reference with respect to the Union's external policies can be found in Article 21(3) of the Treaty on European Union (TEU), which states that:

[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.⁷

The latest treaty reform thus charges the classical EU institutions, and – in the external policy sphere – the HR in particular with the task of promoting coherence. It is an open question whether these provisions and the actions that follow from it will succeed in actually doing so with regard to the EU's external activities. If only time will tell with all certainty, it is perfectly possible to scrutinize already the Union's reformed institutions and policies by comparing the new status quo with the pre-Lisbon situation and asking whether the former exhibits any potential to do away with the deficits of the latter. The present contribution engages in such an analysis with the intention of shedding light on whether the principal motivation behind improving the coherence of the Union's external action, namely enhancing the probability that the EU achieves its long-term goals in its external policies, has actually been fulfilled, to what degree and why (not).

³ Pursuant to Art. 18(3) TEU the HR presides over the Foreign Affairs Council.

⁴ Pursuant to Art. 18(4) TEU the HR is one of the Vice-Presidents of the Commission and shall ensure the consistency of the Union's external action. The HR shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action.

⁵ Pursuant to Art. 27(3) TEU: '[i]n fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States.'

⁶ C. Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union', in *Developments in EU External Relations Law*, ed. M. Cremona (Oxford: Oxford University Press, 2008), 12–13.

⁷ Note that where it says consistency in the English version of the Treaty, other languages speak of 'coherence' (in French: *cohérence*, in German: *Kohärenz*; in Spanish: *coherencia*; in Italian: *coerenza*). This interchangeable use between the two terms is further problematized in s. 2 of this contribution, where we define coherence as a generic term that encompasses consistency.

Policy areas in which *coherent* EU action seems particularly desirable are those dealing with matters of a collective action nature, that is, whenever Member States' unilateral behaviour or inconsistency among the EU-27 (plus the Commission) can seriously hamper EU as well as individual state effectiveness on the global scene. Environmental issues, such as the emblematic problem of climate change, but also the ever more important question of energy security, defined as the adequacy of supply at a reasonable price,⁸ provide therefore suitable cases for scrutinizing whether the Lisbon Treaty can really advance EU external coherence. In the global politics of climate change, which is a shared competence, the EU has a long track record of performing as a common foreign player, with indicators pointing toward growing, if incomplete coherence in its activities in the United Nations (UN) climate regime. In the energy security domain, traditionally a *domaine réservé* of the Member States, bilateral relations between EU members and third countries have long dominated the picture, and coherence was – and appears *prima facie* to remain – particularly low. Although the rationale for coherent action is relatively similar in these two closely intertwined domains, they provide different degrees of challenges for coherent EU external action. For that reason, a comparative study of the two cases promises insights into the nexus between institutional changes and the real dynamics surrounding EU external coherence.

To assess EU coherence in its external policy regarding these two cases, the contribution proceeds as follows. Section 2 provides the analytical framework for the assessment of coherence in EU external activities. It clarifies the understanding of the terms coherence and consistency while operationalizing them for usage in the empirical investigation. To engage in this analysis, section 3 first looks into the specific example of the Union's ability to deliver on the diversification of its sources and transit routes for natural gas, preventing its Member States from undermining a common external approach vis-à-vis third country suppliers. Subsequently, it delves into the issues of coherence within the realm of external climate policies. Particular attention is thereby given to the Union's performance in recent rounds of post-2012 climate negotiations under the UN umbrella and in related governance fora such as the G-20. In both sub-sections, the operationalized concept of coherence is employed to compare the pre-Lisbon situation to the status quo in order to assess whether the creation of a HR and the establishment of the EEAS have already had or can be expected to have a positive impact on the EU's overall policy coherence in this field. Section 4 concludes with a comparative analysis of the findings for the two cases,

⁸ S. Haghighi, *Energy Security: The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries* (Oxford/Portland: Hart, 2007), 14.

providing a critical reflection on the key challenges of coherence that underpin the EU's efforts in the studied fields and providing an outlook into the future of its activities in the examined policy areas.

2 COHERENCE IN EU EXTERNAL POLICY: ANALYTICAL FRAMEWORK

Much confusion still seems to reign over what coherence precisely means in an EU policy context. Many of the misunderstandings with regard to its meaning stem from the fact that the English language version of the EU's Treaties uses a rather minimalistic notion of coherence embodied in the term 'consistency', as seen in the passage from the Lisbon Treaty quoted above, whereas the German, French and other versions refer to the stronger term 'coherence'.⁹ Although coherence and consistency are thus often used interchangeably, the two terms have different meanings. Whereas coherence can be understood as the 'action or fact of sticking together' or a 'harmonious connection to the several parts of a discourse, system, etc., so that the whole hangs together', consistency should be read as referring to 'the quality, state or fact of being consistent'.¹⁰ Consistency in this sense refers to the absence of contradiction. Coherence, by contrast, implies positive connections. Consistency thus revolves more around compatibility of policy, while the latter pertains to synergy and adding value. These differences notwithstanding, what both terms have in common is that they hint at the need for coordinated policies in the EU.

Once this conceptual demarcation has been made, it becomes clear that 'coherence' is really a generic term that encompasses consistency.¹¹ This clarification also makes it possible to distinguish between two ideal-typical forms of coherence: *coherence in a broad sense*, emphasizing the synergetic dimension of EU coordination, and coherence in the narrow understanding of 'absence of contradictions', which we refer to as *consistency*. In making this distinction, we do not follow the English language version of the Treaties but adopt a conceptual usage of the terms which allows for a more adequate assessment of whether the objectives underpinning the constant reference to coherence and consistency in EU external policies, namely the goal of ensuring the EU acts in unity to attain its policy objectives, is actually fulfilled.¹²

⁹ See also *supra* n. 7.

¹⁰ S. Duke, 'Consistency, Coherence and EU External Action', in *European Foreign Policy: Legal and Political Perspectives*, ed. P. Koutrakos (Cheltenham: Edward Elgar, 2011), 18.

¹¹ Gebhard, *supra* n. 1, 106.

¹² A. Missiroli, 'European Security: The Challenge of Coherence', *European Foreign Affairs Review* 6, no. 2 (2001): 182.

If we add another dimension to this distinction between narrow and broad conceptions of coherence, a 2×2 matrix emerges, which can usefully be employed to assess EU external coherence empirically (see Figure 1). Coherence is a multidimensional concept. Horizontally, it refers to coordination among EU policies. In its weak form, horizontal coherence points to (iii) the absence of contradictions within the external positions and activities in different areas of EU foreign policy (and with other policies, if relevant inter-linkages exist) (*horizontal consistency*); in its stronger form, it calls (iv) for the establishment of a synergy between these aspects (*horizontal coherence*). Vertical coherence in turn relates to the interactions between EU and Member State actors. It implies (i) the absence of contradictions between the external position and activities of the EU and those of its individual Member States (*vertical consistency*); and (ii) the establishment of a synergy between these actors' positions and undertakings (*vertical coherence*).¹³

Figure 1 Conceptualizing Coherence in EU External Policy

	Narrow understanding: consistency	Broad understanding: coherence
Vertical, actor coherence	(I) Absence of contradictions between Member State external actions/positions/initiatives and those of the EU's central actor(s)	(II) Presence of a synergy between EU external actions/positions/initiatives and those of the Member States
Horizontal, policy coherence	(III) Absence of contradictions between external positions/policies within a given domain (and with other, related policies)	(IV) Presence of a synergy between EU external positions/policies within a given domain (and with other, related policies)

The matrix in Figure 1 depicts thus a basic typology of coherence. This typology will be used to perform an in-depth analysis of the degree of *intra-policy* coherence regarding the Union's actions and initiatives within the fields of energy security – natural gas in particular – and global climate politics in the UN, focussing on the two dimensions of vertical coherence only. Testing

¹³ Gebhard, *supra* n. 1, 107; Duke, *supra* n. 10, 21–22.

horizontal coherence – between the two fields,¹⁴ but also with *all* other fields of EU policy-making (e.g., energy and economy) – would represent an interesting, but wide-reaching analysis going beyond the scope of this contribution. Although the normative objective of the Treaties (Article 7 TFEU) stipulates such maximum coherence, we concentrate our enquiry on the crucial aspect of cooperation between Member States and EU institutions within the – already vast – issue areas selected.

The analysis therefore systematically covers quadrants I and II of the matrix, engaging first in a comparative analysis of EU and Member State actions in the selected cases to check for apparent signs of contradiction in their stated objectives or actions (quadrant I). To establish whether synergies have actually been exploited between actors, the Union's external policy performance first needs to be understood: did it reach its objectives through enhanced unity and coordination (quadrant II)? In carrying out the analysis, the study relies on a soft form of process-tracing, comparing the pre- and post-Lisbon Treaty phases. It relies on ongoing research by the authors, drawing, for triangulation purposes, on document analysis, interviews and observation research.

3 COHERENCE IN EU EXTERNAL ENERGY AND CLIMATE POLICIES PRE- AND POST-LISBON

This section examines the two chosen cases by comparing the situation pre-Lisbon (*what was the status quo, what were the problems in terms of coherence then?*) to the current context, systematically employing the typology depicted in Figure 1 to pinpoint the degree of vertical coherence then and now. In so doing, the question we ultimately strive to answer is whether the expectations generated with the entry into force of the Lisbon Treaty and the subsequent establishment of the post of the HR and the EEAS have already been – or at least have the potential of actually being – fulfilled.

3.1 THE CASE OF ENERGY SECURITY: EU EXTERNAL NATURAL GAS POLICY

Attempts at forming a coherent EU external approach on natural gas first arose when the collapse of the Soviet Union prompted the opening up of new nearby energy markets in its former Republics. By early 2000, the Commission viewed the EU's rising dependence on natural gas imports as a justification

¹⁴ Horizontal coherence between EU climate change and energy policies is increasingly becoming the topic of debates in the wake of the Union's 2008/2009 climate and energy package. These debates almost exclusively turn around internal policy coherence, however, rather than external coherence.

for developing a common external approach on energy.¹⁵ In the years that followed – particularly after the 2006 crisis between Russia and Ukraine – the Commission intensified its calls,¹⁶ leading to (i) the adoption of an Action Plan, (ii) a seemingly united EU towards Russia at the informal Lahti EU Summit of 20 October 2006 and (iii) a full-scale report by the European Parliament Committee on Foreign Affairs on a common European foreign policy on energy.¹⁷ Following the row between Russia and Ukraine in 2006, Brussels placed diversification of its gas suppliers and transit routes at the top of the agenda – culminating in plans to construct a ‘Southern Gas Corridor’ that would bring Central Asian gas to the EU market in late 2008.¹⁸ The plan consists of a set of pipelines that circumvent Russia and Ukraine, the most well-known of which is the EU-supported ‘Nabucco’ project, a planned natural gas pipeline stretching from the Caspian via Turkey, Bulgaria, Romania and Hungary onwards to Austria. Two smaller pipelines, the Italy-Turkey-Greece Interconnector (ITGI) and the Trans-Adriatic Pipeline (TAP), complemented the pack.¹⁹ Barely two months after the launch of these plans, a second – much more severe – interruption of gas transit through Ukraine occurred in January 2009. The two-week long crisis, which left large parts of southeastern Europe without gas, again badly exposed a need for diversification of energy sources. However, the reality is that the EU possesses few competences on energy matters that go beyond the internal market. This causes Member States to often operate unilaterally when it comes to external gas relations – despite paying tribute to calls from Brussels for more coherent external action.

¹⁵ COM(2000) 769, 2–3.

¹⁶ See, *inter alia*, COM(2006) 105 final of 8 Mar. 2006; COM(2006) 590 final of 12 Oct. 2006; and European Commission and the Secretary General of the Council of the European Union/High Representative for Common Foreign and Security Policy (2006). ‘An External Policy to Serve Europe’s Energy Interests’.

¹⁷ Finland’s EU Presidency, ‘Transcript of the second press conference for the informal meeting of Heads of State and Government’, (Lahti, 20 Oct. 2006), <www.eu2006.fi/NEWS_AND_DOCUMENTS/OTHER_DOCUMENTS/VKO42/EN_GB/1161383205709/INDEX.HTM>, 23 Sep. 2011; ‘European Parliament resolution of 26 Sep. 2007 on towards a common European foreign policy on energy (2007/2000/INI)’, Doc. A6-0312/2007; See also F. Umbach, ‘Die EU-Energiestrategien’, Bundeszentrale für Politische Bildung, (2008), <www.bpb.de/themen/V86QPM,0,Die_EUEnergiestrategien.html>, both accessed on 31 Aug. 2011.

¹⁸ See COM(2008) 781 final (13 Nov. 2008), 4–5. On the developments from 2000 until late 2008, see also F. Baumann, ‘Europe’s Way to Energy Security – The Outer Dimension of Energy Security: From Power Politics to Energy Governance’, *European Foreign Affairs Review* 15, no. 1 (2010): 82–83.

¹⁹ The ITGI aims to expand the Turkish national grid for transmitting natural gas to Italy and Turkey, build pipelines between Turkey and Greece and between Greece and Italy. The former pipeline has by now been built and became operational in 2007. The Trans Adriatic Pipeline is a proposed pipeline project to transport natural gas from the Caspian and Middle East regions via a new gas transportation route starting in Greece via Albania and the Adriatic Sea to Italy and further to Western Europe. Its shareholders are Swiss EGL, Norwegian Statoil and German E.ON-Ruhrigas.

This brief overview demonstrates the EU's continuous attempts to achieve a greater degree of vertical coherence in its external gas policy. The real challenge at the moment is whether the EU will actually succeed in diversifying its gas supply and transit relations without its attempts being undermined by incoherent policy choices, both horizontally as well as vertically. As the Commission noted in November 2010, it is particularly important in this respect that the EU formalizes the principle whereby Member States act in the benefit of the Union as a whole in bilateral energy relations with key partners, including, and in particular, Russia.²⁰

Through an examination of the EU's positions, activities and performance – and the interplay with and among its twenty-seven Member States – in its attempts to realize a 'Southern Gas Corridor' shortly before and immediately after the entry into force of the Lisbon Treaty, this section assesses whether the Union is in fact achieving its goal of diversifying its natural gas suppliers and transit routes.

3.1[a] *The Coherence of EU External Natural Gas Policy Prior to the Lisbon Treaty*

The Russia-Ukraine crises triggered Europe to rethink its existing energy security arrangements. After the first crisis in 2006, the European Commission claimed 'Europe needs a clearer and more collective and cohesive policy on security of energy supply'.²¹ The March 2006 European Council acted promptly, calling for the definition of an 'energy policy for Europe', on account of security risks affecting producing and transit countries.²² In light of security of supply, the Commission, Member States and the European Council all emphasized that, in its external policy, Europe should speak with a single voice and intensify diversification efforts with respect to external and local sources, suppliers and transport routes.²³

However, Member States' actual implementation of these policies was much different. Rudely awoken to its dependence on the transit of gas through 'unreliable' states such as Ukraine and Belarus, Germany struck a deal with Gazprom in early 2006 to construct a direct pipeline between Germany and

²⁰ COM(2010) 639 final (10 Nov. 2010), 17. See also Baumann, *supra* n. 18, 83.

²¹ 'Andris Piebalgs EU Energy Commissioner Speaking Notes welcoming the agreement between Gazprom and Naftogaz. Joint Press Conference with Mr Bartenstein, Austrian Federal Minister for the Economy and Labour', (Brussels, 4 Jan. 2006), 2, <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/1&format=HTML&aged=0&language=EN&guiLanguage=en>>, 31 Aug. 2011.

²² European Council, 'Presidency Conclusions', (Brussels, 23–24 Mar. 2006), 4 and 13.

²³ *Ibid.*, 14. See also COM(2006) 590 final (12 Oct. 2006), 2; and Council of the European Union, '2717th Transport, Telecommunications and Energy Council Meeting', (Brussels, 14 Mar. 2006), 6–7.

Russia underneath the Baltic Sea, thus circumventing Ukraine. Construction on the 'Nord Stream' project officially began on 9 April 2010, with the first technical gas flowing through the pipe on 6 September 2011.²⁴ In equal fashion, Gazprom managed to negotiate deals in many other EU Member States, with particularly noteworthy ones signed in Bulgaria, Hungary and Austria to roll out its South Stream project – the main rival to Nabucco.²⁵

When the second Russia-Ukraine crisis left large parts of Europe in the cold for almost two weeks in 2009,²⁶ the European Commission was quick to call for the rapid development of infrastructure and the diversification of energy sources and supply routes.²⁷ Given that Gazprom managed to sign up almost all of Nabucco's consortium members,²⁸ some observers concluded that Russia is in fact winning the 'pipeline race'.²⁹

This brief descriptive analysis allows us to evaluate whether the EU managed to act coherently in the build-up to the entry into force of the Lisbon Treaty in December 2009. In terms of vertical coherence, the 2006 and 2009 Russia-Ukraine crisis on both occasions served to get the EU Institutions and its twenty-seven Member States to agree on the proposed solutions, that is, the need to diversify natural gas suppliers and transit routes, and for Europe to present a united position externally. This would suggest that in a narrow view, the positions of all actors were consistent (quadrant I). However, in terms of the execution thereof, significant discrepancies exist between the positions of the European Commission and European Parliament on the one hand and those of the

²⁴ See 'Russia Pledges Future Gas Supplies to Europe', *Euobserver*, 13 Feb. 2006, <<http://euobserver.com/?aid=2088>>; 'Russia Starts Filling Nord Stream Gas Pipe', *Euractiv*, 6 Sep. 2011, <www.euractiv.com/energy/russia-starts-filling-nord-stream-gas-pipe-news-507308?utm_source=EurActiv%20Newsletter&utm_campaign=2d469af32b-my_google_analytics_key&utm_medium=email>, both accessed on 8 Sep. 2011.

²⁵ South Stream is a proposed gas pipeline to transport Russian natural gas to the Black Sea to Bulgaria and further onto Italy and Austria. Under these deals, Gazprom acquired greater market access in return for maintaining supplies to these countries on a bilateral basis. See A. Cohen, 'Russia: The Flawed Energy Superpower', in *Energy Security Challenges for the 21st Century*, ed. G. Luft & A. Korin (Santa Barbara, CA: ABC-CLIO, LLC, 2009), 94; R. Youngs, *Energy Security: Europe's New Foreign Policy Challenge* (Abingdon: Routledge, 2009), 82.

²⁶ For a detailed analysis of the January 2009 crisis and the EU's interventions, see S. de Jong, J. Wouters & S. Sterkx, 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management After Lisbon', *European Foreign Affairs Review* 15, no. 4 (2010): 511–538.

²⁷ 'Statement of President Barroso on the resolution of the Ukraine-Russia Gas Dispute', Press Point, Doc. Speech 09/12 (Brussels, 20 Jan. 2009), <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/12&format=HTML&aged=0&language=EN&guiLanguage=en>>, 2 Sep. 2011.

²⁸ Nabucco's shareholders are Bulgarian Energy Holding (Bulgaria), Botas (Turkey), MOL (Hungary), OMV (Austria), RWE (Germany) and Transgaz (Romania).

²⁹ K. Barysch, 'Should the Nabucco Pipeline Project Be Shelved?', (London: Centre for European Reform Policy Brief, 2010), 10; J. Bush, 'Russia's South Stream Project Gets a Boost', *Spiegel Online*, 19 May 2009, at: <www.spiegel.de/international/business/0,1518,625697,00.html>; P. Escobar, 'Relax and Float South Stream', *Asia Times online*, 14 Mar. 2008, at: <www.atimes.com/atimes/Central_Asia/JC14Ag01.html>, both accessed on 20 Dec. 2010.

Council and EU Member States on the other. Whereas the Commission and Parliament firmly advocated diversifying natural gas supplies and transit routes away from Russia, Member States in many instances seem to have in fact strengthened their energy ties to Gazprom. These Member States thus opted for short-term solutions by deepening existing arrangements, rather than a long-term – and in the eyes of many EU Member States a more financially and politically risky – undertaking to acquire Caspian gas instead. The fact that many Central and Eastern European Member States possess few interconnections other than Eastwards and do not have the financial means to construct new routes should be taken into account when judging these decisions. It is this fact that likely caused Poland and the Baltic states in particular to be incensed about the deal between Gazprom and German E-ON-Ruhrgas and BASF to construct Nord Stream. Having been denied the role of transit states as a result, these states labelled the project a flagrant example of quick bilateral geopolitics, lacking any form of solidarity, where discussions at the EU level had largely been absent.³⁰ In response, Germany and Italy – who is Gazprom's main partner in the South Stream project – rather view Nord Stream as a purely industry-driven project between commercial undertakings that should not necessarily be discussed at Council level.³¹ In summary, when taking a broad understanding of vertical coherence, Member State actions have largely undermined the positions of the European Commission and the European Parliament concerning diversification of natural gas suppliers and transit routes (quadrant II).

The limited vertical coherence in the period preceding the Lisbon Treaty's entry into force can essentially be traced back to the fact that the EU possesses few competences on energy outside of the internal market. As decisions regarding the energy mix fall under the exclusive competence of the Member States, the Russia-Ukraine crises prompted many of the Union's members to seek individual – bilateral instead of multilateral – solutions to the challenges posed by the interruptions. The Commission instead has argued that energy policy should rather be given its own legal basis, requesting measures to be taken *in connection* with related policies on the environment and the EU internal market, but not based on the latter's provisions in the treaties.

³⁰ Interviews with officials from EU Member State Permanent Representations, 23 April, 13 May, 7 June, 23 April and 19 Apr. 2010.

³¹ Interviews with officials from EU Permanent Member State Representations, 2 July and 24 Jun. 2010.

3.1[b] *Expectations Generated by the Lisbon Treaty and the Coherence of EU External Natural Gas Policy after Its Entry into Force*

The Lisbon Treaty fulfilled this desire through the creation of a specific energy Title.³² Article 194 TFEU situates the Union's policy on energy explicitly 'in the context of the establishment and functioning of the internal market' and 'with regard for the need to preserve and improve the environment'.³³ Some believed the new title could strengthen the Union's self-perception as an energy actor and gradually turn European energy politics into a more natural undertaking, as Member States traditionally wary of increased 'Europeanization' in this field could become more convinced of the possible added value of energy policy at European level.³⁴ Moreover, the new HR and EEAS were created to tackle precisely this type of challenge.³⁵ In fact, energy could very well fall under their remit, insofar that it constitutes a Common Foreign and Security Policy (CFSP) matter. This represents a likely situation if a gas interruption induces not purely economic, but also political and security concerns. Furthermore, in her role as Vice-President of the Commission, the HR is responsible for 'coordinating other aspects of the Union's external action',³⁶ which ultimately also includes energy.³⁷ Although possible, this presupposes both increased concerted external action on energy and that the benefits of such actions outweigh those taken at Member State level.³⁸ Equally, it should be noted that under the TFEU, Member States retain exclusive competence over determining the conditions for the exploitation of their energy resources, their choice between different energy sources and the general structure of their energy supply.³⁹ An analysis of the EU's efforts on realizing its Southern Gas Corridor in the post-Lisbon era therefore indicates the extent to which the Union managed to improve its coherence and whether such a synergetic development toward an EU energy policy can realistically be expected.

In its current form, Nabucco – the Southern Corridor's flagship project – intends to source its gas from Azerbaijan's Shah Deniz gas field, of which the second exploration phase reserved 10 billion cubic metres (bcm) per year for

³² Title XXI, 'Energy', of Part Three, 'Union policies and internal actions', TFEU.

³³ Article 194(1) TFEU.

³⁴ S. Fischer, 'Energie- und Klimapolitik im Vertrag von Lissabon: Legitimationsverweiterung für wachsende Herausforderungen', *Integration* 1 (2009): 58; interview with official from EU Member State Permanent Representation, 19 Apr. 2010; European Parliament, 'Summary of the hearing of Günther Oettinger – Energy', (14 Jan. 2010), at: <www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100113IPR67198>, 20 Sep. 2011.

³⁵ de Jong, Wouters & Sterkx, *supra* n. 26, 534.

³⁶ See also Art. 18(4) TEU.

³⁷ de Jong, Wouters & Sterkx, *supra* n. 26, 535. The fact that the HR/VP presided the EU-US Energy Council of 19 Nov. 2010 goes some way toward strengthening this argument.

³⁸ De Jong, Wouters & Sterkx, *supra* n. 26, 531.

³⁹ Article 194(2) second para. TFEU.

Europe.⁴⁰ The problem is however that the two other Southern Corridor projects, ITGI and TAP, are equally vying for the same contract. A second issue is that Shah Deniz contains an insufficient amount of gas to fill Nabucco's capacity of 31 bcm/year. ITGI and TAP however – running at 12 bcm/year and at an initial capacity of 10 bcm/year,⁴¹ respectively – could easily be filled.⁴² The State Oil Company of Azerbaijan Republic (SOCAR) claims it is only willing to pay for gas transit as if Nabucco were running at full capacity.⁴³ However, at a fixed transit tariff and when running at only one third of its potential, Nabucco carries a higher per unit transit cost compared to a full pipe, a cost that ultimately has to be borne by someone. Naturally, the other Southern Corridor projects were quick to emphasize that Nabucco does not justify investment for a pipeline with a 31 bcm capacity and that ITGI and/or TAP could serve as the first step for the eventual full construction of the Southern Corridor.⁴⁴ On 21 February 2012 SOCAR announced it no longer considered ITGI for the Italian pipeline option, thus effectively leaving TAP as the only contender to Nabucco. However, TAP recently received competition from a new pipeline project launched by BP. The South-East Europe Pipeline (SEEP), as it is called, would run from western Turkey across Romania and Bulgaria to Hungary's western frontier with a capacity of 10 bcm per year. Using mostly existing infrastructure, it comes at a fraction of the estimated EUR 10 billion needed for Nabucco.

On the whole, such traces of 'intra-EU competition' are not doing the Southern Corridor project any favours. Rather, they play into the hands of third countries and undermine the Union's negotiating position. Early 2011, the European Council therefore repeated that there is a need for improvements in the coherence of the Union's external energy relations. It invited the HR to take full account of the energy security dimension in her work and called upon the Commission to submit new proposals.⁴⁵ On 7 September 2011, the Commission issued its new Communication on security of supply and international

⁴⁰ Shah Deniz was discovered in 1999 and constitutes the country's largest offshore gas field at over 1 trillion cubic metres of gas. The project – led by BP – has been producing gas since 2006. Phase one is estimated at a maximum production rate of 8.6 bcm per year. Phase two is estimate to deliver an additional 16 bcm per annum of gas, thus almost tripling the field's overall production.

⁴¹ TAP is extendable to 20bcm/yr.

⁴² See P.K. Baev & I. Overland, 'The South Stream versus Nabucco Pipeline Race: Geopolitical and Political Stakes in Mega-projects', *International Affairs* 86, no. 5 (2010): 1082; S. de Jong, 'The Nabucco Pipeline: Turkey and Europe's Drive Towards Diversification', *REVOLVE Magazine* Summer Issue, Turkey Report (2011), 27.

⁴³ See R. ten Hoedt, 'We do not Want to Depend on Only One Pipeline', *European Energy Review*, 15 Nov. 2010, 2, at: <www.europeanenergyreview.eu/index.php?id=2528>, 7 Sep. 2011.

⁴⁴ Interview with official from EU Member State Permanent Representation, 24 Jun. 2010; 'Italy's Edison promotes cheaper version of Nabucco', *Euractiv*, at: <www.euractiv.com/en/energy/italy-s-edison-promotes-cheaper-version-nabucco-news-485149>, 27 Apr. 2010; 'Nabucco in "David vs. Goliath" battle for Azeri gas', *Euractiv*, 10 Dec. 2010. Both accessed on 7 Sep. 2011.

⁴⁵ European Council, 'Conclusions', (Brussels, 4 Feb. 2011), point 11.

cooperation. Among other things, it proposes to set up an information exchange mechanism on international energy agreements between Member States and third countries, including those still under negotiation. Furthermore, it suggests that such agreements can also be negotiated at EU level if they have a large bearing on the Union's energy policy objectives, and where there is a clear common EU added value. A recent example of a case where there is such an added value would be the Council mandate bestowed on the Commission to start talks with Azerbaijan and Turkmenistan on a legal framework for a TransCaspian pipeline.⁴⁶

Initial reactions to the proposals were however rather mixed. Known supporters of a common EU external energy policy, such as European Parliament President Jerzy Buzek and Polish MEP Jacek Saryusz-Wolski greatly welcomed the proposals.⁴⁷ Others, however, were not so enthusiastic. Giles Chichester, the Conservative spokesman on energy within the European Parliament, condemned the proposal as 'the worst kind of meddling', adding that energy arrangements are 'Britain's own business, not the Commission's'. Kjetil Tunland, the managing director of TAP, added that Brussels' first step should rather have been to 'develop a cost-effective pipeline that will be ready to bring the [gas] volumes currently under discussion to the Union as soon as they become available'.⁴⁸

The analysis of the developments since the January 2009 Russia-Ukraine crisis allows us to evaluate the extent to which the entry into force of the Lisbon Treaty impacted on the level of coherence in the Union's external natural gas policy. Lisbon's creation of a specific legal basis for energy with detailed objectives and new actors such as the HR and EEAS had sparked high hopes for a more coherent EU external energy policy. Indeed, at his initial Parliamentary hearing in 2010, European Commissioner for Energy, Günther Oettinger, stated he would work towards greater 'Europeanization' of energy policy and aim to move away from bilateral agreements such as Nord Stream.⁴⁹ Oettinger's enthusiasm was echoed by a majority in the European Parliament and Central

⁴⁶ COM(2011) 539 final (7 Sep. 2011), 4–5. See also Council of the European Union, 'The Council gives go-ahead for negotiations on Trans-Caspian Pipeline System', Council Doc. 14095/11 PRESSE 307. (Brussels, 12 Sep. 2011).

⁴⁷ 'EU attempts to speak with one voice on energy', *Euractiv*, at: <www.euractiv.com/energy/eu-attempts-speak-voice-energy-news-507462#comments>, 8 Sep. 2011; J. Kanter, 'European Union Seeks Power to Block Bilateral Energy Deals', *The New York Times*, 7 Sep. 2011, at: <www.nytimes.com/2011/09/08/business/global/eu-seeks-power-to-bloc-bilateral-energy-deals.html>; France24, 'EU mounts power grab over state energy deals', *France 24*, 7 Sep. 2011, at: <www.france24.com/en/20110907-eu-mounts-power-grab-over-state-energy-deals>, all accessed on 9 Sep. 2011.

⁴⁸ 'EU attempts to speak with one voice on energy', *supra* n. 47.

⁴⁹ European Parliament, *supra* n. 34.

and Eastern EU Member States alike.⁵⁰ However, scepticism remained about whether Oettinger's ties to Europe's energy 'big boys' (notably Germany and France) would render void such claims.⁵¹ These initial post-Lisbon events pointed thus to some degree of vertical coherence (in the narrow sense of consistency, quadrant I in Figure 1) in the views of the Commission, the European Parliament and the Central and Eastern European Member States. Yet, Europe's larger Member States still have positions inconsistent with these policies. This threatens not only the EU's broad vertical coherence (quadrant II) but even its consistency.

In fact, the Commission's recent new set of proposals touches upon the core of this issue: should the EU wish to end 'bilateral deals' such as Nord Stream, it is faced with groupings of Member States which favour different approaches in natural gas relations vis-à-vis third states. Asked about whether the Commission could play a greater role in terms of coordination, some of the Union's larger Member States are swift to point to the Union's lack of competences, claiming foreign policy is first and foremost a Member State responsibility.⁵² Some of the Member States who joined after 2004 indeed also point to the split in competences between EU and Member State level; however, they equally refer to the extent to which Member States are unwilling to confer theirs – leaving the Commission sometimes unable to deliver on its promises.⁵³ The Southern Corridor is a good example. Almost two years after the entry into force of the Lisbon Treaty, intra-EU competition has rendered Nabucco – the one pipeline among the three with the most favourable overall impact on European energy security – an unlikely candidate to wheel in a crucial Azeri gas contract. Views 'from the outside in' seem to underline this belief. When asked, third states confirm that Member States promoting this or the other pipeline, followed by the Commission ushering its support for yet another, blurs the view of third countries on what the EU effectively wishes to pursue in its external energy policy.⁵⁴

⁵⁰ Council of the European Union, 'Summary of the meeting of the Committee on Industry, Research and Energy (ITRE)', Council Doc. 5460/10 (Brussels, 14 Jan. 2010), 1 and 3.

⁵¹ European Parliament, 'Anhörung von Günther H. Oettinger, Designiertes Kommissionsmitglied Energie – Verbatim Report', Question posed by Claude Turmes MEP, 9. See also H. Belin, 'Günther Oettinger: a Friend of Industry', *European Energy Review*, 18 Jan. 2010, at: <www.europeanenergyreview.eu/site/pagina.php?id_mailing=29&toegang=6ea9ab1baa0efb9e19094440c317e21b&id=1630>, 21 Sep. 2011.

⁵² Interviews with officials from EU Member State Permanent Representations, 10 and 24 Jun. 2010.

⁵³ Interviews with officials from EU Member State Permanent Representations; interview with official from European Commission DG Energy, 26 Mar. 2010.

⁵⁴ Interview with official from Embassy of Azerbaijan in Brussels, 13 Sep. 2010.

In summary, where some of the Union's Central and Eastern Members are positive towards a larger role for the European Commission,⁵⁵ countries such as France, Germany, the United Kingdom, Italy and the Netherlands⁵⁶ are not too eager on having their sovereignty limited, as they view their market size and energy sector's power as a sufficient defence against any threat posed by external dependency.⁵⁷ Different energy exposures are largely seen as preventing a strengthened commitment to the external dimension of European energy policy.⁵⁸ It seems therefore that the Central and Eastern European Member States feel they need the support of the European Commission to keep up with the bigger Member States when it comes to energy.⁵⁹ It is therefore to be expected – as initial comments already indicated – that Member States who possess strong multinational energy companies (German E.ON and RWE, French GDF, Italian ENI, Dutch Gasunie, Anglo-Dutch Shell, British BP, to name only a few) are likely to dismiss the Commission's proposal to grant it more powers. The strength of these companies enables them to turn complicated infrastructure projects such as Nord Stream and South Stream into reality. When taking a broader understanding of coherence, the belief that such projects should preferably be industry driven, rather than discussed at Council level, clearly undermines the potential for synergies to trickle down and raise the impact of EU energy security initiatives beyond their immediate region of implementation.⁶⁰

⁵⁵ Interview with official from EU Member State Permanent Representation, 10 Jun. 2010; R. Jozwiak, 'EU Wants More Oversight Of Energy Deals', *Radio Free Europe Radio Liberty*, 7 Sep. 2011, at: <www.rferl.org/content/eu_wants_more_oversight_of_energy_deals/24321007.html>, 12 Sep. 2011.

⁵⁶ Interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 Apr. 2010; interviews with officials from EU Member State Permanent Representations, 13 May and 5 May 2010. See also Barysch, *supra* n. 29, 4.

⁵⁷ E. Kirchner & C. Berk, 'European Energy Security Co-operation: Between Amity and Enmity', *Journal of Common Market Studies* 48, no. 4 (2010): 868; Barysch, *supra* n. 29, 4; interviews with officials from European Parliament Directorate-General Internal Policies, 30 Mar. 2010; interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 Apr. 2010; interview with official from EU Member State Permanent Representation, 5 May 2010.

⁵⁸ Interview with official from European Commission DG Energy, 26 Mar. 2010. See also A. Macintosh, 'Security of Europe's Gas Supply: EU Vulnerability', *CEPS Policy Brief* No. 222 (November 2010); Baumann, *supra* n. 18, 83; and Youngs, *supra* n. 25, 34.

⁵⁹ Interviews with officials from European Commission DG Energy, 11 and 26 Mar. 2010; Jozwiak, n. *supra* 55.

⁶⁰ Interviews with officials from EU Member State Permanent Representations, 10 and 24 June and 2 Jul. 2010.

3.2 THE CASE OF CLIMATE CHANGE: EU EXTERNAL CLIMATE POLICY IN THE POST-2012 GLOBAL REFORM DEBATES

The EU's efforts at acting as a coherent global player on climate change date back to the early 1990s. Negotiations of the UN Framework Convention on Climate Change, the first international treaty on this issue, took place in 1991–1992. This included a joint key position foreseeing the stabilization of greenhouse gas emissions at 1990 levels by the year 2000 and the ad hoc coordination efforts of the Council Presidency and the Commission that assured a minimum degree of uniformity, although Member States also had their own representations.⁶¹ Following the entry into force of the Maastricht Treaty, higher degrees of coordination were achieved through mandating a working party on climate change with the development of EU positions, as well as via the new representation arrangement involving a Troika of current, former and future Council Presidency.⁶² Fairly coherent EU representation was thus assured during the 1995–1997 negotiations on the Kyoto Protocol. From late 2000 on, the European Commission replaced the former Council Presidency in the Troika, officially to ensure policy continuity and help the EU to act more coherently.⁶³ Since 2004, the EU's external climate policy is in the hands of a group of lead negotiators, from any Member State or the Commission, and issue leaders, who prepare EU positions in the Working Party on International Environmental Issues–Climate Change (WPIEI-CC), which serves the Environment Council, and are also responsible for defending them in the UN negotiations.⁶⁴

This historical sketch of the evolution of the Union's external climate policy practice suggests that the EU constantly attempted to move toward greater vertical coherence.⁶⁵ The EU realized need to be as united as possible on the global common goods challenge posed by climate change. The EU's members therefore tried to find institutional solutions to the intricate task of coordinating a body consisting of at first 12, later 15, 25 and 27 Member States, not even counting the Commission with its growing competences in this policy area.

⁶¹ D. Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary', *Yale Journal of International Law* 18, no. 2 (1993): 451–558.

⁶² T. Lescher, *Die EU als eigenständiger Akteur in der Entstehung des internationalen Klimaregimes* (Trier: University of Trier, 2000), 72.

⁶³ M. Grubb, 'The UK and the European Union: Britannia Waives the Rules?', in *Climate Change After Marrakech: The Role of Europe in the Global Arena*, ed. D. Sprinz (Trier: University of Trier, 2001), 10.

⁶⁴ S. Oberthür & C. Roche Kelly, 'EU Leadership in International Climate Policy: Achievements and Challenges', *The International Spectator* 43, no. 3 (2008): 38.

⁶⁵ See S. Schunz, 'The European Union in the United Nations Climate Change Regime', in *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*, ed. J. Wouters, H. Bruyninckx, S. Basu & S. Schunz (Houndmills, Basingstoke: Palgrave Macmillan, 2012).

Against this backdrop, it is interesting to investigate whether these efforts paid off, especially in the most recent past. External climate policy has definitively transformed into a *foreign* policy issue in recent years. This is due to both the latest scientific evidence of climate change, the growing urgency in finding political solutions that it imposes, and its close intertwinement with the industrialized world's economic model and its systems of energy production and consumption. By examining the Union's positions, activities and performance during the latest round of global climate talks since the mid-2000s and until 2011, an assessment of its external policy coherence in this significant domain becomes possible. The main objective of these negotiations is the reform of the existing UN climate regime in preparation for the period after the expiry of the Kyoto Protocol's first commitment period in 2012. Two topics are of central importance in this context: the emission reduction targets that parties will adopt and the means by which reductions are to be achieved. Shedding light on the EU's positions, activities and performance on these issues, the analysis distinguishes between the old, pre-Lisbon phase (from the mid-2000s until 2009) and the post-Lisbon experience in 2010 and 2011.

3.2[a] *The Coherence of EU External Climate Policy Prior to the Lisbon Treaty*

The EU entered the post-2012 negotiations with a key position on targets: in early 2007 already, it pledged to reduce its emissions by 20% by the year 2020 (compared to 1990 levels).⁶⁶ It was prepared to envisage reductions by 30% if other industrialized parties and major developing emitters were to engage in comparable efforts, the magnitude of which was specified in the Council's negotiation mandate.⁶⁷ Internally, the reduction effort was shared among Member States as part of the wider climate and energy package adopted in 2008. This package, which included measures on energy efficiency, renewable energy as well as a reform of the Union's key policy instrument – the emissions trading scheme (ETS) – was not only to boost the Union's credibility vis-à-vis the wider world but also to ensure the right combination of policy objectives in the climate change and energy domains.⁶⁸ In the course of the UN negotiations, the EU operated with the above-mentioned representation system involving lead negotiators and issue leaders. Their key diplomatic activities included the promotion of the Union's central positions (20–30% reductions, emission trading)

⁶⁶ European Council, 'Presidency conclusions', (Brussels, 8–9 Mar. 2007).

⁶⁷ Council of the European Union, '2826th Council meeting – Environment', (Luxembourg, 30 Oct. 2007).

⁶⁸ S. Oberthür, 'The Role of the EU in Global Environmental and Climate Governance', in *The European Union and Global Governance*, ed. M. Thelo (London: Routledge, 2009), 192–209.

so as to 'show the way' to other parties.⁶⁹ Yet, in the face of a growing diversification of global climate policy arenas, EU external representation also had to transcend the UN (as the main) arena. Concretely, the Union also had to show climate policy presence in fora such as the G-8(+5), G-20, the Major Economies Forum of the seventeen largest emitters as well as in manifold bilateral summits. It chose, moreover, to jointly reach out via local Green Diplomacy networks of Member State embassies and Commission delegations in key capitals of the world (Washington, Beijing, and so forth).⁷⁰ Its external climate policy in these different arenas was pursued by diverse actors, ranging from diplomats associated with Heads of State to the lead negotiators. Although all of these actors were bound by the Union's overarching positions, differences in approach and nuances in the presentation of these positions became unavoidable.⁷¹ This situation was exacerbated as the negotiations moved into their decisive stages, notably at the crucial December 2009 conference of the parties (COP) at Copenhagen. During the much publicized high-level segment, the EU's heads of state took over from the lead negotiators and environment ministers. This resulted in growing EU discord and open disagreements, notably regarding the question of whether to offer a unilateral move toward 30% reductions to re-boot the negotiations. Also as a consequence of this last minute incoherence, the EU became sidelined during the key negotiation phase, with the result that none of its main positions were reflected in the 'Copenhagen Accord' adopted at the end of the summit.

This analysis allows for an evaluation of the EU's vertical coherence until the Copenhagen summit and the entry into force of the Lisbon Treaty in December 2009. The positions the EU defended on key issues were at first fairly consistent. The EU promoted its reduction targets and ETS-based approach, and one can observe a relatively low degree of contradictions in its positions and diplomatic activities prior to the Copenhagen summit. This could notably be observed for the UN negotiations and resulted from the cooperation among the lead negotiators. Beyond the UN sphere and although local Green Diplomacy Networks attempted, for instance, to exploit synergies in key capitals of the world, transaction costs were higher, given the large number of actors involved in EU external climate policy. The problems faced by the EU during the decisive moments at Copenhagen implied that the EU did not attain overall vertical

⁶⁹ For an example of how this was done vis-à-vis the globe's number one emitter China, see G. de Cock, 'The European Union as a Bilateral "Norm Leader" on Climate Change vis-à-vis China', *European Foreign Affairs Review* 16, no. 1 (2011): 89–105.

⁷⁰ S. Schunz, 'The European Union's External Climate Policy: A Foreign Policy Analysis', *CFSP Forum* 7, no. 2 (2009): 1–6.

⁷¹ Interview with EU Member State negotiator, April 2009.

coherence during this period (quadrant II), not even in the narrow sense of consistency (quadrant I). Key causes can be found in the multiplicity of views and interests among EU members and traditional differences in approach and strategies in foreign policy. This is exacerbated by the absence of comprehensive rules on task-sharing within the Union. The solution often invoked for these problems was institutional in nature: if the position-forming and defence were centralized in a single body and coordination efforts could be streamlined, it was argued, this would be advantageous for EU foreign policy in general.

3.2[b] *Expectations Generated by the Lisbon Treaty and the Coherence of EU External Climate Policy after Its Entry into Force*

The entry into force of the Lisbon Treaty in December 2009 generated hopes that the EU's external policies would become more coherent, especially in the climate change domain. These hopes were notably nurtured by a teleological approach to interpreting the Treaties. From this perspective, the intention behind the reform clearly was to have the EU speak with a single voice on the global stage through the HR, whose task was to act as the Union's voice and coordinator in external affairs in CFSP areas, but also regarding 'other aspects of the Union's external actions' (Article 18 (4) TEU), and the EEAS. Moreover, changes in the external representation formula gave the HR potentially greater leverage, also in domains such as climate change (Article 218 TFEU). Lady Ashton repeatedly expressed a commitment for the EEAS to work on climate change, notably through the creation of an EEAS department dealing with 'global and multilateral issues'.⁷² At the same time and unlike for energy policy, the treaty reform did not modify much substantively for the issue area: the reference to climate change in Article 191 TFEU represents largely a formalization of existing practices.⁷³

Given the high degree of generality of the Treaty's provisions, it remained – and to a certain extent still remains – unclear how these changes will play out in practice, as an assessment of the status quo of the EU's external climate policy some two years after the entry into force of the Lisbon Treaty reveals.

After the Copenhagen summit, the substance of EU external climate policy did not fundamentally change. Its key positions were internally harshly contested, but on the crucial issue of adopting a 30% unilateral reduction target the Union

⁷² 'Ashton names EU Foreign-Service Priorities at Low-Key Launch Event', *EUobserver*, 2 Dec. 2010, at: <<http://euobserver.com/18/31413>>, 23 Sep. 2011.

⁷³ J. Lieb & A. Maurer (eds), *Der Vertrag von Lissabon. Kurzkommentar* (Berlin: German Institute for International and Security Affairs, 2009), 89.

has not altered its stance.⁷⁴ Regarding its external representation, it attempted to draw the lessons of the problematic Copenhagen COP and coordinate more effectively. Yet, a conflict over EU representation on external environmental policies complicated the relations between the Member States and the Commission in 2010. Shortly after the entry into force of the Lisbon Treaty, the Commission had attempted to set a precedent by demanding the full representation responsibilities for negotiations in the field of mercury, while also claiming that it alone was to sign the letter to the UNFCCC Secretariat containing the Union's target pledges under the Copenhagen Accord. Both these moves were strongly re-buffed by the Member States. In the face of these quarrels, the Treaty *de facto* thus only brought slight adjustments in the climate domain for the moment. If the Commission took a stronger stance in representing the Union at the 2010 and 2011 COPs in Cancun and Durban, to the detriment of the Council Presidency, this had more to do with the fact that the Commission created the post of a Climate Commissioner, whose first occupant is the charismatic former Danish Minister Connie Hedegaard, than with any changes in the EU Treaties. In other global fora, the existence of the HR and the EEAS has not yet significantly altered EU external climate policy practice, while the bilateral relations and diplomatic outreach still require greater coordination between these players and the WPIEI-CC. The situation therefore remained largely unchanged and the Union's coherence problems had not been remedied. Applying the analytical framework to the emerging EU external climate policy post-Copenhagen yields mostly the same assessment as for the pre-Copenhagen period. Given ongoing conflicts about key positions and their representation, the EU appears even less consistent in its external climate policies.

The question needs to be asked, therefore, whether key Lisbon Treaty provisions regarding the Union's external relations have the potential of leading to greater coherence by remedying the problems identified above *at all*. To scrutinize this potential, a scenario involving greater responsibilities for the HR and the EEAS can be imagined. Climate change is increasingly considered a foreign policy priority, and the HR and EEAS do lay claim to having a say on it. A possible development in the spirit of the Treaty would be that the two develop – in close cooperation with the Member States and the Commission – the EU's external climate strategy and represent the EU on the basis of a mandate granted by the twenty-seven Member States.⁷⁵ This scenario would allow the HR to

⁷⁴ H. Fiona, 'EU Votes against Reducing Carbon Emissions by 30%', *The Guardian*, 5 Jul. 2011, at: <www.guardian.co.uk/environment/2011/jul/05/tory-meps-reject-carbon-cut-law?INTCMP=SRCH>, 23 Sep. 2011.

⁷⁵ Other solutions could be imagined, such as a Commission take-over or a situation in which parties opt for a 'more-of-the-same' approach, perpetuating the current system. See S. Afionis, 'The

refine positions and identify issue linkages while also overseeing the defence of EU positions.

From a coherence perspective, although this scenario does not do away with possible interferences by individual Member States, it promises to improve cooperation. The risk that the EU's positions become disparate, contradictory or represented by many voices considerably diminishes. A centralization of the Union's external climate policy in the EEAS thus heightens the probability for vertical consistency (quadrant I) and even holds the potential for exploiting synergies between the EU and Member States diplomats, which are currently all too often lost (quadrant II). The conditions under which such a change would take shape are, however, very demanding. Not only would the Member States and the Commission have to be prepared to follow the spirit of the Treaty, but the HR and the EEAS would also need to possess the capacities to fulfil these novel tasks. Currently, while the latter institutions are still far from fully operational, the former condition is clearly unfulfilled, with Member States reluctant to cede leverage over this highly sensitive policy domain.

4 CONCLUDING REMARKS

The Lisbon Treaty reform intended to strengthen the (vertical) coherence of the Union's external action and to increase the probability that the EU achieves its long-term goals. In this contribution, we examined two important areas of EU external relations, external natural gas and climate policies, with the principal aim of understanding whether these efforts actually succeeded. A number of conclusions can be drawn.

First, the analysis of EU external natural gas policy revealed that the Union's lack of competences beyond the internal market undermined vertical coherence both in the aftermath of the Russia-Ukraine crises and with respect to the Southern Corridor. Lisbon's creation of a specific legal basis for energy may have inspired hopes for greater coherence in external energy relations, yet the fact remains that energy is still an area of shared competence where EU Member States hold the ultimate say over their energy mix. Although Member States pay tribute to institutional efforts to improve external coherence, they still regularly go their own way when it comes to natural gas security, thereby limiting the occurrence of potential synergies with energy security initiatives taken by different actors and at different levels. Thus, faced with confined legal powers and

European Union as a Negotiator in the International Climate Change Regime', *International Environmental Agreements* 10, no. 4 (2010): 165–185; S. Schunz, *Beyond leadership by Example: Towards a Flexible European Union Foreign Climate Policy* (Berlin: German Institute for International and Security Affairs, 2011).

a division among Member States as to whether the Commission should be granted greater oversight of external gas relations, Brussels' options are limited. To date, the HR and EEAS appear to have little to no authority to alter this state of affairs in energy policy. Although desirable from the viewpoint of improving external vertical (and horizontal) coherence, their inclusion seems unlikely as long as influential EU Member States continue to assert their competences in this field.

Second, in the field of EU external climate policy, the gradual improvements in coherence over the past twenty years have proven to be rather unstable, as the Copenhagen COP and the period thereafter demonstrated. With climate change remaining a shared competence and no clear rules on EU climate foreign policy task-sharing among the EU-27+1, the coherence gains may be easily lost at any moment whenever reluctant Member States choose to act out of step with the rest of the EU. Although it has yet to have any positive effects in the field of climate change, the new Treaty holds the potential of reducing these interferences by centralizing decision-making and representation to some extent in the newly created bodies. The preconditions for actually transferring such wide-reaching responsibilities on climate change to the HR and the EEAS are, however, demanding. Member States would need to be willing to communitarize their foreign policy approaches on this crucial issue. The price to pay is sovereignty; the gain is synergies on this common goods problem.

If one compares the two cases, striking parallels can be detected regarding both the assessment of vertical coherence and the reasons for why this evaluation is rather disillusioning when compared to the hopes sparked by the Lisbon Treaty. The conclusion that no coherence gains were made through the Lisbon Treaty reform might just be the snapshot picture of two EU policies at this moment in the history of its integration. It may however, together with tendencies in other policy fields, also point to a broader trend of renewed Member State reluctance to the communitarization of foreign policy, even in domains where much suggests that a common defence of positions would lead to desirable synergies.

In this context, one can ask whether the institutional reforms of the Treaty actually serve the purpose of their creation – or if they do just the opposite. While Lisbon's designation of the HR and EEAS was meant to move EU external policies beyond the purely cooperative governance mode into some form of centralization, our analysis indicates that in the areas of energy and climate change, where there are few possibilities for the EU to 'force' Member States to comply if they choose otherwise, the two institutions make cooperation actually *less* likely. A certain degree of consistency had been reached at the outset of policy formation since the Treaty of Maastricht for both energy and climate

policies, which had been experiencing a gradual integration among institutions through internal market and environmental legislation. Awareness that additional integration in external relations was needed for the Union to attain its goals was thus clearly present among Member States. This incremental integration dynamic, while by no means stable, appears to have been interrupted by the new Treaty, with the HR and the EEAS provoking, in the first instance, negative responses against further integration. If generalized and persistent, the Lisbon Treaty may thus have the perverse effect of legally cementing the status quo of incoherence in EU external policies.

AIMS

The aim of the *Review* is to consider the external posture of the European Union in its relations with the rest of the world. Therefore the *Review* will focus on the political, legal and economic aspects of the Union's external relations. The *Review* will function as an interdisciplinary medium for the understanding and analysis of foreign affairs issues which are of relevance to the European Union and its Member States on the one hand and its international partners on the other. The *Review* will aim at meeting the needs of both the academic and the practitioner. In doing so the *Review* will provide a public forum for the discussion and development of European external policy interests and strategies, addressing issues from the points of view of political science and policy-making, law or economics. These issues should be discussed by authors drawn from around the world while maintaining a European focus.

EDITORIAL POLICY

The editors will consider for publication unsolicited manuscripts in English as well as commissioned articles. Authors should ensure that their contributions will be apparent also to readers outside their specific expertise. Articles may deal with general policy questions as well as with more specialized topics. Articles will be subjected to a review procedure, and manuscripts will be edited, if necessary, to improve the effectiveness of communication. It is intended to establish and maintain a high standard in order to attain international recognition.

SUBMISSION OF MANUSCRIPTS

Manuscripts should be submitted to the Editorial Assistant at the Editorial Office. The manuscript should be accompanied by a covering letter stating that the article has not been published, or submitted for publication, elsewhere. Authors are asked to submit two copies of their manuscript as well as a copy on computer disk. Manuscripts should be 6,000-8,000 words and be typed, double spaced and with wide margins. The title of an article should begin with a word useful in indexing and information retrieval. Short titles are invited for use as running heads. All footnotes should be numbered in sequential order, as cited in the text, and should be typed double-spaced on a separate sheet. The author should submit a short biography of him or herself.

BOOK REVIEWS

Copies of books should be sent to the Book Review Editor.

For books in English: Professor Alasdair Blair, Head of Department of Politics and Public Policy, De Montfort University, The Gateway, Leicester, LE1 9BH, UK. Email: ablair@dmu.ac.uk.

Books in other languages: Professor Sven Biscop, EGMONT, Royal Institute for International Relations (IRRI-KIIB), Rue de Namur 69, 1000 Brussels, Belgium. Email: s.biscop@egmontinstitute.be.

2

TOWARDS GLOBAL ENERGY GOVERNANCE: HOW TO PATCH THE PATCHWORK

Sijbren De Jong

Abstract

Contemporary global energy relations have fundamentally changed, *inter alia*, as a result of dwindling oil and gas reserves, an increase in demand for energy from emerging economies, the need for global climate change action, the impact of renewable and alternative sources of energy, and, linked to all this, the increased politicisation and securitisation of energy.¹

The institutional architecture governing energy relations worldwide has been unable to accommodate these developments. It suffers from fundamental issues of representativeness, a low level of institutionalisation and a lack of compliance enforcement capacity. Today's institutions thus risk becoming unrepresentative and ultimately ineffective unless reform takes place.

Subsequently an analysis is made of the most influential international energy fora and institutions with a particular view to identifying their ability to effectively govern global energy relations, the role of emerging and developing countries within the current architecture, and the potential for these fora and institutions to contribute to an inclusive and effective form of global energy governance.

1. Introduction

The global market in hydrocarbons has undergone radical change in the course of the last 60 years. Today's markets are truly global in scope, with the involvement of a wide range of different actors. This situation was vastly different midway through the twentieth century when a select group of Western oil companies that held concessions in key oil-exporting countries dominated the supply chain through their internal trading schemes. The 'Seven Sisters',²

¹ This development has led to what is now commonly known as 'security of supply', or the adequacy of energy supply at a reasonable price.

² The Seven Sisters at the time consisted of Standard Oil of New Jersey (Esso), Royal Dutch Shell, Anglo-Persian Oil Company, Standard Oil Company of New York (Socony), Standard Oil of California, Gulf Oil and Texaco. Today, after a series of mergers and takeovers, only four of the original seven remain as stand-alone operating companies, namely ExxonMobil, Chevron, Shell and BP.

as they were known, held a firm grip on global oil markets. This picture fundamentally changed in the 1970s as the world bore witness to a series of oil supply disruptions instigated by non-Western supplier countries.³ The interruptions triggered an institutional response by the West in the form of the creation of the International Energy Agency (IEA) in 1974, its principal goal being to counteract disruptions to the oil market through its emergency oil-sharing mechanism (see Section 3).

The 'oil crises' of the 1970s mark a decisive turn in global energy relations as the oil exporters' drive towards nationalisation of production deprived the Seven Sisters of their grip on the world market and simultaneously disrupted the vertical integration of the industry. As a consequence, the newly created national oil companies (NOCs) were deprived of retail outlets and importing markets (Goldthau and Witte, 2010, 4; Jaffe, 2009, 79; Haghighi, 2007, 53). Basically, therefore, the origins of the global oil market as we know it today date back to the crises in the 1970s.

The end of the Cold War caused a drop in crude oil prices and sparked hopes for a global, free, transparent and open oil market bereft of national prerogatives (Van der Linde, Perlot and Hoogeveen, 2006, 5). The dissolution of the Soviet Union prompted the opening up of hitherto more reclusive oil and natural gas markets in Central Asia. Spurred by the need for reliable and affordable energy resources in Western Europe, on the one hand, and for investment in the former Soviet republics, on the other, a process was initiated that led to the European Energy Charter Declaration.⁴ The subsequent development and signing of the Energy Charter Treaty (ECT) (see Section 5) in 1994⁵ marked the first and only intergovernmental energy agreement aimed at investment protection that consists of legally binding rules, is backed up by a dispute settlement mechanism and contains detailed principles on transit (Goldthau and Witte, 2010; Haghighi, 2007, 188–9).

However, much has changed since the early 1990s as many new players have entered the 'global game' and concerns over climate change have risen to the top of the international policy agenda. Such new players include major NOCs, commodity traders and powerful intermediary companies. These developments translated into a surge in global energy demand and speculation, on the one hand, and a growing awareness of the need to adequately incorporate emerging countries within a global climate change agreement, on the other.

On a closer look, these new actors differ in terms of their impact on global energy markets. Traders can worsen price volatility and uncertainty in the market, whereas intermediary companies can serve to reduce overall transparency of transactions. That being said, the 'real impact' is generated by NOCs when taking into account factors such as the level of energy demand and the effects on

3 In 1973 the Arab members of the Organization of the Petroleum Exporting Countries (OPEC) instigated an oil embargo and curbed their exports to the United States (US) and Western Europe as a response to support for Israel during the Yom Kippur war. The 1979 Iranian revolution caused a major disruption in Iranian oil production and exportation. After resumption of exports production was irregular and at a lower volume, causing prices to rise. During the Iran–Iraq war that followed in 1980 Iranian production virtually ground to a halt.

4 *Energy Charter Treaty* (and related documents), p. 209. Available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf#page=211. Accessed on 9 June 2010.

5 *Ibid.*, pp. 37–161.

climate change at a global level. The most prominent among these are the NOCs of Brazil, Russia, India and China (BRIC). Russia and Brazil have the additional impact of being major suppliers of gas (Russia) and ethanol (Brazil).

A further factor complicating international cooperation is that the BRIC countries and their NOCs seem to demonstrate a preference for a 'state-centred' approach to energy, characterised by national autonomy and control, as opposed to being anchored in multilateral governance frameworks (Van de Graaf, 2008, 39; Goldthau and Witte, 2010; Perovic, 2008; Chen and Ni, 2008; Daojing, 2006; Baumann, 2010, 85–7).

The aim here is to analyse the strength and ability of the existing international energy architecture to govern global energy relations (specifically in the hydrocarbon sector), focusing on the role of emerging and developing countries. Section 2 makes an assessment of the very notion of energy security and its implications for global energy governance. Sections 3 to 6 analyse the most influential international energy fora and institutions with a particular view to identifying their ability to effectively govern global energy relations, the role of emerging and developing countries within the current architecture, and the potential for these fora and institutions to contribute to an inclusive and effective form of global energy governance. Section 7 provides a critical appraisal of the abilities of these organisations to contribute to global energy governance and proposes recommendations for international energy cooperation.

2. Energy security

Energy security is a concept that has been increasingly translated into a policy priority, as illustrated, *inter alia*, by its inclusion in the European Security Strategy, the 2010 US National Security Strategy and the recent Russian proposal for new rules on international energy cooperation.⁶

It is difficult to provide a universal definition of energy security because it means different things to different people. The aforementioned three strategic documents are illustrative in that regard. Whereas the European Union (EU) and US frame energy security primarily as a response to an unwelcome dependence on external suppliers,⁷ Russia, on the other hand, sees energy security in terms of unconditional state sovereignty over natural

6 Council of the European Union, *A Secure Europe in a Better World: European Security Strategy*, Brussels, 12 December 2003; *National Security Strategy*, Washington: The White House, May 2010; President of Russia, *A Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles)*, President of Russia, 21 April 2009. Available at <http://eng.kremlin.ru/text/docs/2009/04/215305.shtml>. Accessed on 10 March 2010.

7 The 2003 European Security Strategy reads: 'Energy is a special concern for Europe. Europe is the world's largest importer of oil and gas. Imports account for about 50 per cent of energy consumption today. This will rise to 70 per cent in 2030. Most energy imports come from the Gulf, Russia and North Africa.' See Council of the European Union, *supra* note 6, p. 3. The 2008 report frames energy security in a similar fashion but gives the issue a more central position within the document, illustrative of its rising importance. See Council of the European Union, *Report on the Implementation of the European Security Strategy*, Council Doc. S407/08, Brussels, 11 December 2008. The 2010 US National Security Strategy reads: 'We must transform the way that we use energy, diversifying supplies, investing in innovation and deploying clean energy technologies. By doing so, we will enhance energy security, create jobs and fight climate change.' See *National Security Strategy*, May 2010, p. 10.

resources, reformed transit dispute mechanisms and a guarantee that access to international energy markets is non-discriminatory and competitive.⁸

Next to these differing interpretations between producers and consumers, the meanings attached to energy security are further contested depending on whether a country in question is an exporting, importing or transit state. Furthermore, the way in which a country defines energy security to a large extent hinges on its own 'energy situation', that is the composition of its national energy mix and the extent of dependency on particular suppliers.

2.1. Security of supply

A commonly used term when speaking of energy security is what is known as 'security of supply' (Haghighi, 2007, 14). Energy security in this regard is more about access to sufficient amounts of energy, the affordability thereof and the protection against supply interruptions (Fuerth, 2005, 411 and 413; Yergin, 2006, 70). Some authors are in favour of a more stringent interpretation of 'security', emphasising that energy security should not only be about reliable access to supplies but should also be about protecting its vital infrastructure against external threats, both domestically and internationally (Kalicki and Goldwyn, 2005, 2; Koknar, 2009; Nincic, 2009; Yergin, 2006).⁹

It is clear, however, that such views on energy security primarily originate from a consumer perspective. A supplier state would likely be more concerned about sustained demand and price stability so that its national budget can count on a reliable flow of revenues (Baumann, 2010, 88; Yergin, 2006, 71). In this regard one should not neglect the pressures on exporting nations to comply with domestic supply obligations in light of their own economic expansion and population growth (Luft and Korin, 2009, 6). Similarly, a transit state's primary energy security concerns are more likely to revolve around ensuring a reliable flow of revenues, either from transit fees or through a percentage of gas shipped as a payment in kind. The importance of revenues generated from transit is well reflected in the frequently troublesome negotiations between Belarus, Ukraine and Russia over transit fees for natural gas destined for Europe.¹⁰ A significant part of a transit state's energy security policy is therefore aimed

8 See President of Russia, *supra* note 6. On this proposal see also Bochkarev, A. (2010) 'Redrawing the Global Energy Blueprint', *European Voice*, 12 February 2010. Available at <http://www.europeanvoice.com/article/2010/02/redrawing-the-global-energy-blueprint/67151.aspx>. Accessed on 16 June 2010. See also Belyi, A. (2009) *A Russian Perspective on the Energy Charter Treaty*, Real Instituto Elcano. Available at http://www.kent.ac.uk/politics/carc/research/eag/papers/ARI98-2009_Belyi_Russian_Perspective_Energy_Charter_Treaty.pdf. Accessed on 16 June 2010.

9 At the time of writing a Japanese oil tanker carrying over 270,000 tonnes of oil suffered damage due to an explosion in the Strait of Hormuz. Speculation ensued as to whether the explosion was caused by an attack or an accident. In any event the incident again focuses attention on the 'bottleneck' nature of the Strait of Hormuz through which millions of barrels of oil pass each day. See CNN, *Officials: Explosion Damages Japanese Tanker in Strait of Hormuz*, 28 July 2010. Available at <http://edition.cnn.com/2010/WORLD/asiapcf/07/28/uae.tanker.explosion/index.html?iref=allsearch#fbid=UcvafNPBNjZ>. Accessed on 29 July 2010. Others doubt the ability of countries such as Iran to pose a credible threat to the Strait of Hormuz. See Gholz, E. (2009) 'The Strait Dope: Why Iran Can't Cut Off Your Oil', *Foreign Policy*. Available at http://www.foreignpolicy.com/articles/2009/08/12/the_strait_dope. Accessed on 29 July 2010.

10 The negotiations at the end of 2008 did not result in an agreement, prompting Russia to cut off the gas. A detailed discussion of these negotiations is outside the purview of this chapter, however. For a detailed analysis of the dispute and the ability of the EU to handle future supply disruptions see De Jong, Wouters and Sterkx (2010). At the time of writing another crisis broke out, this time between Belarus and Russia as a result of outstanding payments on the part of Belarus. See EUobserver, *Russia to Cut Supplies to Belarus*, 21 June 2010. Available at <http://euobserver.com/9/30328>. Accessed

at the consolidation, enhancement and utilisation of its strategic geographical position in between suppliers and consumers.

Such interpretations set aside, energy security also necessarily possesses a wider dimension given the finite nature of fossil fuels. This prompts consumer, producer and transit states' alike to search for alternative sources of energy.¹¹ Moreover, recent events involving the oil spill in the Gulf of Mexico¹² have illustrated that energy security revolves as much around acquiring stable access to sources of fuel as around its careful and safe handling.

2.2. Securing supply?

The aforementioned interpretations of energy security notwithstanding, one has to note that a large portion of the world population lives on less than USD 1.25 a day¹³ without adequate and reliable access to electricity. With traditional wood, crop residues and animal waste as primary sources of energy, the Least Developed Countries (LDCs) are likely to frame energy security in terms of the availability of clean water and energy for cooking, heating, lighting and public transportation (Luft and Korin, 2009, 5). Moreover, many energy-exporting countries are developing nations and, given their often strong dependence on a single income from the sale of energy, they can be classified as so-called 'rentier states'.¹⁴ Often these states have struggled for decades to overcome their exposure to balance of payments deficits as a result of changes in energy prices (Haghighi, 2007, 381; Yergin, 2006, 71).

In the past some authors have claimed that, where an economy is more diversified and developed, the chances of there being security, prosperity and stability are much higher (Lipset, 1959).¹⁵ Taking into account the fact that an important part of consumer nations' energy security policy is directed at improving the climate for foreign investors in supplier countries, an integral part of such policy should also be the strengthening of essential social and physical infrastructures that allow for such investment – the building blocks of a developed and diversified economy (Haghighi, 2007, 386–7). In other

on 21 June 2010. See also EurActiv, *Russia Orders Belarus Gas Supplies Cut*, 21 June 2010. Available at <http://www.euractiv.com/en/energy/russia-orders-belarus-gas-supplies-cut-news-495439>. Accessed on 22 June 2010. The dispute sent bilateral diplomacy roaring with a quick response on both the Russian and the EU side, careful not to harm ongoing deliveries to the European market. See EUobserver, *Russia Launches EU Gas Communications Blitz*, 21 July 2010. Available at <http://euobserver.com/9/30332>. Accessed on 22 July 2010.

11 In recent years the debate about the finite nature of fossil fuels has been dominated by the 'Peak Oil' theory (Deffeyes, 2001; Goodstein, 2004; Minqi, 2007; Roberts, 2005; Ruppert, 2009; Yergin, 2008).

12 On 20 April 2010 an explosion aboard the drilling rig 'Deepwater Horizon' in the Gulf of Mexico caused the largest oil spill in the history of the industry. The rig was at the time under lease by BP.

13 For example, according to the World Bank, 50 per cent of people in Sub-Saharan Africa lived below USD 1.25 a day in the first quarter of 2009. See World Bank, *Regional Brief: Sub-Saharan Africa*. Available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,menuPK:258652~pagePK:146732~piPK:146828~theSitePK:258644,00.html>. Accessed on 1 September 2010.

14 The concept of the 'rentier state' is often referred to in connection with the so-called 'resource curse' thesis, or the phenomenon whereby states that are well endowed with natural resources tend to have less economic growth and are generally less developed than countries that possess far fewer of such resources (Collier, 2003; Le Billon, 2006; Friedman, 2006; Karl, 1997).

15 Comanescu, L. (1999) *The Link Between Economics, Security and Stability: The Case of South-Eastern Europe*, p. 36. Available at <http://www.nato.int/docu/colloq/1999/pdf/036-042.pdf>. Accessed on 16 June 2010.

words, when speaking about broader energy security policy, the links with development cooperation should not be overlooked.

2.3. Competition or cooperation?

Overall, the debate about energy security is often viewed as one of competition between states, where one state's security comes at the expense of another. Much of this belief is fuelled by consumer countries' attempts to frame energy security in terms of a heightened vulnerability *vis-à-vis* supplier states.¹⁶ This causes the country in question to be portrayed as if it were at the mercy of the opportunistic behaviour of suppliers. The continued haggling between Belarus, Ukraine and Russia seems to go some way in strengthening this argument – not least from a European point of view. However, such reasoning ignores important interdependencies between supplier and consumer nations in terms of supply and demand. More importantly, it begets the institutional dimension that underpins the relations between suppliers and consumers. One should not forget that market rules and international institutions increasingly structure global energy relations (Goldthau and Witte, 2010, 2).¹⁷

Concerted action aiming to influence global energy relations is too often organised from either a consumer or a producer point of view alone. This has resulted in a fragmented contemporary global energy landscape that contains a patchwork of institutions, organisations and fora, where it proves difficult to unite both sides. Add the rise of the BRIC countries, plus the energy concerns of developing nations, and the picture becomes even more complex.

The question therefore is: to what extent can the existing international architecture contribute to a move away from zero-sum *competition* to positive-sum global energy *cooperation*? To answer that question, the following four sections analyse a selection of key actors within the global energy debate for their ability to effectively govern international energy relations. These include the more institutionalised organisations such as the IEA and the ECT, on the one hand, and the international fora characterised by less stringent cooperation such as the International Energy Forum (IEF), the Group of Eight (G-8), and the Group of 20 (G-20), on the other. While this selection is not exhaustive, it represents organisations and fora that stand out in terms of their impact *on* and prospects *for* global energy governance.

3. The International Energy Agency

The IEA is an intergovernmental organisation attached to the Organisation for Economic Co-operation and Development (OECD) that was founded in the

16 Essentially, such attempts by policy-makers can be labelled 'securitisation' moves. Energy issues are framed as extremely urgent, that is as security threats, and become policy priorities that should be dealt with immediately (and by extraordinary means). It is important to stress that this is (i) a subjective process, since it is the choice of political actors – by means of security discourse – to move policy issues into the realm of security, as well as (ii) an inter-subjective process, since the (successful) securitisation of a policy issue depends on the approval of society at large (Buzan, Waever and De Wilde, 1998, pp. 21–5).

17 Al-Faisal, Prince T. (2009) 'Don't Be Crude: Why Barack Obama's Energy Dependence Talk is Just Demagoguery', *Foreign Policy*, p. 2. Available at http://www.foreignpolicy.com/articles/2009/08/17/dont_be_crude. Accessed on 29 June 2010.

wake of the 1973–74 oil crisis. The IEA's initial role was to 'repair' severe disruptions in the global oil market through coordinated release of strategic oil stocks.¹⁸ The IEA has since broadened its scope¹⁹ to include the promotion of energy security, environmental protection, economic growth through stable energy supplies and free markets, and global engagement with non-member countries through its Global Energy Dialogue.²⁰

The IEA regularly issues publications and statistical analyses and is widely recognised as an authority on energy market projections, thus functioning as a kind of agenda-setter for governments and the private energy sector, reaching beyond IEA member countries alone (Florini and Sovacool, 2009; Baumann, 2010, 80). In 1993 the IEA established what is known as its Global Energy Dialogue, which aims to reach out to non-member countries. China, India and Russia have been given particular attention and bilateral agreements with each of them have been concluded (Bamberger, 2004). In addition, the IEA has engaged non-member countries in its 'Implementing Agreements', which are operational networks that allow interested member and non-member governments to pool resources and to stimulate the research of particular energy technologies (Van de Graaf and Lesage, 2009, 299).

Its broader scope notwithstanding, the core of the IEA still revolves around the emergency oil-sharing mechanism, which obliges IEA member countries to hold oil stocks equivalent to at least 90 days of net oil imports.²¹ So far a coordinated release of oil stocks has occurred only twice. The first instance was shortly before the outbreak of the Gulf War in 1991 to dampen fears over shortages in the market. The second time was in 2005 in the aftermath of the hurricanes in the Gulf of Mexico that had destroyed much of the oil infrastructure in the region.²²

Since its inception the IEA has seen a steady rise in its number of members, reaching its current total of 28 member countries in 2008.²³ At the time of the IEA's creation the combined share of its members constituted the bulk of global oil consumption, thus providing the organisation with a sufficient counterweight to a supply interruption. With that balance having since shifted more towards the BRIC countries, the IEA's ability to respond to market distortions has come under stress. This shift has profound consequences for the effectiveness of the IEA's oil-sharing mechanism because the decline in the relative share of world oil consumption entails that, in the event that a coordinated release of oil stocks is deemed necessary, its effect shall be undermined as the IEA's share of world oil consumption has fallen relative to other major players, notably China and India (Bamberger, 2004, 154–5; Florini and Sovacool, 2009; Kohl, 2010, 204; Kalicki, and Goldwyn, 2005; Colgan, 2009, 7; Harks, 2010, 249; Yergin, 2006, 75).

18 *Decision of the Council of the Organisation for Economic Co-operation and Development Establishing an International Energy Agency of the Organisation*, 15 November 1974. Available at <http://www.iea.org/about/docs/apendx4.pdf>. Accessed on 29 June 2010.

19 *About the IEA*. Available at <http://www.iea.org/about/docs/iea2010.pdf>. Accessed on 19 July 2010.

20 *Agreement on an International Energy Program* (as amended on 25 September 2008). Available at <http://www.iea.org/about/docs/IEP.PDF>. Accessed on 29 June 2010.

21 *About IEA Emergency Response*, p. 3. Available at http://www.iea.org/textbase/nppdf/free/response_system.pdf. Accessed on 19 July 2010.

22 *Ibid.*, p. 11.

23 Currently all OECD countries are members of the IEA, except for Mexico and Iceland.

Changing this situation is not a clear-cut affair. First, membership of the IEA is limited to OECD countries, which means that, in order to join the IEA, BRIC countries must first join the OECD – negotiations that are likely to be cumbersome, given the requirement for applicants to conform to the principles of representative democracy and a free market economy.²⁴ Second, the requirement to hold oil stocks equivalent to 90 days of net imports is an expensive endeavour and BRIC countries China and India fall well short of this obligation (Kohl, 2010, 205–6; Van de Graaf, 2008, 45; Van de Graaf and Lesage, 2009, 299; Colgan, 2009, 11; Harks, 2010, 248). Third, it is not necessarily in the interest of the said countries to join the IEA as the current system allows them to enjoy the benefits without necessarily making the required investments (Van de Graaf, 2008, 46; Van de Graaf and Lesage, 2009, 299; Colgan, 2009, 10; Florini and Sovacool, 2009). Finally, the vote weight allocation system within the IEA Governing Board is partially based on the oil consumption shares of 1973 and is thus disadvantageous to the BRIC countries (Van de Graaf 2008, 46; Van de Graaf and Lesage, 2009, 306).

In order for the emergency oil-sharing mechanism to remain effective, reform is needed. But this is not without implications for the vested powers within the IEA as new members are likely to seek voting rights in line with their respective shares of world oil consumption (Colgan, 2009, 10; Van de Graaf, 2008).

However, the IEA Executive Director has repeatedly recognised the need to ultimately incorporate China and India as members. Moreover, US Secretary of State Hillary Clinton suggested during her confirmation hearing at the Senate Foreign Relations Committee in January 2009 that the IEA should start investigating ways for Chinese and Indian membership and that the State Department would support its efforts (Florini and Sovacool, 2009; Colgan, 2009, 10).

In spite of these hopeful signs, redistributing the votes would ultimately boil down to a zero-sum game, where one country's gain constitutes another country's loss. Powerful states benefit from the existing arrangements and there thus seems little incentive for them to change the current system (Colgan, 2009, 8). Therefore, such reform seems unlikely for the moment, which means alternative paths should be sought to achieve results. Other fora such as the IEF, the G-8 and the G-20 can have a role to play in this regard. The following section discusses the role of the G-8 and the G-20 and their partnership with the IEA in more detail, whereas Section 6 focuses on the IEF.

4. The G-8 and the G-20

The G-8 represents a forum which allows for informal dialogue and discussion between heads of state and government of the world's major industrial democracies on a broad range of current international economic and political

24 *About OECD*. Available at http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1,00.html. Accessed on 26 July 2010.

issues. Its members are Canada, France, Germany, Italy, Japan, Russia, the United Kingdom (UK), and the US. The EU is a full participant in the G-8 summits, but it does not chair or host them. Early summits of the G-8 devoted relatively little attention to energy issues, but this changed significantly after the 2005 Gleneagles summit, chaired by then UK Prime Minister Tony Blair.

The Gleneagles summit made numerous strong commitments to climate change, clean energy and sustainable development and for the first time explicitly recognised human-induced climate change (Florini and Sovacool, 2009; Lesage, Van de Graaf and Westphal, 2009, 265). According to Kirton and Kokotsis, there were a total of 63 commitment statements in the climate change and energy area listed in the Gleneagles Plan of Action²⁵ aimed at the reduction of greenhouse gas (GHG) and the promotion of a low-carbon economy that was released after the summit.²⁶ The Gleneagles summit marked a decisive moment for cooperation between the G-8 and other institutions. The IEA was given a major role as adviser on the implementation of the Plan of Action and asked to look into alternative energy scenarios, whereas the World Bank was requested to develop a new Clean Energy for Development Investment Framework.²⁷

The IEA published its study in 2008, calling for, *inter alia*: the urgent pooling and implementation of the energy efficiency targets and energy technology programmes of the world's major economies; the improvement of energy efficiency statistics to allow future policies to advance on the basis of sound data and analysis; the promotion of commonality and ambition in measures and standards to accelerate the efficiency of energy-using appliances and equipment; the enhancement of global coal power stations' efficiency; the international coordination and deployment of carbon capture and storage initiatives; and the expansion of both the scope and scale of government and private-sector research and development (R&D) efforts to bring forward low-carbon transport options (IEA, 2008, 6–7).

The World Bank's Investment Framework for Clean Energy and Development was set up in 2007 and constitutes a comprehensive analysis of existing and possible public and private financing mechanisms. It aims to increase access to energy in developing countries, particularly Sub-Saharan Africa, to accelerate the transition to a low-carbon economy and to adapt to climate variability and change (Lesage, Van de Graaf and Westphal, 2009, 271; Kohl, 2010, 204; World Bank, 2007a,b, 8–22). The establishment of the Framework was followed by the launch of its associated Action Plan in April 2007, which was expected to provide total energy support in excess of USD 10 billion for the three-year period since the Framework's inception, up from USD 7 billion in the preceding three years (World Bank, 2007b, 1). After the Framework's inception the World Bank achieved a 40 per cent share of its total energy lending for

25 G-8 (2005) *Gleneagles Plan of Action: Climate Change, Clean Energy and Sustainable Development*. Available at http://www.mofa.go.jp/policy/economy/summit/2005/ccc_a.pdf. Accessed on 30 June 2010.

26 Kirton, J. and E. Kokotsis (2005) *Gleneagles Performance: Number of Documents, Words and Commitments*. Available at <http://www.g7.utoronto.ca/evaluations/2005gleneagles/2005commitments.html>. Accessed on 29 July 2010.

27 G-8 (2005) *The Gleneagles Communiqué* (points 11a and 11b). Available at <http://www.g7.utoronto.ca/summit/2005gleneagles/communique.pdf>. Accessed on 29 July 2010.

renewable energy and energy efficiency in the period 2007–09²⁸ and saw its lending activity in energy and mining increase to USD 6,267.4 million, up from USD 1,784 million in fiscal year 2007 (World Bank, 2009, 57). However, as impressive as these results may sound, a closer look at the World Bank's renewable portfolio shows that for fiscal year 2009 more than half relates to fossil energy efficiency and the majority of its renewable energy programmes are funded by specific donor funds and are therefore not a structural part of World Bank energy lending.²⁹

The 2006 G-8 summit in St Petersburg that followed gave less pronounced attention to climate change, clean energy and sustainable development and focused more specifically on energy security – most likely inspired by the gas dispute between Russia and Ukraine in January 2006. The summit released a comprehensive statement which made reference to the so-called 'Global Energy Security Principles'.³⁰ The summit also put forward the St Petersburg Plan of Action on Global Energy Security, calling for, *inter alia*: increased transparency, predictability and stability in global energy markets; the improvement of the investment climate in the energy sector; the enhancement of energy efficiency and energy saving; the diversification of countries' energy mix; ensuring the physical security of critical energy infrastructure; the reduction of energy poverty; and addressing climate change and sustainable development.³¹

The focus on sustainable development, clean energy and climate change was prioritised again a year later as, prior to the 2007 summit in Heiligendamm, the European Commission had put forward a proposal to create an international framework agreement on energy efficiency which contained quantitative targets.³² However, this proposal was considered too far-reaching by the participants that were in favour of a looser form of cooperation. This culminated in the creation of the International Partnership for Energy Efficiency Cooperation (IPEEC) which was formally set up a year later.³³ The goals of the IPEEC are to facilitate those actions that yield high energy efficiency gains, to compile best practices, to exchange information, to promote joint R&D and to develop public–private partnerships. IPEEC members choose to take action in the areas of their interest on a voluntary basis.³⁴

28 Government of the Netherlands (2010) *Position Paper of the Netherlands on Promoting World Bank Investments in Renewable Energy*, The Hague, July 2010, p. 1. Available at http://siteresources.worldbank.org/EXTESC/Resources/NL_Position_Paper_WB_RE_2010_July.pdf. Accessed on 1 September 2010.

29 Government of the Netherlands (2010), *supra* note 28.

30 The Principles mention, *inter alia*, the importance of transparent and competitive markets and the need for investment in all stages of the energy supply chain, safeguarded by an effective legal and regulatory framework. The document further calls for enhanced dialogue between stakeholders, diversification, the promotion of energy saving and efficiency measures both nationally and at international level, the environmentally sound development and use of energy, the deployment and transfer of clean energy technologies to tackle climate change, the safeguarding of critical infrastructure, and the addressing of the energy challenges of the poorest populations in developing countries.

31 G-8 (2006) *St Petersburg Plan of Action on Global Energy Security*, 16 July 2006. Available at <http://en.g8russia.ru/docs/11.html>. Accessed on 30 July 2010.

32 European Commission (2006) *Communication from the Commission on an Action Plan for Energy Efficiency: Raising the Potential*, COM(2006) 545 final of 19 October 2006, p. 16.

33 *Declaration of the International Partnership for Energy Efficiency Cooperation*. Available at <http://www.g7.utoronto.ca/energy/080608ipeec.pdf>. Accessed on 1 July 2010.

34 *Ibid.* The IPEEC's members include the energy ministers from the G-8 and those from China, India and Korea. The EU joined in January 2010. See IEA, *EU Joins International Partnership for Energy Efficiency Cooperation*. Available at <http://www.iea.org/journalists/latestinformation.asp?offset=100>. Accessed on 16 September 2010.

The 2007 summit also established what became known as the 'Heiligendamm Process'. This constituted an effort to intensify the dialogue with China, India, Brazil, Mexico and South Africa on several topics, including energy efficiency over a period of two years from 2007 to 2009 (Lesage, Van de Graaf and Westphal, 2009, 264; 2010).³⁵ The Process was organised around four working groups dealing with investment promotion and corporate social responsibility, development and Africa, innovation and intellectual property rights, and energy efficiency (Lesage, Van de Graaf and Westphal, 2010).

In 2008 the G-8 endorsed the cutting of GHG emissions by 50 per cent by 2050.³⁶ Prior to the summit the IEA had put together 25 recommendations on energy efficiency, which were promised implementation by the G-8.³⁷ Equally, the IEA was asked to develop a roadmap for innovative technologies and to cooperate on carbon capture and storage.³⁸ One month earlier a special energy ministers' meeting had been held in Aomori (Japan), which formally established the IPEEC.³⁹ With its secretariat hosted by the IEA, the IPEEC represents a world first whereby the major powers have agreed to establish cooperation on energy efficiency through a coherent policy framework (Lesage, Van de Graaf and Westphal, 2009, 266).

Since its inception IPEEC members have contributed over USD 1.6 million in funding in support of six initiatives that support energy efficiency. These initiatives include: efforts to help share best practices for energy efficiency through on-site training workshops and online materials; the provision of intelligent building solutions through connecting numerous building efficiency organisations; research into how energy efficiency efforts can better leverage financing from domestic sources such as commercial banks; the creation of a forum for policy-makers and industry leaders to share best practices for managing and reporting industrial energy consumption; the acceleration of efforts to develop and implement methods for energy efficiency indicators that measure and report energy performance; and a global initiative to collaborate on test methods to measure appliance efficiency and coordinate incentives for manufacturers to provide more efficient equipment and appliances.⁴⁰

Notwithstanding the positive impetus that these projects generate, one cannot help but feel that with USD 1.6 million they are hopelessly underfunded with respect to their aims. Furthermore, throughout its existence the G-8 has been roundly criticised for its exclusive character and therefore largely

35 *Joint Statement by the German G-8 Presidency and the Heads of State and/or Government of Brazil, China, India, Mexico and South Africa*, on the occasion of the G-8 Summit in Heiligendamm, Germany, 8 June 2007, p. 3. Available at http://www.g-8.de/Content/EN/Artikel/_g8-summit/anlagen/o5-erklarung-en,templateId=raw,property=publicationFile.pdf/o5-erklarung-en.pdf. Accessed on 1 July 2010.

36 *G-8 Hokkaido Toyako Summit Leaders Declaration*, Hokkaido Toyako, 8 July 2008, point 23. Available at http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080714_en.html. Accessed on 1 July 2010.

37 *Ibid.*, point 26. These recommendations pertained, *inter alia*, to promoting energy efficiency in buildings, appliances, lighting, transport, industry, power utilities and cross-sectoral areas.

38 *Ibid.*, point 31.

39 *Declaration of the International Partnership for Energy Efficiency Cooperation*, 8 June 2008. Available at http://ec.europa.eu/dgs/energy_transport/international/int/g8/doc/2008_06_07_ipeec_declaration_en.pdf. Accessed on 16 July 2009.

40 Each of these initiatives is led by a specific member of the IPEEC. For more information see US Department of Energy, *Global Leaders Meet to Collaborate on Energy Efficiency Goals*, 11 May 2010. Available at <http://www.energy.gov/news/8962.htm>. Accessed on 16 September 2010.

illegitimate nature when it comes to global governance (Florini and Sovacool, 2009; Cooper, 2010, 753–4; Payne, 2010, 729, 733 and 738).

In contrast, the G-20 stands out in having a far broader membership that spans the full range of major (emerging) economies worldwide. Established in the wake of the 1999 Asian financial crisis, in an attempt to stabilise global financial markets, the G-20 saw its role as an economic forum strengthened during the recent financial crisis. With respect to energy, however, the G-20 is a relatively new actor on the stage. The 2009 Pittsburgh summit reiterated earlier G-8 commitments to the promotion of renewable, clean and affordable energy for developing countries and LDCs and included a specific paragraph on energy security and climate change which reconfirmed the commitment to the St Petersburg Global Energy Security Principles.⁴¹

The Toronto summit of June 2010 reaffirmed the G-20's commitment to the Copenhagen Accord on climate change and welcomed the report prepared by the IEA, OPEC, OECD and the World Bank on energy subsidies.⁴² In this regard, G-20 members heralded the work done by finance and energy ministers on delivering nationally appropriate strategies and timeframes, for the rationalisation and for the medium-term phasing out of inefficient fossil fuel subsidies that encourage wasteful consumption, while taking into account vulnerable groups and their development needs.⁴³ Given this context, India announced that it would deregulate retail petrol prices and raise the prices for diesel, kerosene and liquid petroleum gases, with a further commitment to phase out the diesel subsidy over time. Similarly, in Mexico the government began phasing out motor fuel subsidies while conducting a household-level census of fuel consumption to allow for targeted compensation of low-income households.⁴⁴ In order to thoroughly phase out these energy subsidies, however, some call for more stringent action in the form of country-specific research and data analysis to identify what subsidies governments are providing, their scale, impacts and the measures necessary to overcome challenges to reform.⁴⁵

Overall, the references and acknowledgements to agreements reached at earlier G-8 summits seem to indicate that there is some policy continuity within the G-20. Nevertheless, at this stage it is difficult to say how the G-20's role in energy governance will materialise because much depends on the interplay between the major powers. When compared, the G-8 has a much stronger and longer-standing profile in energy than does the G-20, but its results are somewhat mixed due to a lack of concrete targets, the non-binding

41 *G-20 Leaders' Statement, The Pittsburgh Summit*, 24–25 September 2009, points 23–25 of the Preamble and points 28–33 on Energy Security and Climate Change. Available at http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf. Accessed on 1 July 2010.

42 *Analysis of the Scope of Energy Subsidies and Suggestions for the G-20 Initiative*, 2010. IEA, OPEC, OECD, World Bank Joint Report, prepared for submission to the G-20 Summit Meeting, Toronto (Canada), 26–27 June 2010. Available at http://siteresources.worldbank.org/EXTENERGY2/Resources/G20_Subsidy_Joint_Report.pdf. Accessed on 1 September 2010.

43 G-20 (2010) *Toronto Summit Declaration*, 26–27 June 2010, points 41–42. Available at: http://www.g20.org/Documents/g20_declaration_en.pdf. Accessed on 30 July 2010.

44 The White House, *The G-20 Summit in Toronto: Acting on Our Global Energy and Climate Change Challenges*, 27 June 2010. Available at <http://www.whitehouse.gov/the-press-office/g-20-summit-toronto-acting-our-global-energy-and-climate-change-challenges>. Accessed on 16 September 2010.

45 The Global Subsidies Initiative Policy Brief, June 2010. *Delivering on the G-20 Commitment to Reform Fossil-Fuel Subsidies: Essential Outcomes from Toronto*. Available at http://www.globalsubsidies.org/files/assets/ffs_pb6_delivering.pdf. Accessed on 16 September 2010.

nature of its commitments and overall problems with compliance (Lesage, Van de Graaf and Westphal, 2010). This being said, however, the fact that the G-8's commitments are non-binding should not necessarily be qualified as a problem *per se*, given that governments are more easily willing to commit to more ambitious courses of action through non-binding agreements.

In fact, the G-8's 'loose' set-up allows the organisation to act as a kind of 'policy entrepreneur', able to foster high-level political engagement among its members, including towards the countries involved in the Heiligendamm Process. The G-8 is small enough to provide space for effective discussions, yet large enough to include powerful leaders that can exert significant influence on global problems through coordination of their national policies. Moreover, because meetings take place at the levels of heads of state and government, the proceedings are not hampered by an internal bureaucracy that would raise questions of accountability (Florini and Sovacool, 2009). The frequency of G-8 meetings also enables it to keep a close eye on the development of its previous agreements and commitments and capitalise on the engagement of its members. Cooperation with other organisations such as the IEA is useful in this regard as it provides the working group with quick expertise that not only aids the decision-making process but could also increase the engagement on the part of the Heiligendamm countries (Lesage, Van de Graaf and Westphal, 2009, 269; Florini and Sovacool, 2009).

In the long term, however, engagement of the Heiligendamm countries in the framework of the G-8 ultimately falls short of their full integration. Therefore, in order for the organisations' legitimacy to be upheld, a gradual transfer of the G-8's expertise in global energy matters to the more inclusive G-20 level is the preferred course of action in the long term.

5. The Energy Charter

The ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were signed in December 1994 and entered into force in April 1998.⁴⁶ The Energy Charter represents a legally binding multilateral energy agreement that has as its aim to strengthen the rule of law on energy issues by creating a level playing field of rules to be observed by all participating governments and to mitigate risks associated with energy-related investment and trade. The Energy Charter is the only multilateral investment treaty in the field of energy that has legally binding rules and is backed up by a dispute settlement mechanism. The ECT provides extensive protection, arguably the most important of which is that against expropriation through, for example, nationalisation of industries – a feat not uncommon in the energy world.⁴⁷

The ECT is open for signature to all countries; producer, consumer and transit states, industrialised, emerging and developing nations alike can all become parties to it. Indeed, countries that have already signed include

46 Energy Charter Treaty (and related documents). Available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf. Accessed on 29 June 2010.

47 Art. 13, ECT.

important Central Asian producer and transit states such as Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan (Selivanova, 2010, 62). Issues regarding the effectiveness of the ECT's dispute resolution mechanism and the representativeness of its member base remain, however.

Its 'open character' notwithstanding, the ECT is primarily a European creation, which is to some extent reflected by the emphasis placed on issues that could be seen as primarily important to consumer nations, which include, apart from the aforementioned protection against expropriation, a strong emphasis on non-discriminatory practices concerning investment by other contracting parties and ensuring that transit is free from interruptions. ECT members are obliged to refrain from discriminatory practices concerning foreign investments by other contracting parties to the ECT.⁴⁸ This provision, however, only grants such protection to investments already made. In other words, regarding the process of making investments, there is only a 'best endeavours' requirement to grant non-discriminatory treatment (Selivanova, 2010, 64; Haghighi, 2007, 195).⁴⁹ The ECT prescribes detailed rules on the subject of transit, obliging its members to take the necessary measures to facilitate the transit of energy, consistent with the principle of uninterrupted transit, and to secure established energy flows.⁵⁰ Pursuant to the said principle, ECT members are under an obligation not to let transit be interrupted as a result of a conflict with another member.⁵¹

The ECT's Transit Protocol,⁵² which is currently still under review, would significantly boost the regulatory oversight of energy transit within Eurasia. However, transit is a delicate issue between producer and consumer countries, causing negotiations to be long and inconclusive. In recent years Russia, one of the Protocol's main critics, has increasingly voiced its concerns over the protection of producer countries' interests under the ECT in spite of the recognition of sovereignty over energy resources,⁵³ ultimately leading to Russia's refusal to ratify the ECT (De Jong, Wouters and Sterkx, 2010). The ECT was, however, applied provisionally, until on 20 August 2009 Russia officially stated that it intended to terminate provisional application.⁵⁴ Russia's refusal stemmed mainly from opposition to opening up its network to lower-cost gas from Central Asian countries, a lack of access to the European market and

48 Art. 10(1), ECT.

49 Art. 10(2), ECT. Negotiations on a supplementary treaty concerning protection at the pre-investment stage were initiated in 1995, which ultimately led to the formulation of a text for such an agreement. In the end political issues within the Charter prevented the conclusion of the agreement (Selivanova, 2010, p. 64; Haghighi, 2007, p. 195).

50 Art. 7(1), ECT.

51 *Ibid.* Art. 7(5), ECT, obliges ECT members to 'secure established flows of energy materials and products to, from or between the areas of other contracting parties'. A core element of this principle is to prevent non-transit-related issues (commercial issues) from having a negative impact on transit volumes.

52 *Final Act of the Energy Charter Conference with Respect to the Energy Charter Protocol on Transit (Draft) of 31 October 2003*. Available at http://www.encharter.org/fileadmin/user_upload/document/CC251.pdf. Accessed on 22 July 2010.

53 The Treaty states that the contracting parties 'recognise State sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law.' See Art. 18(1), ECT. Art. 18(4) ECT nuances this provision slightly by stating that 'the contracting parties undertake to facilitate access to energy resources, *inter alia*, by allocating in a non-discriminatory manner on the basis of published criteria authorisations, licenses, concessions and contracts to prospect and explore for or to exploit or extract energy resources'.

54 The Energy Charter Secretariat was notified on 20 August 2009 of Russia's desire to terminate provisional application. See <http://www.encharter.org/index.php?id=414>. Accessed on 22 July 2010.

the fact that the ECT's Transit Protocol would not apply between European countries (the EU being defined as a single economic space), which Russia saw as a discriminatory practice (Haghighi, 2007, 348; Bordachev, 2003, 88; Youngs, 2009, 80–1). Doubts have since risen over the ECT's ability to quell supply interruptions, in particular after the January 2009 gas dispute between Russia and Ukraine.⁵⁵

Other concerns relate to the ECT's member base. A closer look reveals its Eurasian dominance, with virtually every European country having joined. Important transit nations such as Ukraine and Belarus,⁵⁶ as well as Turkey and several Central Asian producer and transit nations, are also parties to the ECT. What stands out, however, is that some of the world's larger consumer nations such as the US,⁵⁷ China and Canada are not members, the exceptions being Australia⁵⁸ and Japan. Nevertheless, more crucial for the functioning of the Energy Charter is the absence of most of the world's key producer nations.⁵⁹ Furthermore, with virtually no LDCs being parties to the ECT, serious concerns exist over the ability of the Energy Charter to effectively contribute to global energy governance.

Legally, the ECT has incorporated the 1979 General Agreement on Tariffs and Trade (GATT)⁶⁰ decision on developing countries, referring to what is known as the 'Enabling Clause', which addressed the role of developed countries in the economic progress of developing countries (Energy Charter Secretariat, 2001, 66). It became known as the 'permanent legal basis' for 'Special and Differential Treatment' and the continuation of GATT's Generalised System of Preferences (GSP).⁶¹ However, there are no other exceptions specifically designed to favour developing countries incorporated in the ECT. That suggests that developing countries are bound by the same rules as developed countries (Haghighi, 2007, 254–60).

Of particular relevance in this context is the often used practice of energy exporters (many of which are developing countries) to handle a system of 'dual pricing' whereby higher prices are charged for products destined for export and lower ones if meant for domestic consumption, or vice versa, the goal being to stimulate either domestic production and consumption or exports (Haghighi, 2007, 274). It is argued that such pricing is a 'hidden subsidy'. Nevertheless, Art. 27(2)(b) of the relevant WTO agreement, while recognising the role that subsidies play in the economic development of a country, permits their use with regard to developing nations for a period of eight years from

55 For a detailed analysis of the January 2009 dispute and the efforts to resolve it by the parties concerned see De Jong, Wouters and Sterkx (2010).

56 Ratification of the Treaty is still pending in Belarus. Provisional application takes place in accordance with Art. 45, ECT, which states that even without ratification the Treaty is provisionally applicable, provided that it does not contradict existing domestic legislation.

57 For a detailed analysis of the objections of the US with respect to the rules of the ECT see Fox (1996), p. 194.

58 In Australia the Treaty is also applied provisionally, pending ratification.

59 Algeria, Egypt, Indonesia, Iran, Kuwait, Nigeria, Qatar, Saudi Arabia, United Arab Emirates and Venezuela are all observers to the ECT.

60 GATT was replaced by the current World Trade Organization (WTO) in 1995.

61 The GSP was designed in 1971 to allow developed countries to grant preferential treatment to developing countries. It is considered the key undertaking on behalf of developed countries to provide preferences for developing country access to their markets.

the date of entry into force of the WTO agreement.⁶² Moreover, if a developing country considers it necessary to extend this period based on what it sees as a legitimate development ground,⁶³ it can enter into consultation with the WTO Subsidies Committee which will determine whether this is justified based on the economic, financial and development needs of the country in question.

However, apart from the possibility of providing tariff reductions to developing countries for imports of natural gas or oil, the ECT does not allow for any other exception listed in the WTO for developing nations on development grounds (Haghighi, 2007, 285–6). The inability of the Energy Charter to allow for such exceptions for development reasons is an impediment for developing nations (many of which are important energy-exporting nations) to become parties to the ECT.

As a counterweight to the Energy Charter's consumer orientation, as well as its subsequent inability to take producer countries' concerns adequately into account, the IEF potentially provides some room for manoeuvre.

6. The International Energy Forum

Whereas the IEA and the ECT were created against the backdrop of concerns stemming from consumer countries, the IEF aims to bring both producers and consumers together on one platform. The IEF represents the world's largest biennial gathering of energy ministers with membership open to all countries that wish to participate. Meetings are attended by all major oil market nations, and BRIC countries Russia, India and China are among the IEF Executive Board members.⁶⁴ The IEF was created in the early 1990s, primarily in an attempt to increase transparency and reduce transaction costs between consumers and producers in order to dampen volatility in international oil markets (Goldthau and Witte, 2010, 8).⁶⁵

Oil prices dropped below USD 10 per barrel in the 1990s and rose to over USD 150 per barrel in 2008, only to plummet again when the economic crisis set in.⁶⁶ This volatility causes consumer countries to make expensive adaptations in their consumption patterns as price changes cause the industry to opt for a different allocation of energy products and more energy-efficient capital goods are bought by individual users. For producer countries it means that national budgets dependent on oil revenues are rendered unpredictable, swinging between surplus and deficit, which hampers long-term macro-economic policy (Harks, 2010, 252).

This dramatic price increase is of course partly explained by the surge in demand coming from Asia. However, it seems that more structural reasons

62 Art. 27(2)(b), *WTO Agreement on Subsidies and Countervailing Measures*.

63 Such grounds would include regional growth, technological R&D funding and production diversification. See WTO (2001), point 10.2, p. 6.

64 Other members include Algeria, Egypt, France, Germany, Iran, Italy, Japan, Kuwait, Mexico, Netherlands, Norway, Qatar, Saudi Arabia, Turkey, UK, Venezuela, and the IEA and OPEC Secretariats.

65 International Energy Forum, *Energy Security Through Dialogue*, p. 2. Available at <http://www.ief.org/Documents/International%20Energy%20Forum%20brochure.pdf>. Accessed on 30 June 2010.

66 For more insights into volatile oil prices see BBC News, *Q&A: Volatile Oil Prices*, 5 June 2009. Available at <http://news.bbc.co.uk/2/hi/business/7425489.stm>. Accessed on 27 July 2010.

are at play here too. First, a lack of reliable and up-to-date information on production and consumption levels, as well as on the state of imports, exports and oil stocks is said to be one of the key causes underpinning the volatility of the market, with only a handful of countries producing timely and accurate information (Yergin, 2006, 76).⁶⁷ Acquiring such information is an expensive affair, undermined by a continuous incentive for ‘free-riding’ on the part of those countries that do not wish to disclose their data (Harks, 2010, 249–50). Second, the erosion of spare production and refining capacity as a result of rising demand causes neither spare capacity nor additional wells to be available as mitigation measures in the event of a supply crisis. Moreover, any additional oil that might still be produced cannot be easily sold because its quality is below par for usage in the world’s refineries. Finally, these issues are further compounded by a surge in speculation on the oil spot and paper markets (Yergin, 2006, 72–3; Harks, 2010, 254).⁶⁸

The IEF was born out of the desire to reduce this volatility and to raise the level of transparency of the market by bringing producers’ and consumers’ interests together.⁶⁹ The first IEF meeting took place in Paris in 1991, shortly after the Gulf War had stirred up the international oil market. Since then, a ministerial meeting involving the world’s leading producers and consumers has been held biennially. Since 2004 the meeting has been preceded by a business forum for top-level executives of leading energy companies and related industries (Harks, 2010, 256).

In spite of the fact that the IEF has had a permanent secretariat in Riyadh since 2003, the organisation is a form of ‘soft’ cooperation whereby proceedings take place in a less institutionalised manner outside a formal operating structure. Discussions are informal and the agenda does not follow an established procedure. This constitutes both a weakness and a strength. The weakness lies in the fact that the lack of institutionalisation does not allow the IEF to rely on formal tools, instruments and procedures to guide the discussions. Moreover, the informal nature prevents the IEF from having binding decision authority or the ability to settle disputes. Hence, compliance with its decisions remains subject to the ‘good faith’ of its members. This being said, the advantages of such a structure lie in the fact that the IEF’s open character allows for the participation of producer, consumer, industrialised, BRIC and developing countries, thus creating a unique and truly global platform. Indeed, it is safe to say that the lack of a formal operating structure, well-established rules and procedures is the sole reason that the said countries are all willing to participate in the first place.

Arguably, the IEF’s most tangible milestone has been the creation of the Joint Oil Data Initiative (JODI), an oil market data collection initiative comprised

67 Currently only OECD member countries provide timely and accurate data on the state of their oil markets. This implies that for non-OECD countries – which constitute the bulk of the world’s market in oil products – acquiring such information is necessarily based on estimations.

68 See also De Rato y Figaredo, R. (2007) *Dialogue – An Absolute Necessity: Promoting Energy Security Through a More Stable Oil Market*. Available at <http://www.ief.org/Articles/Pages/DIALOGUE-AnAbsoluteNecessity.aspx>. Accessed on 28 July 2010. See also G-8 (2005), *Gleneagles Summit: Global Economy and Oil*, point 6. Available at <http://www.mofa.go.jp/policy/economy/summit/2005/economy.pdf>. Accessed on 29 July 2010.

69 See IEF (2008) *Ultimate Goal is Full Transparency of Agendas*. Available at <http://www2.iefs.org.sa/Ministers/Pages/UlimateGoalisFullTransparencyofAgendas.aspx>. Accessed on 28 July 2010.

of six international organisations⁷⁰ under the coordination of the IEF.⁷¹ JODI collects data from over 90 member countries, representing around 90 per cent of global oil supply and demand.⁷² The data are publicly available, and, in spite of limitations in terms of quality and comparability, they boost an impressive range of information on various energy products⁷³ and flows.⁷⁴ Provided that JODI manages to overcome its limitations and expand its range of data available, it has the potential to significantly address the lack of information available on the global oil market.

In recent years the most pressing theme discussed at IEF meetings has been the price of oil. Soaring prices were a source of much concern among IEF member countries and the topic dominated meetings throughout 2008: so much so that a joint statement was released after the June 2008 Jeddah meeting (Harks, 2010, 258). In the statement the participants recognised spare capacity's vital role for stability in the oil market, the need to exercise better financial regulation, the need to intensify development assistance to alleviate the pressure of higher oil prices on LDCs and called for immediate collaboration between the IEA and OPEC Secretariats, together with the IEF, on preparing shared oil market analyses.⁷⁵

By the time of the next meeting in December 2008 in London the situation could not have been more different. The economic crisis had caused a drop in oil price of around 70 per cent compared to July 2008, wreaking havoc for budgetary planning and investment decision-making.⁷⁶ In light of the gravity of the situation, participants emphasised the importance of consumer-producer dialogue and agreed to establish an expert group to provide recommendations for strengthening the IEF's institutional architecture.⁷⁷

In spite of this noteworthy convergence that took place between producers and consumers as a result of the extreme price volatility in oil markets in recent years, one cannot help but feel that the IEF constitutes more a kind of 'talk shop' rather than a place where important decisions are made.⁷⁸ It is true that JODI represents an important step towards increased transparency. But as the IEF's only tangible outcome, JODI's overall record is somewhat disappointing. The announcement of a group of experts to work on strengthening the IEF's

70 The participating organisations are Asia-Pacific Economic Cooperation (APEC), the Statistical Office of the European Communities (Eurostat), the IEA, the Latin American Energy Organization (OLADE), OPEC and the United Nations Statistics Division (UNSD).

71 JODI was originally launched in 2001 under the name of Joint Oil Data Exercise. In 2005 the IEF secretariat took over the coordination of JODI.

72 For a list of participating countries see <http://www.jodidata.org/pc.shtm>. Accessed on 28 July 2010.

73 Data are available for crude oil, liquefied petroleum gas, gasoline, kerosene, gas/diesel oil, heavy fuel oil and total oil.

74 Data are available for production, imports/exports, closing stock, stock change, refinery intake, refinery output and demand flows.

75 *Joint Statement by the Kingdom of Saudi Arabia and the Secretariats of the International Energy Agency, International Energy Forum and Organization of the Petroleum Exporting Countries*. Jeddah Energy Meeting, 22 June 2008. Available at <http://www.ief.org/whatsnew/Documents/Finial%20statment%2022%20june%202008.pdf>. Accessed on 28 July 2010.

76 *International Energy Forum: London Meeting Chair's Report*, December 2008, p. 1. Available at <http://www.ief.org/whatsnew/Documents/UK%20Chairs%20report%20London%20Energy%20Meeting.pdf>. Accessed on 28 July 2010.

77 *Ibid.*, p. 3.

78 Bochkarev and Austin refer to the IEF in this regard as an organisation lacking a firm structure and a clear mission statement. See Bochkarev, D. and G. Austin (2007) 'Energy Sovereignty and Security: Restoring Confidence in a Cooperative International System', *EastWest Institute Policy Paper*, No. 1, p. 6. Available at <http://www.ewi.info/energy-sovereignty-and-security-restoring-confidence-cooperative-international-system>. Accessed on 29 July 2010.

institutional architecture seems a step forward towards increasing the IEF's abilities. However, it is unlikely that far-reaching changes can be expected because IEF members prefer to keep the level of institutionalisation low, which prohibits the IEF from being able to take binding decisions. In this regard the stated desire of IEF members for immediate collaboration with the IEA and OPEC Secretariats on preparing shared oil market analyses is welcome and could possibly strengthen cooperation within the framework of JODI, without necessarily changing the IEF's inclusive institutional set-up.

7. Critical appraisal

It is apparent from the above discussion that the contemporary global energy architecture represents an embroidery in need of patching. The vast range of organisations and fora all differ in terms of their aims, degree of visibility, extent of institutionalisation and level of inclusion. It seems fair to assert therefore that no single institution or forum is best equipped to handle the complex challenges underpinning global energy governance. Rather, a pooled combination of 'best practices' and key strengths may provide an answer to some of the issues identified above. Ultimately, the key is to find the right combination of institutionalisation, representativeness and enforceability of compliance. In addition, such a combination of 'best practices' should entail decision-making on the basis of solid statistical and market information.

In terms of institutionalisation, the aforementioned organisations and fora can be placed along a continuum which runs from a low to a high level of institutionalisation. At one end of Figure 2.1 there are the G-8, the G-20 and the IEF which have a low level of institutionalisation, whereas at the other end there are the Energy Charter, the IEA and the World Bank which are highly institutionalised organisations.

Similarly, in terms of representativeness, Figure 2.2 posits a continuum which runs from exclusive to inclusive. At one end there is the G-8 with its exclusive character, whereas at the other end it lists the G-20 and the IEF. The Energy Charter, the IEA, the World Bank take up a more 'middle of the road' position, albeit tending more towards exclusive rather than inclusive.

With respect to the enforceability of compliance, a continuum would run from a general weak ability to do so within the G-8, the G-20 and the IEF, according to Figure 2.3, to a strong enforceability of compliance through the legally binding Energy Charter. The World Bank and the IEA take up a more 'middle of the road position' in this regard.

So, what is the optimal combination? A look at the figures seems to suggest that global energy governance suffers from a classic 'standoff' as, although strong enforcement and institutionalisation are desired, they come at the expense of the required inclusiveness, and vice versa. An organisation such as the Energy Charter, in spite of having the (legal) means to wield considerable power in the energy field, is ultimately undermined by its Eurocentric view and the lack of participation by developing nations and key producer and consumer states. Moreover, the challenges of global energy governance are such that the focus of any *leading* organisation in this field should be top-down

Figure 2.1 – Level of institutionalisation

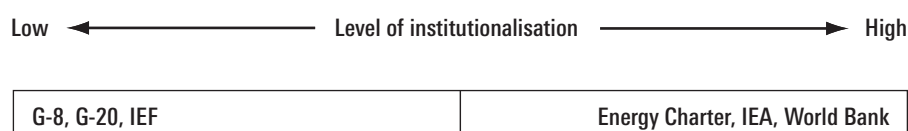


Figure 2.2 – Level of representativeness

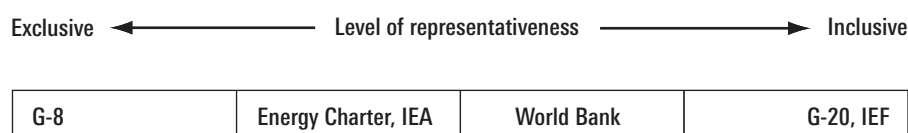
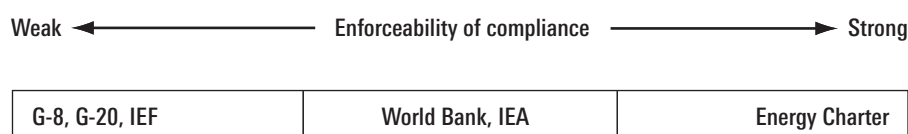


Figure 2.3 – Enforceability of compliance



from the level of heads of state and government, given that a lower level is unlikely to generate results – at least not of the magnitude required. An initial *flexing* of enforcement capability therefore seems justified.

Judging from the analysis of the respective organisations, it seems that the only two institutions capable of capturing political engagement at the highest level are the G-8 and G-20. In terms of representativeness, however, the G-8 is troubled by its exclusivity, whereas the G-20 has a comparatively modest track record when it comes to energy matters. On the other hand, the G-8's exclusivity does mean that its member base is more homogeneous, potentially limiting the occurrence of opposing interests. Wright claims in this regard that placing a priority on broader participation and inclusion – for example, making the G-20 the main vehicle of global energy governance – will likely increase deadlock, weakening the architecture of cooperation rather than strengthening it (Wright, 2009, 164).

The G-20 will undoubtedly find it harder to overcome such opposing interests, but this does not mean that it should not be attempted. Moreover, the G-20 is by no means comparable to the United Nations (UN) and represents only a fraction of its members. Also, the G-20's members share a common feature as the world's major economies, all of whom are likely interested in keeping this status in the long term. Furthermore, the G-20 can potentially brush up its limited track record on energy if it is allowed to benefit from a gradual transfer of G-8 expertise to the G-20 level.

In order to compensate for the lack of institutionalisation and to supply the required technical know-how, it is important to turn towards other organisations for support. The legacy of cooperation between the G-8 and

institutions such as the IEA and the World Bank could be of great benefit to the G-20 in this regard. Simultaneously, such cooperation would encourage the further integration of the BRIC countries within the structures of the IEA. Equally, the IEA and the IEF can feed valuable statistical and market information into G-20 negotiations to ensure that decisions are made on the basis of sound data analysis.

Finally, in order to increase the enforcement of compliance capacity within the G-20, collaboration with the aforementioned organisations should preferably take place subject to the review of both the IEA and the World Bank to safeguard careful implementation and follow-up at subsequent G-20 summits.

8. Conclusion

The analysis here demonstrates that, for the moment, a true global energy governance ‘steering mechanism’ at the international level is largely missing. This is not to say that such a vehicle cannot be created, given that the instruments for its inception are largely available through the present international architecture. The greatest potential seems to be for the G-20 to take up this role in careful collaboration with the existing organisations and fora. Ultimately, whether this happens depends to a great extent on the degree to which the experiences of the G-8 in the field of energy are transferred to the G-20 level and on whether the G-20 succeeds in effectively harmonising any opposing interests among its members. In the long run, however, if the haphazard embroidery in need of patching, that is global energy governance today, is to progress to the status of a carefully woven fabric, it is highly recommended for the world’s leaders to embark on such a path.

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The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon

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Abstract. The dispute between Russia and Ukraine of January 2009 brought about the largest interruption in the supply of natural gas in the history of the European Union (EU). Given the significance of Russian gas to the EU, the 2009 crisis triggered a challenge that had to be resolved swiftly and adequately in cooperation with all parties concerned. Against the backdrop of the Union's foreign policy *leitmotiv* of 'effective multilateralism', this article aims to critically assess the EU's interventions and draw lessons for future energy crisis management. Furthermore, it analyses the implications of the entry into force of the Lisbon Treaty for EU external action in the field of energy crisis management.

I Introduction

The changing security environment following the end of the Cold War has led to a widening of the concept of security,¹ which caused progressively more issues to be approached from a security point of view. In connection with this, security has also become more prominently visible within the external relations of the European Union ('the Union' or 'the EU'), prompting the latter to transform itself into a security actor on a variety of terrains, including anti-terrorism and civilian and

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¹ Traditionally, being confined to the military domain, the changing security environment following the end of the Cold War and the ensuing debate on the concept of security have led it to now also comprise environmental, society (identity), political, and economic issues. See, *inter alia*, B. Buzan, 'Rethinking Security after the Cold War', *Cooperation and Conflict* 32, no. 5 (1997): 5–28; and B. Buzan, O. Waever & J. de Wilde, *Security: A New Framework for Analysis* (Boulder/London: Lynne Rienner Publishers, 1998); and H.G. Brauch et al. (eds), *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century* (Berlin, Heidelberg: Springer, 2008).

military operations, but also increasingly on 'non-traditional' security areas such as energy.²

Energy gained increased prominence within the security domain, not least because of a series of interruptions in the supply of energy to the Union or specific EU Member States. Security concerns with regard to energy commonly focus on what is known as 'security of supply', or the 'adequacy of [energy] supply at a reasonable price'.³ Precisely, this adequacy of supply was threatened in January 2009. What happened was a halt in natural gas deliveries from Russia to Ukraine, followed by reported shortages and a cut in supplies to other European countries a few days later. In a two-week span, in what was one of the coldest winters in decades, the EU experienced one of the largest interruptions in its energy supply to date. In January 2006, a similar crisis between the two countries had resulted in falling pressures and non-delivery of gas reports by European companies. A 'new years gas tussle' thus seemed to become the rule, rather than the exception, prompting concerns on whether existing energy security arrangements and instruments are adequate.⁴

Given the significance of Russian gas for the EU,⁵ the 2009 crisis triggered a challenge that had to be resolved swiftly and adequately in cooperation with all parties concerned. As such, it provided a solid test of whether the Union was able to act according to its *leitmotiv* of 'effective multilateralism' (section II below) and guarantee a stable supply of energy. The present article aims to assess whether the EU's interventions were successful to that effect and what impact the Treaty of Lisbon has on the Union's future ability to resolve such crises.

To this end, we first briefly introduce the concept of 'effective multilateralism', which plays a central role in our analysis of the EU's interventions during the dispute (section II). We then turn to a digression of EU-Russia energy relations, giving careful attention to the most important frameworks that guide these relations,

² In recent years, there has been a veritable rise in the number of publications dedicated explicitly to energy and its security implications. See, *inter alia*, S. Haghighi, *Energy Security: The External Legal Relations of the European Union with the Major Oil and Gas Supplying Countries* (Oxford: Hart Publishing, 2007); J.H. Kalicki & D.L. Goldwin, *Energy and Security: Toward a New Foreign Policy Strategy* (Washington, DC: Woodrow Wilson Centre Press, 2005); and R. Youngs, *Energy Security: Europe's New Foreign Policy Challenge* (Abingdon: Routledge, 2009).

³ Haghighi, n. 2 above, 14.

⁴ See, *inter alia*, Haghighi, n. 2 above, 357; J. Perovic & R. Orttung, 'Russia's Energy Policy: Should Europe Worry?', *Russian Analytical Digest* 18 (2007): 2; J. Stern, 'The Russian-Ukrainian Gas Crisis of January 2006', *Oxford Institute for Energy Studies* (2006): 14; J. Grätz, 'Energy Relations with Russia and Gas Market Liberalization', *Internationale Politik und Gesellschaft* 3 (2009): 67–68; J. Perovic, 'Russian Energy Power Abroad', *Russian Analytical Digest* 33 (2008): 2.

⁵ In 2008, gas imports from Russia to the EU-27 constituted 23% of total imports; 37% was generated from indigenous production and 18% was imported from Norway. The other large supplier of natural gas to the Union is Algeria with 9% of the total share. See Eurogas, 'Statistics 2008', <www.eurogas.org/uploaded/Eurogas%20Annual%20Report%202008-2009_%20statistics.pdf>, 3 Mar. 2010, 30.

and where appropriate highlighting the role played by Ukraine (section III). The next section provides an overview of the way in which the Union handled the January 2009 crisis (section IV). We then critically evaluate the EU's interventions, with a particular focus on whether its efforts have been effective in reinstating the gas supply (section V). A final section discusses the implications of the entry into force of the Lisbon Treaty for EU external action in the field of energy crisis management (section VI). At the end, we make some brief concluding remarks (section VII).

II The EU and Effective Multilateralism⁶

In 2003, in a bid to strategically steer its foreign and security policy, the Union released the European Security Strategy ('ESS'),⁷ in which it put forward its own *leitmotiv* to guide its external relations, that is, 'effective multilateralism'. According to Ruggie, multilateralism refers to the 'coordinating [of] relations among three or more States in accordance with certain principles that order relations among these States'.⁸ Adding the notion of 'effectiveness' presupposes multilateralism to first and foremost produce 'noticeable effects' that, when applied to the EU, refer to the extent to which the Union is able to attain its predetermined policy goals.⁹ This is made more likely if decisions taken at EU level succeed in improving the Union's problem solving capacity in the international arena.¹⁰ At the same time, the ability to act effectively requires the EU also to organize itself efficiently in a consistent, coherent, and sustainable manner in cooperation with key actors involved. Taking these two aspects of effectiveness together, one could say effective multilateralism has become the key

⁶ The research method applied here is based on an ongoing collaborative research project that investigates the role of the EU as a regional security actor with global aspirations in a context of challenged and changing multilateralism. See <www.eugrasp.eu>, 13 Apr. 2010.

⁷ Council of the European Union, *A Secure Europe in a Better World, European Security Strategy*, (Brussels, 12 Dec. 2003).

⁸ J. Ruggie, *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (New York: Columbia University Press, 1993), 8. Here, Ruggie insists that multilateralism represents a 'generic institutional form' and is thereby not confined to the study of international institutions. See 10–11.

⁹ J. Neyer, 'Explaining the Unexpected: Efficiency and Effectiveness in European Decision-Making', *Journal of European Public Policy* 11 (2004): 22; J. Wouters, S. de Jong & Ph. De Man, 'The EU's Commitment to Effective Multilateralism in the Field of Security: Theory and Practice', *Yearbook of European Law* (Oxford: Oxford University Press, forthcoming, 2010).

¹⁰ Cf. Scharpf's description of output legitimacy, according to which governments (and the EU alike) derive their legitimacy from their capacity to solve problems requiring collective solutions because they could not be solved through individual action or market exchanges alone. See F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999), 11.

benchmark criterion for performance in the Union's external relations. The EU's commitment to multilateralism has meanwhile been confirmed in the Lisbon Treaty (section VI.3 below).

With 'effective multilateralism' as a starting point and key benchmark, this article aims to assess the role that EU multilateral security governance played in handling the January 2009 crisis. Doing so, we will look into the various *levels of cooperation* on which EU action was taken. Departing from Ruggie's definition, we distinguish and analyse four levels of cooperation: (i) the *regional level* encompassing the EU-internal sphere and comprising initiatives/projects that originated from within the Union itself, as well as Member State-led initiatives, operating either individually or in a concerted EU effort; (ii) the *bilateral level* referring to the EU's engagement vis-à-vis individual third States, including specific dialogues with supply and transit countries; (iii) the *interregional level* comprising the interaction between the EU and other regional organizations relevant to the crisis; and (iv) the *global level* referring to EU action in multilateral organizations/institutions, independent of the level of their institutional character.¹¹

An analysis is made of how the EU acted on those levels of cooperation with a view to assessing whether its actions have been effective in resolving the crisis. Next to secondary documents (i.e., think tank and public policy research centre reports, media sources, and relevant academic literature), the analysis is largely based on primary documents such as EU Statements, Council Working Group Reports, Commission documents, and press releases that were released shortly before, during, and shortly after the crisis. Questions that are addressed are whether or not the levels of cooperation are concretely used, whether actions are mutually connected, and whether the overall policy is effective or not.

Since the focus of this article is on a single case, that is, the Russian-Ukrainian gas row, the empirical analysis makes use of a 'within-case method' and proceeds by means of process tracing.¹² Although we opt for a detailed and chronological narrative tracking a chain of events (before, during, and in the wake of the crisis), the explanation will be analytically and geographically selective, focusing on whether the EU's actions have been effective in resolving the crisis within the Union's immediate neighbourhood (where the impact of the crisis was most felt).¹³ In doing so, the underlying assumption of the analysis is that, if the EU wants to be

¹¹ Cf. Ruggie, n. 8 above.

¹² See A.L. George & A. Bennett, *Case Studies and Theory Development in the Social Sciences*, (Cambridge, MA: MIT Press, 2005), 224; A. Bennett, 'Process Tracing: A Bayesian Perspective', in *The Oxford Handbook of Political Methodology*, eds J.M. Box-Steffensmeier, H.E. Brady & D. Collier (Oxford: Oxford University Press, 2008), 704.

¹³ George & Bennet, n. 12 above, 10–11.

an effective security actor, it will have to act on the relevant levels of cooperation, in an interconnected as well as in an effective way.

III EU-Russia Energy Relations

Relations between the EU and Russia are currently described as tense, based on conflicts and mistrust; energy being an area where this is prominently felt.¹⁴ Nevertheless, given the strong mutual interdependence between the two, it is no surprise that several frameworks have been established over time that either include or deal specifically with energy.

1. *The Partnership and Cooperation Agreement*

Arguably, the most important framework to guide relations between the EU and Russia is the Partnership and Cooperation Agreement (PCA), which came into force in 1997 for a period of ten years.¹⁵ Under Article 106 of the PCA, the agreement is automatically prolonged, unless either party to the agreement gives notice of termination. Both parties have agreed to leave it in place until a new agreement is signed, to avoid having no agreement at all.¹⁶ Given the vital importance of energy, the PCA contains specific energy provisions, including the ‘improvement of the quality and security of energy supply’.¹⁷ The agreement aims both at security of energy supply but also at assisting Russia in overcoming its shortages in the energy sector. This includes modernization of the latter’s energy infrastructure, promotion of energy saving and energy efficiency, and improvements in the management and regulation of the energy sector in line with market economy principles.¹⁸

¹⁴ R. Leal-Arcas, ‘The EU and Russia as Energy Trading Partners: Friends or Foes?’, *European Foreign Affairs Review* 14, no. 3 (2009): 348; J. Sherr, ‘The Russia-EU Energy Relationship: Getting It Right’, *The International Spectator* 45, no. 2 (2010): 57–59. Contrary to the EU’s ‘market’ perspective, Russia takes a firm ‘statist’ view with respect to its gas market characterized by strong vertical integration and control over its pipeline system. See J. M. Godzimirski, ‘The Northern Dimension of the Russian Gas Strategy’, *Russian Analytical Digest* 58 (2009): 3; and K. Hóber, ‘Law and Policy in the Russian Oil and Gas Sector’, *Journal of Energy & Natural Resources Law* 27, no. 3 (2009): 426.

¹⁵ Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Russian Federation, of the Other Part, OJ L 327/3 of 28 Nov. 1997.

¹⁶ See K. Barysch, ‘Report from the 4th Friedrich-Ebert Stiftung and Foundation for Unity for Russia Roundtable (2006)’, <http://www.cer.org.uk/pdf/partnership_with_russia_barysch_dec06.pdf>, 10 Mar. 2010, 2.

¹⁷ Article 65 EU-Russia PCA, n. 15 above.

¹⁸ *Ibid.* See also Haghighi, n. 2 above, 343–344.

In the past, market reform has played a major role in fuelling recent conflicts between Russia, Ukraine, and Belarus.¹⁹ The transition to a market-based pricing system and supply obligations between sovereign States was particularly painful for the latter two countries as it was implemented after long delays, and after 2004 when oil and gas prices rose dramatically – prompting acute issues of liquidity.²⁰ In Ukraine, this problem was exacerbated by the 2004 ‘Orange Revolution’, which alternated its relations with Russia and added to a more negative environment for changes in gas prices.²¹ Recently, in an attempt to bring new life to the reform of Russia’s energy sector and market, the EU and Russia agreed on their ‘Partnership for Modernization’.²² The Partnership aims to bring about reform of the Russian economy and society, whereby expanding investment opportunities and the promotion of a sustainable and energy-efficient low-carbon economy are some of its key priorities.²³

The ongoing negotiations on a new PCA have proven cumbersome as both the EU and Russia diverge quite strongly on what a new agreement should look like.²⁴ Whereas the EU seems to favour a new agreement containing precise wordings on energy and security in particular, Russian President Medvedev rather supports a document that is ‘short, without too many details’.²⁵ Issues on trade (notably, negotiations on Russia’s accession to the WTO) and human rights notwithstanding, the ability for both parties to reconcile on a future PCA seems to hinge to a large extent on the ‘legal nature’ of future energy agreements.

¹⁹ In January 2007, a dispute erupted between Russia and Belarus, which led to a cut in Russian supplies, causing angry reactions from the EU. See Euractiv, ‘Europe Caught in Middle of Russian-Belarus Oil Dispute, 9 Jan. 2007’, <www.euractiv.com/en/energy/europe-caught-middle-russia-belarus-oil-dispute/article-160725>, 17 Mar. 2010; and Youngs, n. 2 above, 86. A similar dispute occurred earlier this year. See Euractiv, ‘Russian Oil Flowing to EU Despite Belarus Dispute, 5 Jan. 2010’, <www.euractiv.com/en/energy/russian-oil-flowing-eu-despite-belarus-dispute/article-188545>, 17 Mar. 2010.

²⁰ A. Knoplyanik, ‘Gas Transit in Eurasia: Transit Issues between Russia and the European Union and the Role of the Energy Charter’, *Journal of Energy & Natural Resources Law* 27, no. 3 (2009): 455–45; H. Pleines, ‘The Natural Gas Conflict between Russia and Ukraine’, *Russian Analytical Digest* 41, (2008): 10; and Youngs, n. 2 above, 82 and 86.

²¹ Knoplyanik, n. 20 above, 456.

²² See ‘Joint Statement on the Partnership for Modernization, EU-Russia Summit, 31 May–1 June 2010, Rostov-on-Don, 1 Jun. 2010’, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/114747.pdf>, 14 Jul. 2010.

²³ *Ibid.*, 2.

²⁴ Some scholars argue that the current PCA simply no longer corresponds to the existing character of EU-Russia relations. See, *inter alia*, Y. Borko, *Partnership and Cooperation Agreement between the EU and Russia: Do We Need a New Treaty?* (Moscow: Probel, 2004); N. Arbatova, T. Bordachev & A.S. Makarychev, in *The Elephant and the Bear Try Again: Options for a New Agreement between the EU and Russia*, ed. M. Emerson (Brussels: Centre For European Policy Studies, 2006).

²⁵ ‘Medvedev Makes Nice with the EU’, *International Herald Tribune*, 27 Jun. 2008, <www.ihf.com/articles/2008/06/27/europe/union.php>, 10 Mar. 2010.

2. EU-Russia Energy Dialogue

Deemed such an important field, energy warranted a framework of its own, rather than to constitute only a small part of the PCA. At the 2000 EU-Russia Summit, both parties agreed to institute the so-called 'EU-Russia Energy Dialogue', based on Article 65 of the PCA.²⁶ The Dialogue constitutes a platform where the EU and Russia aim to further integrate their energy markets and highlight common interests for political institutions on both sides, thus keeping each other informed about recent events and developments in the energy sector.²⁷

The Dialogue involves both political and industrial actors and focuses on many different themes including²⁸ the promotion of 'clean coal' technologies in Russia, technology transfer, the monitoring of changes with respect to security of gas and oil markets, energy efficiency, environmental questions, and efforts aimed at improving Russia's investment climate.²⁹ Ensuring the functioning of the EU's internal market has been one of the cardinal topics within the Dialogue, with discussions focusing, *inter alia*, on the compatibility of short-term contracts and destination clauses with existing EU legislation, the establishment of interconnections, energy sector reform, and unbundling.³⁰ A development in recent years that could see an improvement in future crisis management capabilities is the establishment of a so-called 'Early Warning Mechanism' (EWM; sections IV.1 and V below).³¹

²⁶ See EU/Russia Summit Joint Declaration, EU Press Release, Doc. IP/00/1239 (Paris, 30 Oct. 2000).

²⁷ Haghighi, n. 2 above, 345.

²⁸ A comprehensive overview of the EU-Russia Energy Dialogue falls outside the purview of this article. For a more detailed analysis, see P. Aalto (ed.), *The EU-Russia Energy Dialogue: Securing Europe's Future Energy Supplies?* (Aldershot: Ashgate, 2007).

²⁹ Haghighi, n. 2 above, 347–348. See also European Commission, The Energy Dialogue between the European Union and the Russian Federation between 2000 and 2004, COM (2004) 777 final (Brussels, 13 Dec. 2004), 3–4; and T. Romanova, 'The Russian Perspective on the Energy Dialogue', *Journal of Contemporary European Studies* 16, no. 2 (2008): 220–221. October 2005 saw the first Permanent Partnership Council on energy (PPC) that had as its aim the development of an attractive, stable, and predictable investment climate in Russia and foresaw an active role for foreign investors. Russia's 'double pricing' of gas was a particular point of tension. See Youngs, n. 2 above, 81.

³⁰ See COM(2004) 777 final, n. 29 above, 7 and 11; Romanova, n. 29 above, 220; and Youngs, n. 2 above, 85.

³¹ The EWM is a political tool used to identify potential supply and demand problems and risks well in advance and allow for preparedness of Russia and the EU to minimize the impact of future potential disruptions. An agreement was signed on 16 Nov. 2009. See The EU and Russia Reinforce the Early Warning Mechanism to Improve Prevention and Management in Case of an Energy Crisis, EU Press Release, Doc. IP/09/1718 (Brussels, 16 Nov. 2009); Euractiv, 'Russia and EU Agree on Supply Alert Mechanism, 16 Nov. 2009', <www.euractiv.com/en/energy/russia-eu-agree-gas-supply-alert-mechanism/article-187360?Ref=RSS>, 15 Mar. 2010.

Whereas the EU's primary aim is to create a stable legal regime based on the principles of a liberalized energy market with a corresponding stronger influence of private energy companies in securing supply, Russia's view is based on the need to safeguard equality between partners by all means, giving the Russian State the role of overseeing this equality.³² Building on this observation, it is crucial for the EU to have full coherence in its relations with Russia. A coherent external energy policy hinges partly on the extent to which institutions and general rules are followed as opposed to individual barter deals. The former is preferred by the Commission and some Member States, whereas some of the larger Member States tend to prefer the latter, as is well illustrated by the Nord Stream project – a gas pipeline linking Russia and Germany via the Baltic Sea.³³ The pipeline is seen by some as a move by Russia to bypass 'traditional' transit countries such as Ukraine, Belarus, and Poland,³⁴ whereas others oppose it for environmental reasons.³⁵

Pursuing individual barter deals, however, inadvertently creates possibilities for elites in supply countries to pursue their own 'reciprocity rules', that is, not limiting demands to capital, arguing more substantial trade-offs are necessary in order to get things done. The monopolistic and quasi-statist character of such energy markets thus remains unchanged.³⁶

Russia's concerns in recent years over the protection of producer countries' interests under the Energy Charter Treaty (ECT; a multilateral investment protection

³² Romanova, n. 29 above, 225. See also Youngs, n. 2 above, 83.

³³ Construction of the pipeline began on 9 Apr. 2010. Its main proponents are Gazprom, German BASF/Wintershall Holding AG, German E-ON Ruhrgas AG, and Dutch NV Nederlandse Gasunie. Recently, French GDF Suez joined the project. Interestingly, the newly appointed Commissioner for Energy Günther Oettinger confirmed during his hearing at the European Parliament that the bilateral agreement in the case of Nord Stream lacked solidarity. See Council of the European Union, Summary of the Meeting of the Committee on Industry, Research and Energy (ITRE), Council Doc. 5460/10 (Brussels, 14 Jan. 2010), 3.

³⁴ See, *inter alia*, A. Cohen, 'The North European Gas Pipeline Threatens Europe's Energy Security', *Backgrounder (Heritage Foundation)* 1980 (2006); G. Feller, 'Nord Stream Pipeline Project Stokes Controversy', *Pipeline & Gas Journal* 234, no. 3 (2007): 92–92; T. De Wachter, 'The Russian Export of Gas/Oil and the Baltic: A Political Dependency?', *Global* 15, no. 1 (2007): 9; Godzimirski, n. 14 above, 3; and Hóber, n. 14 above, 430.

³⁵ Feller, n. 34 above; and Z. Baran, 'EU Energy Security: Time to End Russian Leverage', *The Washington Quarterly* 30, no. 4 (2007): 135.

³⁶ See Grätz, n. 4 above, 69; Hóber, n. 14 above, 423; and Youngs, n. 2 above, 82–84, 86–87, 91, and 96. See also O. Geden et al., 'Perspectives for the European Union's External Energy Policy. Discourse, Ideas, and Interests in Germany, the UK, Poland and France', Working Paper FG1 (Berlin: SWP, 2006); Romanova, n. 29 above, 227; and A. Checchi, A. Behrens & C. Egenhofer, 'Long-Term Energy Security Risks for Europe: A Sector Specific Approach', Working Document 309 (Brussels: CEPS, 2009); interviews with officials from the Permanent Representations of the Czech Republic and Latvia to the EU on 19 Apr. and 23 Apr. 2010; and interview with official from the Polish Delegation of the European People's Party in the European Parliament on 26 Apr. 2010.

treaty³⁷ and its ultimate refusal to ratify the Treaty³⁸ (see also section V, below, on the application of the ECT to Russia), as well as disputes over the extent of reciprocal access to the European market in exchange for European investments in energy exploration in Russia, have complicated relations in the Dialogue.³⁹

Overall, these underlying divergent views between the EU and Russia are an important factor in determining contemporary energy relations between both parties.

IV The January 2009 Gas Crisis

We divide our analysis into three periods: (1) relevant events in the context of EU-Russia energy relations that took place in the months prior to the crisis; (2) the EU's interventions during the crisis; (3) and the Union's actions that were undertaken in the wake of the supply interruption.⁴⁰ EU action in each of these periods is analysed according to its effectiveness, both in terms of whether its decisions succeeded in solving the problem under consideration and if it was able to organize itself efficiently in a consistent, coherent, and sustainable manner at all levels of cooperation.

1. *An Impending Crisis*

The EU's attempts at modernizing the energy sectors of third countries such as Russia are not limited to supplier countries alone. The Union performs similar actions towards vital transit countries such as Ukraine (see also section IV.3 below). For example, in an attempt to upgrade and increase the efficiency of Ukraine's domestic market and energy infrastructure, the EU started the first negotiations on the country's admission to the Energy Community (ENCOM) in November 2008.⁴¹ ENCOM,

³⁷ The ECT is a legally binding multilateral agreement that has as its aim to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, and so mitigate risks associated with energy-related investment and trade.

³⁸ The Treaty was, however, applied provisionally, until, on 20 Aug. 2009, Russia officially stated it intended to terminate provisional application. Russia's refusal stemmed mainly from opposition to opening up the Russian network to lower cost gas from Central Asian countries, a lack of access on the EU market, and the fact that the ECT's transit protocol would not apply between European countries (the EU being defined as a single economic space). See Haghighi, n. 2 above, 348; T. Bordachev, 'Europe's Russia Problem: Immediate Concerns and Long-Term Prerequisites', in *Prospects and Risks beyond EU Enlargement. Eastern Europe: Challenges of a Pan-European Policy*, ed. I. Kempe (Opladen: Lese & Buddrich, 2003), 88; and Youngs, n. 2 above, 80–81.

³⁹ See Romanova, n. 29 above, 223–224; and Youngs, n. 2 above, 92.

⁴⁰ This part is not exhaustive in the sense that it is limited to those EU actions that impacted most directly on preventing similar crises from occurring in the future.

⁴¹ Energy Community Ministerial Council, 'Meeting Conclusions, Point 13 (Tirana, 11 Dec. 2008)', <www.energy-community.org/pls/portal/docs/296197.PDF>, 13 Apr. 2010.

of which the EU is a member,⁴² is a regional Treaty building an integrated market in Southeast Europe adjacent to the Union and represents a form of EU ‘external governance’, by extending the Union’s *acquis* in relation to internal market, security of supply legislation for electricity and gas, environment, and renewables.⁴³

Although some indications existed about possible difficulties in late December 2008, there was no solid basis to believe that supplies to and through Ukraine would be in fact *completely* cut.⁴⁴ At this stage of the crisis, the Commission did not intervene much, nor seemed it necessary to do so based on the available information. However, anticipating possible difficulties, the Commission had on 19 December already alerted the Gas Coordination Group (GCG)⁴⁵ – which facilitates coordination of security of supply measures by the Union in the event of a major supply disruption – and set up a meeting for 9 January.⁴⁶

2. *The Cut-Off and the Search for a Solution*

In 30 December, Gazprom insisted that late-payment fines and penalties on behalf of Naftogaz were still outstanding. It claimed talks had failed and therefore cut supplies to Ukraine on 1 January 2009.⁴⁷

In an attempt to gather more information about ongoing events, the EU’s Network of Energy Security Correspondents (NESCO)⁴⁸ – designed as an instrument for collecting and processing existing geopolitical- and energy-related data as a means for early warning – was used in an impromptu way to exchange information on the evolution of the situation in EU Member States as well as other third countries concerned.⁴⁹ Three days later, a ‘fact finding mission’ was sent to

⁴² The Treaty establishing Energy Community was signed in October 2005 in Athens, Greece. It entered into force on 1 Jul. 2006. See The Energy Community Treaty, OJ L 198/18 of 20 Jul. 2006.

⁴³ The Energy Community provides a stable investment environment based on the rule of law and ties the Contracting Parties together with the EU. Through its actions, the Energy Community aims to contribute to security of supply in wider Europe. See <www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Facts_and_Figures>, 18 May 2010. See also A. Belyi, ‘EU External Energy Policies: A Paradox of Integration’, in *Europe’s Global Role*, ed. J. Orbie (Aldershot: Ashgate, 2009), 210–211; R. Youngs, ‘Europe’s External Energy Policy: Between Geopolitics and the Market’, Working Document 278 (Brussels: CEPS, 2007), 3.

⁴⁴ Commission Staff Working Document, the January 2009 Gas Supply Disruption to the EU: An Assessment, SEC (2009) 977 (Brussels, 2009), 5.

⁴⁵ The GCG is composed of representatives of Member States, of representative bodies in the industry concerned, and of relevant consumers, under the chairmanship of the Commission.

⁴⁶ Commission Staff Working Document, n. 44 above, 5.

⁴⁷ ‘Russia-Ukraine Gas Row Heats Up’, *BBC News*, 31 Dec. 2008, <<http://news.bbc.co.uk/2/hi/business/7805770.stm>>, 13 Apr. 2010; S. Pirani, ‘The Russo-Ukrainian Gas Dispute, 2009’, RAD 53 (2009): 3.

⁴⁸ NESCO consists of the representatives of the Ministries of foreign affairs and energy from the EU Member States, the European Commission, and the Council Secretariat.

⁴⁹ Commission Staff Working Document, n. 44 above, 5.

Moscow and Kiev. The following day, Commission President Barroso warned that both countries' reputation as reliable partners was at stake and insisted that a stable and long-term solution had to be found.⁵⁰ In spite of the overall quick response by the EU and other organizations to condemn the events, this initial 'bilateral diplomacy' proved ineffective in terms of preventing the crisis from escalating further.

On 7 January 2009, Gazprom shut down the system completely, arguing Ukraine should replace the 'technical' gas it had taken (i.e., the amount of gas required to run the compressor stations, which transit countries usually provide).⁵¹ Around this time, French President Sarkozy and German Chancellor Merkel joined angry calls for Russia to resume supplies as gas shortages and heating rationing threatened to spread from Eastern to central Europe and beyond.⁵²

On 8 January 2009, the Council of the European Union ('the Council') issued a Declaration, which stated:

Given the importance attached to solidarity within the EU, this is a problem for the EU as such. It is unacceptable for the EU to see its citizens and enterprises suffering from gas shortages due to the non respect by both partner countries of their contractual obligations [and it] calls on both parties to accept independent monitoring of the actual flows of gas through the pipelines.⁵³

The International Energy Agency (IEA) took a similar stance by stating that the closure of the pipes is:

completely unacceptable, given that European customers are not a party in this dispute, have long-term contracts with fair prices, and have made prompt payments. The interruption is creating hardship during the coldest weather Europe has faced within a number of years.⁵⁴

Following this, both the EU Presidency and the Commission intensified their efforts to facilitate a solution, which resulted in a monitoring agreement between Ukraine, Russia, and the EU in 9 January. The agreement provided for independent

⁵⁰ Statement from the President Barroso and Commissioner Piebalgs on the Agreement for Gas Monitoring, EU Press Release, Doc. IP/09/33 (Brussels, 11 Jan. 2009).

⁵¹ Pirani, n. 47 above, 3. On the alleged stealing of gas, see 'Gazprom Calls on Naftogaz Ukrainy to Resume Negotiations', *Ukrainefacts*, 4 Jan. 2009.

⁵² 'Europe Shivers as Russia Ignores Calls to Restore Gas', *Telegraph.co.uk*, 9 Jan. 2009, <www.telegraph.co.uk/news/worldnews/europe/russia/4206720/Europe-shivers-as-Russia-ignores-calls-to-restore-gas.html>, 13 Apr. 2010. See also 'Europe Homes Freeze amid Gas Row', *BBC News*, 9 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7819429.stm>>, 13 Apr. 2010 and 'Europeans Struggle to Keep Warm', *BBC News*, 8 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7817780.stm>>, 13 Apr. 2010.

⁵³ EU Declaration on the Russia/Ukraine Problem and Energy Security, Council Doc. 5104/09 (Presse 4) (Brussels, 8 Jan. 2009), Points 1 and 3.

⁵⁴ IEA, 'IEA Urges Resumption of Gas Supplies to Europe, 7 Jan. 2009', <www.iea.org/journalists/arch_pop.asp?MED_ARCH_ID=534>, 13 Apr. 2010.

monitors from all the involved parties to oversee gas transit on Russian and Ukrainian territories.⁵⁵

During the same time interval, the GCG raised production in several Member States,⁵⁶ increased withdrawal from storage to maximum capacity in the most heavily affected areas⁵⁷, stepped up imports from diversification of sources and routes both inside and outside the EU,⁵⁸ and limited consumption for industry in Bulgaria, Slovakia and temporarily for large consumers in Hungary.⁵⁹ The overall effectiveness of these mitigation measures notwithstanding additional Norwegian supplies could not reach Eastern Europe due to a lack of interconnections, as well as differing standards of gas.⁶⁰ It is partly in this context that the GCG emphasized the need for quick implementation of mid- to long-term measures, in particular improving the interconnectivity between Member States and ENCOM countries.⁶¹

⁵⁵ S. Pirani, J. Stern & K. Yafimava, 'The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment', *Oxford Institute for Energy Studies* (2009): 46; Commission Staff Working Document, n. 44 above, 4. See also 'Ukraine Making Gas Crisis Worse', *BBC News*, 10 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7821880.stm>>, 13 Apr. 2010; 'Energy Fuels New "Great Game" in Europe', *BBC News*, 9 Jun. 2009, <<http://news.bbc.co.uk/2/hi/europe/8090104.stm>>, 13 Apr. 2010; Monitoring Team Starts Work in Kiev and Gas Coordination Group Urges Naftogaz and Gazprom to Resume Gas Deliveries Immediately, EU Press Release, Doc. IP/09/24 (Brussels, 9 Jan. 2009). The terms of reference of the agreement can be found here: <<http://old.gazprom.ru/eng/news/2009/01/33576.shtml>>, 13 Apr. 2010; also see 'Accord Signed in Russia Gas Row', *BBC News*, 11 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7822093.stm>>, 13 Apr. 2010. Note that during this time the European Parliament also organized a debate where representatives of Gazprom and Naftogaz were invited to discuss solutions to the crisis. See European Parliament Press Service, Doc. No. 20090108IPR45595.

⁵⁶ Production was raised in the Netherlands, United Kingdom, Romania, and Poland, as well as in non-Member States Norway, Algeria, and Libya to compensate the loss of Russian gas, to the maximum capacity of production and transport means. Europe is said to have lost up to 30% of its gas imports at this time.

⁵⁷ Storage sharing at this point in time was already implemented in two cases: Austria and Slovenia and Hungary and Serbia. Czech Republic left its stored volume in Slovakia for its domestic needs as it was very heavily impacted.

⁵⁸ Imports from alternative suppliers increased, namely Norway and Libya, along with increased Russian imports via Belarus and Turkey. By 10 January, Ukraine announced the delivery of gas from their own reserves to Moldova and Bulgaria. Greece was said to be confident that its Liquefied Natural Gas (LNG) terminal would enable it to cope with the crisis. Fuel switching took place, particularly towards fuel oil for heating and coal for power production in Austria, Slovakia, Greece, Poland, Bulgaria, and Romania. In addition, extra commercial deliveries were delivered from neighbouring countries in the case of Austria, Hungary, and the Czech Republic.

⁵⁹ See 'Gas Cut: How Europe Is Coping', *BBC News*, 8 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7815113.stm>>, 13 Apr. 2010.

⁶⁰ *European Regulators Group for Electricity and Gas (ERGEG) Advice on Russia-Ukraine Gas Dispute* (Brussels, 10 Feb. 2009), 2, <www.energyregulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPERS/Gas/2009/LM_Piebalgs_090210.pdf>, 4 May 2010.

⁶¹ Measures Discussed at Gas Coordination Group, EU Press Release, Doc. MEMO/09/4 (Brussels, 9 Jan. 2009).

Moreover, problems existed in terms of quality of available information. Limitations on consistent information and exchange of data between gas companies were all obstacles in making most of available market potential. In particular, the market was hampered by inadequate information on cross-border gas flows and a lack of transparent information on the flow of gas into the EU (see also section V below).⁶²

On 12 January 2009, the Council evaluated the situation of gas supplies in relevant Member States and expressed its appreciation for domestic and solidarity measures already undertaken. Specifically, it noted:

despite the limited possibilities in the short run [these measures] have helped to mitigate the impact on European citizens and national economies. Member States are encouraged to sustain and deepen solidarity measures until supplies are restored.⁶³

However, the EU's hopes that the monitoring mission would allow gas flows to resume were quickly dashed by Russian claims that Ukraine had blocked gas deliveries to Europe.⁶⁴ What followed was a swift move by European industry in an attempt to end the dispute. After Naftogaz declared to Gazprom that a significant amount of technical gas would be needed to restart the system before transit to Europe could be restarted, in 15 January a group of companies set about creating a means to provide the finance for such gas. A consortium was created consisting of Eurogas⁶⁵ members ENI, Gdf/Suez, E.ON/Ruhrgas, RWE, Wingas, OMV and non-member Gazprom.⁶⁶ The consortium would provide the finance for gas to restart the transit network until the two sides had reached a long-term settlement, after which a mechanism provided for repayment of funds to the companies involved.⁶⁷

In 17 January, Russia hosted a high-level summit in Moscow, with the participation of representatives from the EU, Russia, and Ukraine.⁶⁸ This resulted in an

⁶² Commission Staff Working Document, n. 44 above, 10.

⁶³ Council Conclusions, Extraordinary Council Meeting Transport, Telecommunications and Energy, Council Doc. 5165/1/09 REV 1 (Brussels, 12 Jan. 2009), 2.

⁶⁴ Pirani, n. 47 above, 3.

⁶⁵ Eurogas promotes, *inter alia*, the interests of its membership, companies, national federations, and associations involved in the European gas trade.

⁶⁶ 'Putin Weighs in as Europe Gas Crisis Continues', *MSNBC World News*, 15 Jan. 2009, <www.msnbc.msn.com/id/28678240/>, 21 Apr. 2010. See also I. Traynor, 'Anger at German Award for Russia's Vladimir Putin amid Gas Crisis', *Guardian*, 16 Jan. 2009, <www.guardian.co.uk/world/2009/jan/16/anger-at-german-award-for-putin>, 21 Apr. 2010. Traynor remarks that this agreement was bound to encourage criticism that Moscow and Gazprom succeeded in dividing the EU through dealing with its biggest west European clients, Germany and Italy, and thus bypass the countries of central and southern Europe, which are the main victims of the crisis.

⁶⁷ See Pirani et al., n. 55 above, 48.

⁶⁸ 'EU to Attend Gas Summit in Moscow', *BBC News*, 15 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7830517.stm>>, 13 Apr. 2010.

agreement between Russian Prime Minister Putin and Ukrainian Prime Minister Timoshenko on 19 January.⁶⁹ Gas flows to Europe were reinstated the following day.⁷⁰

3. *A Resulting Rethink of European Energy Security*

Following the resolution of the crisis, Commission President Barroso issued a Statement in which he called for the rapid development of infrastructure, diversification of energy sources and supply routes, and a revision of the 2004 Gas Directive.⁷¹ In a similar ‘call’, the Energy Charter’s Secretary General issued a reflection in which he emphasized that the interruption of gas supplies occurred in spite of transit provisions within the Charter that had in fact been designed to prevent such incidents, while calling for further development of the Treaty so as to better cope with severe supply disruptions. The statement invoked the principle of ‘uninterrupted transit’, which could be seen as a reminder to Ukraine of its obligations under the ECT.⁷² Furthermore, the Secretary General called for the finalization of the ECT’s Transit Protocol, which would limit the risks associated with energy transit (see also section V below).⁷³

EU efforts aimed at diversification of energy sources and supply routes have since intensified.⁷⁴ In March 2009, the EU signed a deal with Ukraine paving the way for USD 3.4 billion of investment in its gas infrastructure. As a follow-up, in

⁶⁹ ‘Gas to Flow after Moscow Deal’, *BBC News*, 18 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7834796.stm>>, 13 Apr. 2010.

⁷⁰ See Commission Staff Working Document, n. 44 above, 4; Pirani et al., n. 55, 25–26; Pirani, n. 47 above, 3; and I. Gazizullin, ‘A Ukrainian Perspective of the 2009 Gas Dispute’, in *ISS Opinion* (European Union Institute for Security Studies, 2009). See also ‘Russia Opens Gas Taps to Europe’, *BBC News*, 20 Jan. 2009, <<http://news.bbc.co.uk/2/hi/europe/7839053.stm>>, 13 Apr. 2010.

⁷¹ Statement of President Barroso on the resolution of the Ukraine-Russia Gas Dispute, Press Point, Doc. SPEECH/09/12 (Brussels, 20 Jan. 2009), <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/12&format=HTML&aged=0&language=EN&guiLanguage=en>>, 13 Apr. 2010. See also Council Directive 2004/67/EC of 26 Apr. 2004 concerning measures to safeguard security of gas supply, OJ L 127/92 of 29 Apr. 2004.

⁷² Article 7(5) ECT obliges ECT members to ‘... secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties’. A core element of this principle is to prevent non-transit related issues (i.e., commercial issues) from having a negative impact on transit volumes.

⁷³ ECT, ‘A Word from the Secretary General on the Energy Crisis of Early 2009, 6 Feb. 2009’, <www.encharter.org/index.php?id=21&id_article=171&L=0>, 13 Apr. 2010.

⁷⁴ In March 2009, former External Relations Commissioner Benita Ferrero-Waldner said that the EU was seeking bilateral agreements on gas shipments with former Soviet countries, including Armenia, Azerbaijan, Moldova, Ukraine, and Belarus. See ‘EU Seeks Gas Accords with Ex-Soviet States, Commissioner Says’, *Bloomberg*, 9 Mar. 2009, <www.bloomberg.com/apps/news?pid=newsarchive&sid=aoON0rcc_3ZY>, 13 Apr. 2010.

August 2009 the EU and international lending institutions agreed with Ukraine a loan worth USD 1.7 billion in return for reforms of its gas sector.⁷⁵

The year 2009 saw also many developments with regard to the Nabucco project – a planned gas pipeline connecting the Caspian region, the Middle East, and Egypt via Turkey, Bulgaria, Romania, and Hungary with Austria and further on with the Central and Western European gas markets, bypassing both Russia and Ukraine. The project enjoys EU support, stemming from its desire to diversify both in terms of suppliers and transit routes. In July 2009, the Nabucco Intergovernmental Agreement was signed by the four EU transit countries and Turkey, paving the way for its further development and construction.⁷⁶ Notwithstanding the fact that the Agreement is a milestone in Nabucco's development, it cannot be said that many of its problems have disappeared. It remains unclear how much gas Turkey will be able to take from the pipeline as this matter was left out of the Agreement.⁷⁷ Therefore, if Nabucco wishes to truly contribute to the Union's energy security in the long-term and not remain an empty pipe, much more than political will is needed by its proponents, with the negotiation of supply contracts ranking on top of the list.

The above overview showed numerous interventions across different levels of cooperation, with varying degrees of success. In the next section, we assess which forms and levels of cooperation were in fact used and whether their use proved effective in resolving the crisis.

V Critical Appraisal

By the complexity of the crisis, it is clear that neither companies nor governments can have access to all relevant information. As shown, a lack of a well-functioning exchange of up-to-date, reliable and consistent information between gas companies, as well as inadequate information on cross-border flows served to undermine full effectiveness of solidarity measures.

This view is supported by Gas Infrastructure Europe (GIE)⁷⁸ – a representative organization to the EU institutions gathering operators of gas infrastructures across Europe – in its April 2009 assessment, in which it claimed

⁷⁵ 'EU Reaches Deal with Ukraine', *BBC News*, 1 Aug. 2009, <<http://news.bbc.co.uk/2/hi/europe/8179461.stm>>, 13 Apr. 2010.

⁷⁶ 'Europe Gas Pipeline Deal Agreed', *BBC News*, 13 Jul. 2009, <<http://news.bbc.co.uk/2/hi/business/8147053.stm>>, 13 Apr. 2010. See also Remarks by Commission President José Manuel Barroso upon the Signature of the Nabucco Intergovernmental Agreement, EU Press Release, SPEECH/09/339 (Ankara, 13 Jul. 2009).

⁷⁷ 'Europe Gas Pipeline Deal Agreed', n. 76 above; see also B. Vermeulen, 'Pijpleiding Nabucco blijft leeg ondanks politieke wil', *NRC Handelsblad*, 13 Jul. 2009, <www.nrc.nl/economie/article2299086.ece/Pijpleiding_Nabucco_blijft_leeg_ondanks_politieke_wil>, 13 Apr. 2010.

⁷⁸ GIE represents sixty-five member companies from twenty-seven countries who work on transmission pipelines, storage facilities, and/or LNG terminals.

that constraints flowing from the confidentiality of data limited information exchanges and prevented relevant solutions from being found.⁷⁹ It noted not so much a lack in quantity of information but claimed its fragmented character proved an overall assessment of the situation that was hard to make.⁸⁰ The efforts by NESCO to distribute information do not seem to have been able to overcome these issues.

According to the European Regulators Group for Electricity and Gas (ERGEG) – the Commission’s formal advisory group of energy regulators⁸¹ – the exchange of information through the GCG constitutes an important first step to improve coordination, though it cannot count as sufficient.⁸² Indeed, access to reliable information is crucial for the EU to be able to act appropriately on its *regional* dimension (section II above). To that effect, a harmonized minimum level of information – while respecting existing confidentiality agreements – should be made available to the market, especially in crisis situations.⁸³ Moreover, in order to improve the Union’s coherence and consistency in external relations, it is important that a single actor acts publicly on the basis of this information.

Although the Gas Directive obliges Member States to have gas emergency plans in place, an insufficient degree of coordination of these plans seems to have contributed to limiting the Union’s resolve. The emergency plans, triggers, and the extent of these mechanisms differ from country to country.⁸⁴ Some Member States declared emergencies as a result of their national situation and launched their plans; some adopted and implemented concrete plans and measures on the first day of the crisis; whereas others had no detailed plans in place.⁸⁵ As such, the level of preparedness across Member States varied significantly.⁸⁶

This was confirmed by ERGEG, who claimed there was neither adequate coordination of the various plans within gas regions nor sufficient transparency of arrangements in Member States (such as maintaining certain levels of gas in storage), which could have consequences in terms of gas flows to or from neighbouring

⁷⁹ Gas Infrastructure Europe, GIE Views Regarding the Prevention and Management of Gas Crises, Doc. Ref: 09GIE130 (30 Apr. 2009), 2, <www.gie.eu.com/adminmod/show.asp?wat=GIE%20views%20on%20SoSversion%2030%20avril_final.pdf>.

⁸⁰ *Ibid.*, 4.

⁸¹ ERGEG was established by the European Commission, in November 2003, in order to assist in creating a single-EU market for electricity and gas. See Commission Decision 2003/796/EC of 11 Nov. 2003 on establishing the European Regulators Group for Electricity and Gas, OJ L 296/34 of 14 Nov. 2003.

⁸² ERGEG, n. 60 above, 1–2.

⁸³ *Ibid.*, 4.

⁸⁴ Commission Staff Working Document, n. 44 above, 7.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

countries.⁸⁷ To prevent this from happening, regional (or Europe-wide, see section VII below) coordination of individual emergency plans with neighbouring countries should take place with the aim of eliminating any contradictions to ensure there is full consistency, avoiding individual actions that could have the effect of reducing gas in neighbouring countries.⁸⁸

Next to inadequate coordination of emergency plans, EU mitigation efforts were further hampered by a lack of interconnectedness of Europe's pipeline system. GIE noted that not all transmission operators could adequately adapt gas flow patterns in their networks (e.g., by reversing the flow of gas) and so deal with an alternated gas flow situation resulting from the dispute.⁸⁹ Overall, the absence of an EU-wide equality in level of preparedness, worsened by a lack of interconnectors, made it more difficult for the Union to adequately deal with the crisis through the Gas Directive.⁹⁰

The new Regulation that will replace the existing Gas Directive⁹¹ seems a step in improving coordination. According to the original proposal, the Commission should coordinate actions both internally and with regard to third States, working with both producer and transit countries on arrangements to handle crisis situations and to ensure a stable gas flow to the Union.⁹²

Specifically, the Commission envisages a role for itself whereby, in consultation with third countries involved, it would be entitled to deploy a task force to

⁸⁷ Examples of situations where actions in one Member State inadvertently placed another under strain include measures on gas flows during emergency situations taken in Italy, which nearly prevented alternate flows of gas from reaching Slovenia. See Commission Staff Working Document, n. 44 above, 10; interview with official from the Permanent Representation of Slovenia to the EU on 23 Apr. 2010. ERGEG's advice presented a five-point plan with suggestions to improve coordination in national emergency planning and regional coordination of network access, interconnections between markets, infrastructure planning procedures, including emergency scenarios, and the careful monitoring of security of supply in order to increase transparency through monitoring and early warning, notably in crisis and pre-crisis situations. See ERGEG, n. 60 above, 1–2.

⁸⁸ ERGEG, n. 60 above, 2.

⁸⁹ GIE, n. 79 above, 6.

⁹⁰ According to the Commission, the existing Directive is insufficient given the growing import dependence and increased supply and transit risks in third countries, as well as increasing gas flows and the development of the internal gas market in the Union. Moreover, it claims the extra capacity to ensure security of supply is not necessarily provided for by market forces. See Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC, COM(2009) 363 final (Brussels, 16 Jul. 2009), 3.

⁹¹ *Ibid.* On 25 Jun. 2010, EU Member State representatives reached a political agreement on a compromise text for the Gas Regulation. See Euractiv, 'EU Agrees Rules to Secure Gas Supply, 28 Jun. 2010', <www.euractiv.com/en/energy/eu-agrees-rules-secure-gas-supply-news-495651>, 28 Jun. 2010.

⁹² Council of the European Union, Note from General Secretariat of the Council to Delegations on the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC 11892/09 ENER 253 CODEC 963, Council Doc. 8304/4/10 REV 4, Recital Point 30, Commission Proposal Text, 20. In its amendments to the Proposal, the European Parliament stresses that this coordinating role should, in particular, be fulfilled in the case of emergency situations. *Ibid.*, EP Amendment 25, 20.

monitor gas flows outside of the Union and assume a role as mediator and facilitator where a crisis arises due to difficulties in a third country.⁹³ Member States posit a slightly more nuanced view, where such a monitoring force may be deployed outside the EU, where necessary, and report on gas flows *into* the Union.⁹⁴ Interestingly, whereas neither the Commission nor the Council makes mention of any role of the High Representative of Foreign Affairs and Security Policy/Vice-President of the Commission (HR/VP), the Parliament repeatedly stresses that this mediation and facilitation role should be enacted through both the energy Commissioner and the HR/VP (see in particular section VI.3 below).⁹⁵

In addition, the draft Regulation would place an obligation on Member States to designate a competent authority to assess risks and establish both preventive and emergency plans, which should be updated regularly and published, and be subject to peer review and testing.⁹⁶ The European Parliament goes a step further, in suggesting that these assessments should include the geopolitical risk to the Union posed by situations in third countries.⁹⁷ Conversely, the Council makes no mention of such risks.⁹⁸ Whether or not geopolitical risks are included, it is safe to say that provisions as suggested by all institutional actors involved would clearly impact positively on the Union's coherence in external action.

What immediately came into play on a *bilateral* level (section II above) is the ineffectiveness of statements made by the EU, as well as other organizations.⁹⁹ Recourse to such interventions, with the Union organizing its emergency planning in the meantime, would have been less necessary if the bilateral EWM had been reinforced earlier. Due to transit countries not being associated with the Mechanism, it was difficult to anticipate the crisis thoroughly. In order for a correct assessment to be made and for the EU to be able to organize its emergency response in advance, it is recommended for (key) transit countries to be associated with the Mechanism in the future. Coupled with the agreement to overhaul Ukraine's energy infrastructure and the country's likely joining of the Energy Community, this should aid the Union's oversight of one of its key transit partners.

Overall, looking at the Commission's handling of the dispute, its initial reaction was swift, as the monitoring agreement was quickly established; in spite of the fact that there proved little to monitor in the end. However, its bilateral diplomacy proved ineffective in preventing the crisis from escalating as neither Russia nor Ukraine acted on the EU's statements. In fact, it was not until industry got actively involved that the dispute was finally settled.

⁹³ *Ibid.*, Recital Point 30, Commission Proposal Text, 20.

⁹⁴ *Ibid.*, Recital Point 30, Current Council Text, 20.

⁹⁵ *Ibid.*, EP Amendment 25, 20–21 and Amendment 86, para. 4a (new), 70–71.

⁹⁶ *Ibid.*, Art. 3(2) and Recital Point 27, Commission Proposal Text, 25–26 and 19.

⁹⁷ *Ibid.*, EP Amendment 33, 27–28.

⁹⁸ *Ibid.*, Art. 3(2), Current Council Text, 27–28.

⁹⁹ Interview with official from the Permanent Representation of the Czech Republic to the EU on 19 Apr. 2010.

In the end, the agreement brokered between European companies was never needed as a final solution was reached before the crisis got to such a stage. However, it seems fair to assume that the mere negotiating of this deal proved helpful in removing Ukraine's objection to pay for the necessary technical gas. The consortium was set up by gas companies and backed up by national leaders – Prime Minister Berlusconi of Italy and German Chancellor Angela Merkel, together with Russian Prime Minister Putin are said to have been particularly influential, with the Commission allegedly not having played a role.¹⁰⁰ In terms of consistency and coherence in external relations however, this public 'interfering' by leaders from Member States and European companies did not aid the EU's attempts to speak with one voice to all relevant parties concerned.

No actions took place on the *interregional* level (section II above), yet this can be easily explained by the lack of regional integration between countries in the area. It is remarkable however that EU actions were largely absent on the *global* level (section II above), for it appears that there was something to gain here. With respect to the IEA, neither Ukraine nor Russia is a member of the organization. Consequently, neither could be held accountable for a failure to adhere to particular treaty provisions. With the Energy Charter, this is somewhat different. In spite of the ECT's primary role being to ensure investment protection and provide for a clear and reliable investment climate, public statements denouncing Ukraine's breach of the Charter's transit provisions on non-interruption and non-reduction of transit flows nevertheless could have exerted pressure on one of the parties to the dispute (in the form of public scrutiny) to push for resolution of the conflict. Doing so could have sent a signal that the EU took a violation of an international agreement by one of its contracting parties very seriously, thus providing the Treaty with a potential early role in resolving the conflict.¹⁰¹ In the long term, the finalization of the ECT's Transit Protocol should be stepped up in order to strengthen the Charter's regulatory framework. Doing so could be a significant first step forward into strengthening the ECT's power to mitigate any future crises.

Overall, differences in types and levels of interventions set aside, the analysis demonstrated that EU interventions seem to have been undermined by deficits in

¹⁰⁰ Pirani et al., n. 55 above, 48; MSNBC, n. 66 above; Traynor, n. 66 above.

¹⁰¹ Cf., P. Stevens, 'Cross-Border Oil and Gas Pipelines: Problems and Prospects', Joint UNDP/World Bank *Energy Sector Management Assistance Programme* (Washington, DC: UNDP/World Bank, 2003), 21 and 44. Here, Stevens argues that the consequences of violating an international agreement are much more serious than those resulting from not adhering to a bilateral agreement. Note that during the crisis, the EU could have referred to Art. 45 of the Treaty, which states that even without ratification, the Treaty is provisionally applicable, provided that it does not contradict existing domestic legislation. This in turn implies that referral to the Article in relation to Russia would have been possible. In fact, this has recently been confirmed by a special international commercial tribunal, set up for the Yukos case, that on 30 Nov. 2009 ruled that the ECT is binding on Russia. See Euractiv, 'Court Rules against Russia in Yukos Case, 1 Dec. 2009', <www.euractiv.com/en/energy/court-rules-russia-yukos-case/article-187869>, 7 Apr. 2010. However, given Russia's withdrawal from the provisional application of the ECT, see n. 38 above, any referral to Art. 45 ECT in the future seems unlikely to have any impact as Russia will no longer be bound by it.

coherence between Member State actions and those at EU level rather than by (in)action at any specific level of cooperation. Building on this observation, the advantages for the Union to act more coherently seem to lie in a combination of prevention, coupled with the ability to pose a credible and unified response to crisis situations. If coherence in external action could be ensured, for example through verification at EU level of Member States' bilateral deals with third country suppliers (e.g., Nord Stream, section III.2 above), the chances for such deals to serve the interests of the Union as a whole, rather than individual Member States, would be significantly enhanced.

In the long term, such verification would allow the benefits of both supply contracts and infrastructural deals to accrue more equally within the Union. This could potentially limit the occurrence of differing technical standards and clauses that constrain information sharing between gas companies, and so improve the level of interconnectedness of the internal market. In turn, this would then have the effect of improving the possibility for a well-informed, coordinated, and *solidaire* response to a supply interruption.

For the Union to be able to execute its emergency response accordingly in the future, institutional developments may act as catalysts or turning points towards achieving this aim. In the next section, we assess whether such implications can be derived from the recent coming into force of the Treaty of Lisbon.

VI Impact of the Treaty of Lisbon

Increased coherence in EU external relations is one of the central aims underpinning the Treaty of Lisbon. The Treaty generated much debate on whether it in fact allows the Union to act more coherently and effectively in its external policies, including energy. In this section, we assess whether three novelties of the Lisbon Treaty, that is, the energy competence, the solidarity mechanism, and the new actors in the Union's external relations, have the potential to act as a catalyst for a common energy policy in the (near) future.

1. *Scope of the Energy Competence*

Under the Lisbon Treaty, energy remains a shared competence,¹⁰² but for the first time it is given its own Title,¹⁰³ consisting of the three-limbed new Article 194

¹⁰² Article 4(2)(i) TFEU. However, one has to note here that the Union's exclusive competence to 'establish the competition rules necessary for the functioning of the internal market' based on Art. 3(1)(b) TFEU also stretches into the internal energy market. See also S. Fischer, 'Energie- und Klimapolitik im Vertrag von Lissabon: Legitimationsverweiterung für wachsende Herausforderungen', *Integration* 1 (2009): 54. It may be added that this also extends to some of the external aspects of the energy policy, see Art. 3(2) TFEU.

¹⁰³ Title XXI, Energy, of Part Three, Union Policies and Internal Actions, TFEU.

Treaty on the Functioning of the European Union (TFEU). Situating the ‘Union policy on energy’ explicitly ‘in the context of the establishment and functioning of the internal market’ and ‘with regard for the need to preserve and improve the environment’, the policy’s objectives are clearly outlined: (i) to ensure the functioning of the energy market; (ii) to ensure security of energy supply in the Union, (iii) to promote energy efficiency, energy saving, and the development of new and renewable forms of energy; and (iv) to promote the interconnection of energy networks.¹⁰⁴

In the past, as energy was an objective under the Treaties, yet no specific legal basis existed to take appropriate measures to that effect, Articles 95¹⁰⁵ and 308¹⁰⁶ of the Treaty Establishing the European Community (TEC) were often used. The frequent recourse to these articles became part of a broader discussion on ‘the future of Europe’ that started back in the early 2000s.¹⁰⁷ The 2001 Laeken Declaration approached the use of Articles 95 and 308 TEC in two ways, when it spoke of how to strike a balance between allowing the EU to be able to react to fresh challenges and developments and explore new policy areas on the one hand, while preventing ‘competence creep’ on part of the Union, on the other.¹⁰⁸ To accommodate both issues and work towards a solution, the Convention on the Future of Europe recommended in 2002 that energy should be granted a new specific legal basis should the Union wish to pursue policy in this field.¹⁰⁹

Some argue that the Lisbon Treaty’s creation of an energy Title may strengthen the Union’s self-perception as an energy actor and gradually turn European energy politics into a more *natural* undertaking, as Member States that are traditionally ‘wary’ of increased ‘Europeanization’ in this field could become more convinced of the possible added value of European energy policy.¹¹⁰ However, such a chain of events is by no means certain. It presupposes both increased concerted external action in the energy field and that the benefits of such actions outweigh actions taken at Member State level. At this stage, it remains speculative whether the application of the provisions of the Lisbon Treaty will effectively lead to this (ideal-type) situation.

¹⁰⁴ Article 194(1) TFEU.

¹⁰⁵ Article 95 TEC allowed for measures that had as their object the establishment and functioning of the internal market.

¹⁰⁶ Article 308 TEC provided for an additional legislative competence if action was proven necessary to attain one of the objectives of the Community, in the course of the operation of the common market, and the Treaty did not provide the necessary powers.

¹⁰⁷ ‘Laeken Declaration on the Future of the European Union, 15 Dec. 2001’, <<http://european-convention.eu.int/pdf/uknen.pdf>>, 15 Jul. 2010, s. III.

¹⁰⁸ *Ibid.*, 4.

¹⁰⁹ Convention on the Future of Europe, Final Report of Working Group V ‘Complementary Competences’, Doc. CONV 375/1/02 REV 1 (Brussels, 4 Nov. 2002), 15.

¹¹⁰ Fischer, n. 102 above, 58; interview with official from the Permanent Representation of the Czech Republic to the EU on 19 Apr. 2010.

Article 194 TFEU raises the question whether all EU measures in the energy field need to be henceforth based on this specific Treaty provision, or whether they may be adopted on the basis of other Treaty provisions (notably internal market provisions), as has been common practice in the past.¹¹¹ As Article 194(2), first paragraph TFEU stipulates that measures necessary to achieve the aforementioned objectives have to be established ‘without prejudice to the application of other provisions of the Treaties’, a cautious approach seems due. It is clear, for instance, that if EU measures were considered for the development of trans-European networks for energy infrastructures, Article 172 TFEU would be the appropriate legal basis. Moreover, the use of the plural ‘Treaties’ seems to indicate that in certain cases also Common Foreign and Security Policy (CFSP) measures – which find their basis in the Treaty on European Union (TEU) and not the TFEU – touching on energy remain possible.

2. *Solidarity*

An important novelty is the solidarity mechanism laid down in Article 122(1) TFEU¹¹² and touching in particular on energy:

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

As was highlighted above, throughout the crisis, the Council made repeated references to solidarity (section IV.2 above). This could be seen as a ‘test’ of Member States’ dedication to and concrete implementation of the Lisbon Treaty’s solidarity provision, pending the latter’s entry into force. However, as the account of the crisis showed, for various reasons the measures did not deliver their full intended effects. This could also stem from the equivocal nature of the concept of ‘solidarity’ itself. It is not a quantifiable notion, and once activated, its financial implications are unclear and cannot be derived from the Treaty. Solidarity is thus subject to Member States’ interpretation on how much weight is given to it in times of crisis.¹¹³ It may be added that ‘a spirit of solidarity between Member States’ is also expressly set out in Article 194(1) TFEU to guide the EU’s energy policy as such.

¹¹¹ B. Delvaux, M. Hunt & K. Talus (eds), *EU Energy Law and Policy Issues* (Rixensart: Euroconfidentiel, 2008), 28.

¹¹² Article 122(1) TFEU is the former Art. 100(1) TEC.

¹¹³ Interviews with officials from the Permanent Representations to the EU of Bulgaria and Czech Republic on 19 Apr. 2010, Latvia on 22 Apr. 2010, and Slovenia on 23 Apr. 2010; interview with official from the European Commission Directorate-General for Energy on 11 Mar. 2010.

The explicit mention of energy in connection with supply interruptions creates a legal basis that could enable the Union to intervene more actively in the future.¹¹⁴ In this light, the solidarity clause will undoubtedly play a role with respect to measures taken to ensure the security of supply at a time of crisis.¹¹⁵ It is however necessary here to point to some limitations. According to Article 194(2), second paragraph TFEU, measures necessary to achieve the objectives of Article 194(1) TFEU

shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c) TFEU.¹¹⁶

Although the extent to which Article 194(2), second paragraph TFEU impacts on the ability for the EU to act is as of yet unclear, possible tensions exist between this provision and solidarity measures necessary in the event of an interruption in energy supply based on Article 122(1) TFEU.

3. *External Relations*

Our account of the crisis has shown that recourse to effective, and above all, coherent EU diplomacy is much needed. The analysis indicated that the effectiveness of such diplomacy was more a question of 'effective bilateralism' rather than multilateralism – thus contradicting the EU's own *leitmotiv* for its external action. This, however, does not mean that the Union should not aim to make more effective use of multilateral instruments at its disposal, seek their reform, or move for increased

¹¹⁴ Fischer, n. 102 above, 57.

¹¹⁵ Yet, in line with the reference to the 'spirit of solidarity' in Art. 194(1) TFEU, it may also do so in promoting the interconnection of energy networks, as part of solidarity measures limiting a (future) crisis' impact. See also U. Eicke & D. Hackländer, 'Europäische Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrags von Lissabon', *Zeitschrift für Europarechtliche Studien* 11, no. 4 (2008): 595.

¹¹⁶ Article 192(2)(c) TFEU, situated in the preceding Treaty Title XX on Environment, provides for a special legislative procedure when the Council adopts 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply'. The Council then has to decide unanimously after consulting the European Parliament, the Economic and Social Committee, and the Committee of the Regions. See also Declaration No. 35 attached to the Lisbon Treaty, stating that the (Intergovernmental) 'Conference beliefs that Article 194 does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the conditions provided for in Article 347'. Art. 347 TFEU contains the age-old clause that 'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.'

‘multilateralization’ of bilateral areas, where appropriate. Article 21(1), second paragraph, of the post-Lisbon TEU clearly states that:

[t]he Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations [...] It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.¹¹⁷

Taking into account that increased coherence and resolve is desired in the EU’s external relations, the Lisbon Treaty’s creation of a new HR/VP, who is both part of the Council¹¹⁸ as well as the Commission,¹¹⁹ assisted by the Union’s own diplomatic corps, the European External Action Service (EEAS)¹²⁰, seems to have been inspired to tackle precisely this challenge.

The HR/VP’s ‘double hat’ was coined in order to bridge the Union’s external economic and political relations. With regard to the creation of the EEAS, this caused some authors to question whether its reach should extend to all aspects of external relations, or whether it should be confined to external political relations.¹²¹ Although energy has a clear external dimension, the discussion on the establishment of the EEAS has focused on the Directorate Generals of the Commission dealing specifically with external relations (DGs Relex and Development) and the Policy Unit, the European Security and Defence Policy (ESDP) and crisis management structures, and directorates of DG-E of the Council Secretariat, letting it hang in the balance whether (elements) of energy policy will be part of the EEAS from the outset.¹²²

¹¹⁷ Article 21(1), second paragraph TEU.

¹¹⁸ Pursuant to Art. 18(3) TEU, the HR presides over the Foreign Affairs Council.

¹¹⁹ Pursuant to Art. 18(4) TEU, the HR is one of the VPs of the Commission and shall ensure the consistency of the Union’s external action. The HR shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action. The HR thereby effectively took over the portfolio of hitherto External Relations Commissioner.

¹²⁰ Pursuant to Art. 27(3) TEU ‘[i]n fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States’.

¹²¹ G. Grevi & F. Cameron, ‘Towards an EU Foreign Service’, Issue Paper 29 (Brussels: European Policy Centre, 2005), 3.

¹²² ‘Council Decision establishing the organisation and functioning of the European External Action Service’, Council Doc. 11665/1/10 REV 1, ANNEX (Brussels 20 Jul. 2010), 1–6; S. Vanhoonacker & N. Reslow, ‘The European External Action Service: Living Forwards by Understanding Backwards’, *European Foreign Affairs Review* 15, no. 1 (2010): 7–8; S. Duke, ‘Providing for European-Level Diplomacy after Lisbon: The Case of the European External Action Service’, *The Hague Journal of Diplomacy* 4 (2009): 218–219; J. Lieb & A. Maurer, ‘The “How” of the EEAS: Variables, Priorities and Timelines’, Working Paper 28 (Brussels: European Policy Center, 2007), 67; A. Centioni & J. Rawlinson, ‘External Action Service: Where Are We?’, *The Euros*, 22 Mar. 2010, 2, <www.theeuros.eu/External-Action-Service-where-are,3597?lang=en>, 6 Apr. 2010.

Under ‘normal circumstances’ (i.e., in a situation of uninterrupted energy supply), it seems clear that the HR/VP does not have direct authority over EU external energy policy.¹²³ However, there is reason to believe that this could change under ‘abnormal circumstances’, such as in the event of a severe supply interruption like in January 2009, especially when such circumstances carry foreign and security policy implications.

The Council Decision establishing the organization and functioning of the EEAS reads in Article 2(1) that the EEAS shall support the HR/VP:

in fulfilling his mandates as outlined, notably, in Articles 18 and 27 TEU:

- in fulfilling his mandate to conduct the Common Foreign and Security Policy (‘CFSP’) of the European Union, including the Common Security and Defence Policy (‘CSDP’), to contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council and to ensure the consistency of the Union’s external action;
- in his capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council;
- in his capacity as Vice-President of the Commission for fulfilling within the Commission the responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union’s external action, without prejudice to the normal tasks of the services of the Commission.¹²⁴

The broad formulation of this provision seems to imply that energy (or parts thereof) may well fall under the remit of the HR/VP and the EEAS. This is definitely the case insofar it constitutes a CFSP matter, thus falling under the responsibility of the HR/VP, a situation quite likely if a crisis contains not purely economic but also political and security elements. Furthermore, in her role as VP of the Commission, the HR/VP is responsible for ‘coordinating other aspects of the Union’s external action’,¹²⁵ which ultimately also includes energy.

The EEAS is expected to support and work in cooperation with the General Secretariat of the Council, the Commission services, as well as with the diplomatic services of the Member States in order to ensure consistency between the different areas of the Union external action and between these and its other policies.¹²⁶ Furthermore, both the EEAS and the Commission are to ‘consult each other on all matters relating to the external action of the Union in the exercise of their

¹²³ S. Andoura, L. Hancher & M. van der Woude, ‘Towards a European Energy Community: A Policy Proposal’ (Paris: Notre Europe, 2010), 13; interviews with officials of the Permanent Representations of Belgium and Slovenia to the EU on 22 and 23 Apr. 2010.

¹²⁴ See n. 122 above.

¹²⁵ See also Art. 18(4) TEU.

¹²⁶ Article 3(1) EEAS Decision, n. 122 above.

respective functions'.¹²⁷ This implies that the EEAS could have staff that is responsible for following up external energy policy, either as part of a geographic desk, or a thematic desk within the EEAS' central administration.¹²⁸

With respect to external representation, the extent to which an issue is dominated by either security or technical/market aspects is likely to determine whether the President of the European Council (at the highest political level), the HR/VP, supported by the EEAS and aided by the Union delegations abroad, or the Commission takes the lead. Close cooperation between both the HR/VP and the Commissioner is crucial here.¹²⁹ A recent addition by the European Parliament to the draft Gas Regulation confirms this necessity:

[w]here the Commission is notified by the Competent Authority that an early warning level has been declared in a Member State or where a threat of disruption of gas supplies might have a clear geopolitical dimension, the Union, represented at the highest level, shall take appropriate diplomatic actions having regard to the special role given by the Lisbon Treaty to the Vice-President/High Representative.¹³⁰

The wording 'at the highest level' indicates that it is the task of the President of the European Council – without prejudice to the powers of the HR/VP – to represent the Union in case such diplomatic actions take place at the level of Heads of State and Government.¹³¹

However, the decision between what constitute 'security' and 'technical or market' elements has been subject to a fierce interinstitutional debate, as the creation of the EEAS prompted the Commission to worry that its role could be (partly) relegated to providing technical assistance, whereas the Council worried over a loss of influence of Member States over EU foreign policy.¹³² In any event, in times of a supply interruption carrying both economic, political, and security consequences, it is most likely that the HR/VP – supported by the EEAS – will take up a more prominent role in diplomatic efforts aimed at resolving a dispute, with the Commission providing assistance where appropriate. When diplomatic action

¹²⁷ Article 3(2) EEAS Decision, n. 122 above, excepting from this obligation the CSDP.

¹²⁸ See Art. 4(3)(a), first indent, EEAS Decision, n. 122 above; interview with official from the Polish Delegation of the European People's Party in the European Parliament on 26 Apr. 2010.

¹²⁹ Interviews with officials from the Permanent Representations of the Czech Republic and Belgium to the EU on 19 and 22 Apr. 2010.

¹³⁰ Council of the European Union, n. 92 above, EP Amendment 86, para. 4a (new), 70–71.

¹³¹ Pursuant to Art. 15(6), second paragraph TEU, '[t]he President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy'.

¹³² See G. Avery, 'Europe's Foreign Service: From Design to Delivery', in *Policy Brief* (Brussels: European Policy Center, 2009), 3; Centioni & Rawlinson, n. 122 above, 2; Vanhoonacker & Reslow, n. 122 above, 7.

at the level of foreign heads of State or government is required, the President of the European Council will come into play.

The new system still needs to be tested. Future crises and the EU's actions to address them will tell us what roles will exactly be played by the President of the European Council, the HR/VP and EEAS, and the Commission, and where the line between elements pertaining to CFSP and those that do not will be drawn.

VII Concluding Remarks

Our analysis has demonstrated that for the moment the EU lacks a unified response to an energy supply crisis, as internal divergences limit the Union's external resolve. Concrete attempts towards solving this issue are being made, with the draft Gas Regulation as its clearest example.

The latter also illustrates that progress is made as a consequence of 'external shocks'. Not only is this a very costly strategy, but in doing so, the EU also risks sustaining damage to its perceived ability to handle future crisis situations if its preventive efforts do not adequately take into account all the options on the table. Therefore, in the long run, an ambitious approach based on a combination of prevention and the ability to react in a concerted and decisive manner is to be preferred.

Given that the negotiations between the EU and Russia on a new PCA are unlikely to show significant progress in the short to medium term, it would be more beneficial for the Union to focus its efforts on its own abilities. Our analysis showed two clearly demonstrated loopholes in the EU's current strategy to resolve supply crises: (i) the fragmented character of information on the internal market and the coordination thereof in terms of emergency plans; and (ii) the sometimes haphazard manner by which bilateral diplomacy is conducted.

Admittedly, the first issue is greatly alleviated by the obligation under the draft Gas Regulation for Member States to designate a competent authority to assess risks, to establish and regularly update preventive and emergency plans.¹³³ ERGEG even suggests these emergency plans to be coordinated in a regional manner in order to avoid contradictions and ensure full consistency.¹³⁴ However, we believe that the EU should be more ambitious in its efforts as the Lisbon Treaty provides the tools to do so.

The Treaty offers the Union a distinct set of new actors and structures that could make for a more ambitious solution to the first problem and solve the second problem at the same time. When a crisis occurs that carries foreign and security implications, it should be the task of the HR/VP or, at the highest level, the President of the European Council, assisted by the EEAS, to engage in diplomatic efforts

¹³³ Council of the European Union, n. 92 above, Art. 3(2) and Recital Point 27, Commission Proposal Text, 25–26 and 19.

¹³⁴ ERGEG, n. 60 above, 2.

on behalf of the EU with the aim of striking a political agreement to the crisis and ensure full consistency and coherence. Yet, their combined efforts should be based on EU-wide information on the Union's internal market, provided by emergency plans coordinated at Union level under the auspices of the Commissioner for Energy.

To that effect, clear rules of cooperation between the President of the European Council, HR/VP, President of the Commission and Energy Commissioner, and Member States could go a long way for the EU to enhance its ability to adequately resolve a crisis such as in January 2009.

The EU's Commitment to Effective Multilateralism in the Field of Security: Theory and Practice

*Jan Wouters, Sijbren de Jong and Philip De Man**

1. Introduction

The European Security Strategy (ESS)¹ was released at a time when the credibility of the international security architecture had come under tremendous strain as a result of the 2003 Iraq war. The lead-up to the conflict had been characterised by an unprecedented divide between UN Member States who backed the US' position and those who believed concerted action should be subject to a UN Security Council (UNSC) mandate. Next to dividing the UNSC, EU Member States also firmly diverged on what action to take. The decision to go ahead without UNSC backing dealt a blow to the belief of achieving a multilateral solution to the 'Iraq question' and with it threw the UN into one of its biggest crises to date. Several months after the invasion Former Secretary General Kofi Anan – speaking before the General Assembly – referred to a 'fork in the road', referring to the need for UN reform.²

Early in 2010, the belief in the multilateral system seems to have been largely restored, not least spurred by the impact of the global financial crisis and the emergence of the G20 as a major forum for discussing global issues. The speeches delivered by EU and other world leaders at the 64th UN General Assembly (UNGA) made reference to a renewed belief in multilateralism as the preferred course of action to engage in true global governance in order to tackle these and other issues.³

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¹ Council of the European Union, 'A Secure Europe in a Better World: European Security Strategy', 12 December 2003.

² Secretary General address to UNGA, 23 September 2003, available at <<http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>> (accessed 8 December 2009).

³ See, inter alia, Statement on behalf of the EU by HE Mr Frederik Reinfeldt, Prime Minister of Sweden: 'We welcome the declared wish of the United States to work together with others in multilateral institutions. This opens the door to a promising new era in international cooperation'; Speech to UNGA by UK Prime Minister, Mr Gordon Brown: '[W]e must forge a progressive

As for the EU, this commitment to multilateralism is nothing new. In fact, it has been a cardinal principle of EU external relations ever since the Union's inception. Manifold references to a commitment to multilateralism can be found both at treaty level and in EU policy documents. In recent years, the EU has stepped up the pace and developed its own doctrine to guide its foreign relations, based on 'effective multilateralism'. What does this notion imply? And what does the EU's commitment thereto actually mean in practice? How strong is the EU's commitment? How far should it go? Finally, to what extent is the 'effectiveness' of EU action affected by the ever-more active presence of other major players on the international scene, both in bilateral relations and multilateral fora?⁴

The present contribution aims to answer the above questions by clarifying the extent of the EU's commitment to effective multilateralism. To this effect, the first two sections analyse the concepts 'multilateralism' and 'effectiveness', respectively, on the basis of a critical review of existing theoretical dissertations on the subjects. Subsequently, the notion of effective multilateralism as conceptualised *in abstracto* in the policy documents of the EU will be clarified. We will then assess the actual level of the EU's commitment to effective multilateralism in its foreign policy by drawing from the recent developments in the field of security, focusing on some of the key threats identified in the 2003 ESS. This will allow us, finally, critically to determine whether the notion of effectiveness as wielded by the EU today corresponds to what is commonly understood by the concept or if it is, rather, a political concept that carries an entirely different meaning.

2. The Concept of Multilateralism

In the immediate post-Cold War period there was a firm belief that multilateral norms and institutions had played a significant role in stabilising the international consequences of the geopolitical turmoil of 1989.⁵ This belief was predicated already for a long time by the so-called 'new institutionalists' in international

multilateralism... and for the first time in human history, create a true global society'; Speech by HE Mr Nicolas Sarkozy President of the French Republic: 'In the midst of a financial, economic and social crisis that has no precedent in the history of the United Nations, and faced with the threat of a global ecological disaster, we have a duty to invent a new world where the follies of yesterday are no longer possible'; Statement by HE Hu Jintao, President of the People's Republic of China, 'Unite as One and Work for a Bright Future': 'We should follow the spirit of equality, mutual benefit, and cooperation to preserve global economic and financial stability. And we should oppose terrorism, separatism, and extremism in all manifestations and deepen international security cooperation'; Remarks of President Barack Obama, 'Responsibility for our Common Future': 'Those who used to chastise America for acting alone in the world cannot now stand by and wait for America to solve the world's problems alone. We have sought – in word and deed – a new era of engagement with the world. Now it is time for all of us to take our share of responsibility for a global response to global challenges.'

⁴ See T. Renard, *A BRIC in the World: Emerging Powers, Europe, and the Coming Order*, October 2009, Egmont Paper 31, available at <<http://www.irri-kiib.be/paperegm/ep31.pdf>> (accessed 15 February 2010).

⁵ J.G. Ruggie, 'Multilateralism: The Anatomy of an Institution', 46 *International Organization* 1992, 561, p. 561.

relations, though their focus had been mostly on 'cooperation' and 'institutions' in a generic sense, international regimes and formal organisations sometimes being conceived as specific international subsets.⁶ Keohane in particular has contributed significantly in this field, defining multilateralism as 'the practice of coordinating national policies in groups of three or more States'.⁷

Other authors insisted that a *nominal* definition as suggested by Keohane failed to take into account the distinctive *qualitative* dimension of multilateralism and could in particular be conceived as also subsuming institutional forms that are traditionally seen as expressions of bilateralism rather than multilateralism.⁸ When defining multilateralism, it is not so much the number of parties or the number of relations that is under consideration, but rather the nature of the relations. Multilateralism not merely implies coordinating national policies in groups of three or more States; it also presupposes the existence of *certain principles for ordering the relations* among those States.⁹ Caporaso further argues that multilateral suggests 'many' actors. Yet it is unclear what should be considered as 'many'; it can range from a minimum of three to a maximum of all. 'Multilateral' as such refers to a region on a continuum, rather than a point, and thus can be analysed in terms of gradations.¹⁰

According to Keohane, institutions can be described as 'persistent and connected sets of rules, formal and informal, that prescribe behavioural roles, constrain activity, and shape expectations'.¹¹ Taking this definition as a basis, Ruggie describes multilateralism as a *generic institutional form* in international relations, adding that its 'generalised organising principles' logically entail a socially constructed indivisibility among the members of a collectivity with respect to the range of behaviour in question.¹² This in turn implies that multilateralism should be distinguished from a study of multilateral organisations *as such*. The latter is focused on the formal organisational elements of the institutions concerned, whereas the former is grounded in and rather appeals to the less formal, less codified habits, practices, ideas and norms of international society.¹³

There are good reasons why multilateralism and multilateral institutions should be kept separate. First, depending on the variation in organising principles, the

⁶ See, inter alia, S.D. Krasner (ed.), *International Regimes*, Ithaca, Cornell University Press, 1983; K.A. Oye (ed.), *Cooperation Under Anarchy*, Princeton, Princeton University Press, 1986; R. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, Princeton University Press, 1984.

⁷ R. Keohane, 'Multilateralism: An Agenda for Research', 45 *International Journal* 1990, 731, p. 731.

⁸ J.G. Ruggie, supra note 5, p. 565. Ruggie notes that Keohane is actually referring to *multinationalism* rather than *multilateralism*. See also Diebold, who distinguishes between 'formal' and 'substantive' multilateralism, reflecting Ruggie's conceptual distinction between nominal and qualitative multilateralism: W. Diebold Jr, 'The History and the Issues', in W. Diebold Jr (ed.), *Bilateralism, Multilateralism and Canada in U.S. Trade Policy*, Cambridge, Ballinger, 1988, 1, p. 1.

⁹ J.G. Ruggie, supra note 5, pp. 566–7. See also W. Diebold Jr, supra note 8.

¹⁰ J. Caporaso, 'International Relations Theory and Multilateralism: The Search for Foundations', 46 *International Organization* 1992, 599, p. 603.

¹¹ R. Keohane, supra note 7, p. 732.

¹² J.G. Ruggie, supra note 5, p. 571; J. Caporaso, supra note 10, pp. 601–2.

¹³ J. Caporaso, supra note 10, p. 602.

former may be strong while the latter is weak, or vice versa.¹⁴ Reference can be made to the G20, which is clearly an expression of multilateralism, even though its level of institutionalisation is very low compared with such multilateral organisations as the UN. Second, multilateral organisations and multilateralism are related in a cause-and-effect manner and can therefore never be substituted for each other: multilateral institutions may provide the venue for behaviour aimed at changing perceptions and beliefs, whereas multilateralism in turn is liable to generate, maintain, change or even undermine specific organisations.¹⁵

Finally, as was observed by Keohane, successful cases of multilateralism in practice generate among their members expectations of 'diffuse reciprocity', i.e. the arrangement in question is expected by its members to yield a rough equivalence of benefits in the aggregate and over time.¹⁶

It follows from the above theoretical overview that multilateralism is a highly demanding institutional form.¹⁷ In order to apply multilateralism in its foreign policy effectively, the EU should display effective coordination and establish clear organising principles that constitute an added value for, and are abided by, all parties concerned. This is clearly an ambitious undertaking which is further compounded by diverging interests, lowest common denominator decisions, the probability of non-compliance and, most importantly, widely differing understandings on what precisely constitutes 'effective'. After all, how can multilateralism be effective if there is no common understanding on what this 'end state' should represent?

3. 'Effective' Multilateralism?

The main problems in trying to define 'effectiveness' stem from the equivocal nature of the concept. Indeed, effectiveness means different things to different people, organisations and institutions, depending on the context in which the term is used. For example, an action can be dubbed 'effective' if the achieved result meets certain (predetermined) qualifications to indicate that the desired goal was attained. At the same time, however, it is difficult to detach this particular type of effectiveness from the process leading up to the result – for it is highly unlikely that an effective outcome can be reached through a process that in itself is not effective.

Taken literally, 'effectiveness' implies for multilateralism to produce 'noticeable effects'. Applied to the EU, the notion in essence refers to the extent to which the Union is able to attain its predetermined policy goals.¹⁸ This is made more likely if

¹⁴ L. Martin, 'Interests, Power, and Multilateralism', 46 *International Organization* 1992, pp. 765–92; J.G. Ruggie, *supra* note 5, p. 572.

¹⁵ See E.B. Haas, *When Knowledge is Power: Three Models of Change in International Organizations*, Berkeley, University of California Press, 1990.

¹⁶ R. Keohane, 'Reciprocity in International Relations', 40 *International Organization* 1986, pp. 1–27.

¹⁷ J.G. Ruggie, *supra* note 5, p. 572.

¹⁸ J. Neyer, 'Explaining the Unexpected: Efficiency and Effectiveness in European Decision-making', 11 *Journal of European Public Policy* 2004, 19, p. 22.

the decisions taken at EU level succeed in improving the Union's problem-solving capacity in the international arena.¹⁹ Whether this heightened theoretical capacity will then also enhance the EU's aptitude to address international challenges in the field, largely depends on the ability of the Union to shape multilateral cooperation or lead collective action in confronting such challenges.²⁰ However, attaining the EU's goals is only part of the problem; effectiveness in the literal sense also hinges upon the extent to which actions and achievements are coherent. Coherence in the context of EU multilateral governance comprises two prongs: (i) the absence of contradictions within EU external activity in different areas of foreign policy and in various multilateral frameworks such as the UN, NATO, the OSCE and the G8/20 (consistency); and (ii) the establishment of positive synergies between the aforementioned fields of activity (coherence). Missiroli terms this 'international coherence' or the 'inter- or cross-organisational dimension' of the idea of coherence.²¹

At the same time, 'effective' multilateralism can also be linked to the relative strength of multilateral governance frameworks, i.e. effective multilateralism as presupposing strong, negotiated and enforceable multilateral regimes.²² A regime can be qualified as strong if it has a wide range of instruments at its disposal for implementing its strategic goals, and is funded in accordance with the degree of urgency and ambition underpinning the issue to which it pertains. 'Negotiated' would imply that a broad coalition of State actors and non-State actors support the regime and that no key actors are limited or excluded from participating as such. Finally, whether a regime is enforceable depends on its ability to produce legally binding results and on the availability of enforcement mechanisms in case of non-compliance. Most problems arise when a regime is not legally binding, in which case compliance will largely depend on whether parties perceive their unilateral goals to be served better by voluntary adherence to the regime than by opting out of it. The difficulties in obtaining a high level of effective multilateralism when defined along these three parameters has been well illustrated by the difficulties of reaching agreement on whether a successor to the Kyoto Protocol in the context of the UN Framework Convention on Climate Change (UNFCCC) should impose legally binding obligations on the Contracting Parties.

Rather than trying to frame 'effectiveness' in terms either of the results it aims to achieve or of the relative strength it is supposed to represent in the context of

¹⁹ Cf. Scharpf's description of output legitimacy, according to which governments [and the EU alike] derive their legitimacy from their capacity to solve problems requiring collective solutions because they could not be solved through individual action or market exchanges alone. See, F. Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford, Oxford University Press, 1999, p. 11.

²⁰ G. Grevi, 'The Interpol World: A New Scenario', European Union Institute for Security Studies Occasional Paper 79, June 2009, available at <<http://www.iss.europa.eu/uploads/media/op79.pdf>>, p. 24 (accessed 15 February 2010).

²¹ A. Missiroli, 'European Security: The Challenge of Coherence', 6 *European Foreign Affairs Review* 2001, 177, p. 184.

²² E.B. Eide, 'Introduction: the Role of the EU in Fostering "Effective Multilateralism"', in E.B. Eide (ed.), 'Global Europe Report 1: "Effective Multilateralism": Europe, Regional Security and a Revitalised UN', London, Foreign Policy Centre, 2004, 1, p. 2.

multilateral regimes, one might also define it by reference to a player's 'strategic actorness', i.e. the extent to which an actor is able to shape the security environment pursuant to its own policy priorities.²³ Criteria for measuring the strength or weakness of an actor include the degree of dependence on other powers and the extent to which one is forced to rely on multilateralism in order to influence the international system. Great or system-determining powers are those which can shape the international scene through their actions, whereas small (system-affecting) powers can only influence the system when acting in accordance with other players through multilateralism.²⁴

The Report on the Implementation of the European Security Strategy in this regard notes that:

[T]o ensure our security and meet the expectations of our citizens, we must be ready to shape events. That means becoming more strategic in our thinking, and more effective and visible around the world. . . . To respond to the changing security environment we need to be more effective – among ourselves, within our neighbourhood and around the world.²⁵

According to this definition, if the EU is to operate effectively within a multilateral setting, it has to demonstrate both a great strategic/forward-looking capacity and a high level of visibility in multilateral institutions and fora in terms of clear and strong engagement with the issues under consideration. Apart from EU Strategies such as the 2003 ESS, which aim to address the EU's strategic actorness, it is thus the actual 'visionary performance' of the Union within key multilateral institutions and fora that is the crucial factor for determining whether or not the EU is an effective strategic actor.

It is often claimed that the current international institutional framework is in dire need of reform as it still reflects the world at the time the institutions were designed and fails accurately to depict the present political-economic global situation. Typically, two general explanations are put forward justifying reform. First, global levels of interdependence have increased significantly in the past decades, thus calling for greater cooperation to tackle today's challenges. Second, the distribution of power has shifted. The failure to adequately include new and rising powers such as Brazil, China, Germany, India, Japan and South Africa in international negotiations and decision-making creates the impression of a crisis of legitimacy: large and increasingly important parts of the world are often not adequately represented at the high table.²⁶ When we link this observation to the discussion above on the notion of effectiveness, this reform is in essence

²³ For a detailed discussion on the EU's level of strategic actorness in the context of international peace and security, see A. Toje, 'The European Union as a Small Power, or Conceptualizing Europe's Strategic Actorness', 30 *Journal of European Integration* 2008, pp. 199–215. See also D. Vital, *The Inequality of States. A Study of Small Power in International Relations*, Oxford, Oxford University Press, 1967, p. 4.

²⁴ A. Toje, *supra* note 23, pp. 200–3. See also R. Keohane, 'Lilliputian's Dilemmas: Small States in International Politics', 23 *International Organization* 1969, 291, pp. 295–6.

²⁵ 'Report on the Implementation of the European Security Strategy: Providing Security in a Changing World', Council Doc. S407/08, 11 December 2008, pp. 2 and 9.

²⁶ T. Wright, 'Toward Effective Multilateralism: Why Bigger May Not be Better', 32 *The Washington Quarterly* 2009, 163, p. 165.

seen as a vital precondition for enhancing the effectiveness of multilateralism as a form of governance. This is also recognised by the ESS, which holds that such reform should ultimately result in '[t]he development of a stronger international society, well functioning international institutions and a rule-based international order'.²⁷ At the same time, however, it should be recognised that an increased level of inclusion by no means guarantees enhanced and more effective cooperation, as the fundamental issue of reaching consensus among the various players involved still remains to be solved and might even worsen due to the increased number of actors.

A final way of defining effectiveness in multilateralism is by seeing it as a means of providing an 'exit strategy' at a time of paralysed negotiations. When key players are at loggerheads and an agreed solution appears more elusive than ever, the suggestion of an alternative way of untying the proverbial Gordian Knot might just be the factor that separates *effective* multilateralism from mere multilateralism. For example, when it became clear that the US would not ratify the Kyoto Protocol, the EU was faced with an enormous challenge to reach the necessary threshold for the Protocol to enter into force.²⁸ The Kyoto Protocol finally entered into force on 16 February 2005 after Russia had ratified it 90 days earlier as the result of an intensive EU-led lobbying campaign which effectively had reached an alternative solution to the problem posed by the US' non-ratification.

This brief overview makes clear that 'effective' does indeed mean different things to different players, thus substantially compounding the definitional issue in trying to apply the notion to the context of multilateralism. However, the strategic policy documents of the EU might offer some guidance in understanding the concept of effective multilateralism in the specific setting of the Union's foreign policy.

4. The EU's Conceptualisation of Effective Multilateralism

As mentioned previously, the EU's commitment to multilateralism as a form of governance can be traced back to the Union's inception. It is not until recently, however, that the EU has started to conceptualise the notion more outspokenly by adding the qualifier of effectiveness to it. This notion was introduced in the ESS and further elaborated upon in several policy documents outlining the EU's approach to foreign affairs issues.

The ESS lists among its main strategic objectives a commitment by the EU to adhere to multilateral treaty regimes, as well as to strengthening the treaties and their verification procedures.²⁹ At the strategic level, the ESS puts great emphasis on pursuing policy objectives both through multilateral cooperation in international

²⁷ European Security Strategy, *supra* note 1, p. 9.

²⁸ Art. 25 (1) of the Kyoto Protocol reads: 'This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.'

²⁹ European Security Strategy, *supra* note 1, p. 6.

organisations and through partnership with key actors, with a particular focus on the transatlantic partnership.³⁰ Furthermore, the ESS asserts that:

[I]n a world of global threats, global markets and global media, our security and prosperity increasingly depend on an effective multilateral system. The development of a stronger international society, well functioning international institutions and a rule-based international order is our objective. We are committed to upholding and developing International Law. The fundamental framework for international relations is the United Nations Charter. The United Nations Security Council has the primary responsibility for the maintenance of international peace and security. Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority.³¹

However, the ESS falls short of clearly identifying what this preferred effective system would actually constitute and what would make multilateralism 'effective'. After the ESS, 'effective multilateralism' developed into a veritable mantra to guide the entire approach to foreign relations to be taken by the EU, and the content of the norm was gradually elaborated upon in the process.

First, the Commission in its 2003 communication on the choice of multilateralism put great emphasis on an active commitment to effective multilateralism. In explaining this concept, the Commission noted, with clear reference to the ESS, that:

[It] means more than rhetorical professions of faith. It means taking global rules seriously, whether they concern the preservation of peace or the limitation of carbon emissions; it means helping other countries to implement and abide by these rules; it means engaging actively in multilateral forums, and promoting a forward-looking agenda that is not limited to a narrow defence of national interests.³²

Interestingly, the Commission also clearly linked the notion of effective multilateralism with that of 'global governance', clarifying that the latter would remain weak as long as multilateral institutions are unable to ensure effective implementation of their decisions and norms, the development of multilateral (legal) instruments and commitments being crucial for success in this regard.³³ In its frontrunner role, it is the EU's job to ensure that important multilateral institutions have the means to deliver results effectively.³⁴ In this context, effective multilateralism seems to refer to a regime that is liable to produce tangible results.

Effective multilateralism is also a guiding notion in the 2003 EU Strategy Against the Proliferation of Weapons of Mass Destruction (WMD Strategy). It stresses that a multilateral approach to security, including disarmament and non-proliferation, provides the best way to maintain international order and hence the EU's commitment to uphold, implement and strengthen the multilateral

³⁰ Ibid., p. 13.

³¹ Ibid., p. 9.

³² 'Communication of the Commission to the Council and the European Parliament on the European Union and the United Nations: The Choice of Multilateralism', COM(2003) 526 final, 10 September 2003, p. 3.

³³ Ibid., p. 5. See also Art. 21(2)(h) TEU, referring to the need to promote an international system 'based on stronger multilateral cooperation and good global governance'.

³⁴ Ibid., p. 9.

disarmament and non-proliferation treaties and agreements.³⁵ The WMD Strategy emphasises that the credibility of the multilateral treaty regime hinges upon its effectiveness, therefore inspiring the EU's policy of reinforcing compliance with the multilateral treaty regime.³⁶ It links effective multilateralism with strong, negotiated and enforceable multilateral regimes as defined previously.³⁷

The EU also seeks to introduce the concept of effectiveness in its workings with other multilateral organisations. One can refer in this respect to the EU common report on the implementation of UNSC Resolution 1540 (2004) on the non-proliferation of weapons of mass-destruction (see *infra*) and to the 2004 EU 'Paper for Submission to the UN High-level Panel on Threats, Challenges and Change', in which the Union outlined its view on the need for organisational reform of the UN. Importantly, the Paper notes that:

... multilateral institutions can remain effective only if they adapt to changing conditions, so that they remain capable of mounting an effective response to new threats and challenges as they emerge. At the same time, they must persist in their efforts to address long-standing challenges, taking into account on-going economic and social change as well as lessons learnt, ... as states will not place their trust in [the multilateral] system unless it shows itself capable of offering an effective response.³⁸

Further on the Paper also refers to the need to provide for *collective tools* (financial and other) and *political will* as vital preconditions for guaranteeing an effective response, thereby implying that multilateralism alone is no guarantor of success.³⁹ This once more points to a conceptualisation of effectiveness in terms of producing noticeable effects. At the same time, however, the Paper also describes an effective multilateral approach as 'a collective willingness to design and implement necessary policies and measures',⁴⁰ indicating that it is this collective willingness that reflects the level of effectiveness, rather than the produced results. Further, as the Paper reflects the EU's position on reforming the UN, the appeal to effective multilateralism therein may also be construed as an instrument for increasing the 'strategic actorness' of the Union within this particular organisation.

Two recent documents shed further light on the notion of effective multilateralism as deployed by the EU. First, it is stated in the 2008 'Report on the Implementation of the European Security Strategy'⁴¹ that Europe must lead a renewal of the multilateral order at a global level, stressing that the opportunity for such leadership is now.⁴² The Report lists the progress made in fostering partnerships for effective multilateralism both with individual States and with other

³⁵ Council of the European Union, 'EU Strategy against proliferation of Weapons of Mass Destruction', Council Doc. 15708/03, 12 December 2003, p. 5.

³⁶ *Ibid.*, p. 6.

³⁷ Cf. E.B. Eide, *supra* note 22, p. 2. This dedication to a multilateral approach was reiterated in the EU report on the implementation of UNSC Resolution 1540, 'Annex to the letter dated 28 October 2004 from the Permanent Representative of the Netherlands to the United Nations addressed to the Chairman of the Committee', UN Doc. S/AC.44/2004/(02)/48, 15 November 2004, pp. 4–5.

³⁸ Council of the European Union, 'Paper for Submission to the High-Level Panel on Threats, Challenges and Change', available at <<http://www.consilium.europa.eu/uedocs/cmsUpload/EU%20written%20contribution2.pdf>>, p. 1 (accessed 11 December 2009).

³⁹ *Ibid.*, p. 2.

⁴⁰ *Ibid.*, p. 3.

⁴¹ *Supra* note 25.

⁴² *Ibid.*, p. 2.

regional and international organisations.⁴³ Both the ESS and the Implementation Report depict the EU as an active and capable security actor on a global scale that can be a force for the good. The pivotal notions 'active' and 'capable' remain undefined, however, and it is unclear how they are linked with the creation of an effective multilateral system.

Second, the notion was further elaborated upon in a 2009 address by Benita Ferrero-Waldner, the then European Commissioner for External Relations and European Neighbourhood Policy. The Commissioner was at pains to point out that the world is in great need of effective multilateralism producing global solutions in light of the financial crisis, adding that multilateralism is also the *only* effective approach, not only for financial and economic matters, but for a much broader range of issues, including, importantly, environmental and security issues.⁴⁴ Once more, it is stated that the EU and the UN are the only two organisations with a sufficiently broad range of instruments at their disposal to be able to act as effective multilateral players.⁴⁵ The definition of effective multilateralism as the notion is used by the then Commissioner again refers to the aptitude to produce *noticeable effects*, in particular through *the effective usage of available instruments*.

Finally, the EU's formal commitment to multilateralism in general was further strengthened by the entry into force of the Lisbon Treaty on 1 December 2009. Article 21 (1), second paragraph, of the Treaty on European Union (TEU) now explicitly mentions that the Union, in the context of its external relations, 'shall promote multilateral solutions to common problems, in particular in the framework of the United Nations'. Further, it is stated that '[t]he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: ... promote an international system based on stronger multilateral cooperation and good global governance' (Art. 21 (2)(h) TEU). Current practice already reflects these commitments, only now made formal, for example, through the annual priority-setting exercise of the EU in preparation of the UNGA (see supra). As mentioned previously, the EU at the most recent session of the UNGA clearly repeated its firm intention to respond to global challenges through effective multilateralism based on international law, the principles enshrined in the UN Charter and its engagement to implementing the goals set forth in the 2005 UN World Summit Outcome document. The Council in this respect stressed that, in order to deliver on these challenging tasks, a renewed multilateral system with a stronger and more effective world organisation – the UN – is more needed than ever.⁴⁶

⁴³ The Report mentions, inter alia, the partnerships with the US, China, Canada, Japan, Russia, Brazil, South Africa, Norway, Switzerland, as well as the UN, NATO and the OSCE. It also refers to increased cooperation with regional organisations such as the African Union, the South Asian Association for Regional Cooperation (SAARC) and the Association of Southeast Asian Nations (ASEAN), along with a strengthened political dialogue with Central Asia.

⁴⁴ B. Ferrero-Waldner, 'Effective Multilateralism: Building for a Better Tomorrow', address at the United Nations Association of Spain, High Level Meeting on European Union and United Nations: Towards Effective Multilateralism, Barcelona, 14 April 2009.

⁴⁵ Ibid., p. 5.
⁴⁶ Council of the European Union, 'EU Priorities for the 64th United Nations General Assembly', Council Doc. 10809/09, 9 June 2009, point 1.

In sum, overlooking the documents mentioned above, it seems fair to say that the EU sees effective multilateralism primarily as a form of governance that should produce noticeable effects whilst being embedded within strong, negotiated and enforceable multilateral regimes. In practice, this means that, for the EU to be an effective multilateral security actor, its output should reflect a measurable increase in security and stability, which in turn should be safeguarded by well-functioning global regimes. The inherently instrumental and teleological aspect of effective multilateralism implies that one should assess the merit of the concept by looking at the way the EU has acted in recent years to address the key threats identified in the ESS, i.e. failed States, regional conflicts, terrorism, organised crime and weapons of mass destruction. The following sections test the EU's commitment by looking at the relative merits of Common Security and Defence Policy (CSDP) missions, mainly deployed in failed States and regional conflicts, on grounds of their complementarity and degree of cooperation with other international organisations (section 5) and by critically assessing the role of the EU within the Treaty on the Non-proliferation of Nuclear Weapons (NPT) Review Conferences in terms of (i) effective intra-EU coordination and (ii) the degree of cooperation with third States in attaining a strong, negotiated and enforceable non-proliferation regime (section 6).

5. Common Security and Defence Policy

The European Security and Defence Policy (ESDP), renamed *Common Security and Defence Policy* (CSDP) in the Lisbon Treaty, finds its origins in the 1998 Saint-Malo Declaration between France and the United Kingdom.⁴⁷ The Declaration stressed the urgent need to decide on the progressive framing of a common defence policy in the framework of the provisions on the Common Foreign and Security Policy (CFSP) as enshrined in the Treaty of Amsterdam (1997). In the following decade, several instruments and policy declarations were adopted to turn this promise into reality.⁴⁸ With the entry into force of the Lisbon Treaty on 1 December 2009, the relevant provisions in the TEU describe the CSDP as an instrument through which to provide the EU with an operational capacity drawing on civilian and military assets, which the Union may use 'on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter, ... using capabilities

⁴⁷ Joint Declaration on European Defense issued at the British-French Summit, Saint-Malo, 4 December 1998, available at <<http://www.fco.gov.uk/resources/en/news/2002/02/joint-declaration-on-eu-new01795>> (accessed 7 January 2010).

⁴⁸ A comprehensive overview of the development of the EU's ESDP/CSDP does not fall within the purview of this contribution. For more on the subject, see J. Howorth, *Security and Defence Policy in the European Union*, Basingstoke, Palgrave Macmillan, 2007; M. Merlingen and R. Ostrauskaite (eds), *The European Security and Defence Policy: Operationalisation, Impact and Context*, London, Routledge, 2007; S. Keukeleire and J. MacNaughtan, *The Foreign Policy of the European Union*, London, Palgrave Macmillan, 2008.

provided by the Member States'.⁴⁹ Ever since launching its first missions in 2003 (EUPM in Bosnia-Herzegovina and Artemis in the Democratic Republic of the Congo (DRC)), the EU has engaged in no less than 23 military and civilian ESDP operations, mainly covering territory in Africa and the Union's neighbourhood countries.⁵⁰ While the sheer number of operations and their overall level of success has led many commentators to herald the CSDP as an effective instrument of EU foreign policy⁵¹, the ad hoc nature and limited scope of the missions, combined with the high level of cooperation with other established peacekeeping actors having already largely pacified the relevant areas of operation before any EU deployment, somewhat qualify this assessment of effectiveness.⁵²

The modest, piecemeal approach to CSDP operations is at odds with the grand rhetoric of the ESS, adopted, incidentally, at the same time as ESDP first became operational. The ESS, it is recalled, defines effective multilateralism as an instrument for developing a stronger international society, well-functioning international institutions and a rules-based international order, so as to allow the EU to make a real impact on a global scale. In this respect, the ESS recognises the pivotal role of the UN and NATO in upholding international peace and security. In particular, it is noted that '[s]trengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority', while also emphasising that '[o]ne of the core elements of the international system is the transatlantic relationship, [which] strengthens the international community as a whole. NATO is an important expression of this relationship'.⁵³ Both relationships are important expressions of effective multilateralism as envisaged by the EU, the ultimate tenor of which is largely contingent upon the evolution of the triangular and partially overlapping relationship EU-UN-NATO.

The institutional relationship between the UN and regional arrangements and agencies is governed primarily by Chapter VIII of the UN Charter, the provisions of which reveal, at the very least, a certain hesitancy in the mind of the drafters to rely overly on regional organisations in matters of international peace and security.⁵⁴ As such, the Chapter prescribes that regional action should always be

⁴⁹ See Arts 42–46 TEU.

⁵⁰ For an up-to-date overview of all EU ESDP/CSDP missions, see <<http://www.consilium.europa.eu/showPage.aspx?id=268&lang=en>> (accessed 15 February 2010).

⁵¹ See, inter alia, the authors referred to in A. Menon, 'Empowering Paradise? The ESDP at Ten', 85 *International Affairs* 2009, 227, pp. 227–8.

⁵² S. Keukeleire, 'European Security and Defence Policy: From Taboo to a Spearhead of EU Foreign Policy?', in F. Bindi (ed.), *The Foreign Policy of the European Union: Assessing Europe's Role in the World*, Washington, Brookings, 2009, 51, pp. 67–8; A. Menon, supra note 51, pp. 229–30.

⁵³ European Security Strategy, supra note 1, p. 9.

⁵⁴ On the tension between regionalism and universalism in the UN Charter and its predecessor, the League of Nations Covenant, in the context of the EU's contribution to multilateralism, see K. Graham, 'UN-EU Cooperation on Security: In Search of "Effective Multilateralism" and a Balanced Division of Tasks', in J. Wouters, F. Hoffmeister and T. Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership*, The Hague, T.M.C. Asser Press, 2006, 281, pp. 288–91; and K. Graham and T. Felício, 'Regional Organisations and Collective Security: The Role of the European Union', in M. Ortega (ed.), *The European Union and the United Nations. Partners in Effective Multilateralism*, Chaillot Paper 78, June 2005, available at <<http://www.iss.europa.eu/uploads/media/cp078.pdf>>, 83, pp. 84–6 (accessed 15 February 2010).

consistent with UN purposes and principles, stressing in particular the need for prior UNSC authorisation before any enforcement activity can be undertaken by regional agencies (Articles 52 (1) and 53 (1) UN Charter). Whether the EU can be considered a regional arrangement pursuant to Chapter VIII is subject to much controversy. What is clear, however, is that the preponderantly sceptical attitude of the UN to regional participation in peacekeeping operations shifted dramatically in the course of the 1990s, when the tragic events of Somalia, Rwanda and Srebrenica prompted a sudden and near-complete withdrawal of European and US troops from UN-led peacekeeping operations.⁵⁵ Ever since, the UN Secretary General has systematically stressed the importance of involving regional players in situations of conflict prevention, peacekeeping and post-conflict stabilisation, starting with Boutros-Ghali's emphatic appeal in *An Agenda for Peace*.⁵⁶ The supply-demand relationship between the UN and the EU has thus effectively been reversed over the past two decades and is currently not so much governed by what the UN wants as by what the EU is willing to offer.⁵⁷

A good indication of this relationship of dependency is to be found in the 2004 Elements of Implementation of the 2003 EU-UN Joint Declaration on cooperation in military crisis management operations.⁵⁸ After recalling the importance of strengthening the UN in clear reference to the ESS, the 2004 document goes on to identify the main modalities under which the EU could provide military capabilities in support of the UN as being the 'provision of national military capabilities in the framework of a UN operation [and] an EU operation in answer to a request from the UN'.⁵⁹ However, it is clear that the activation of the first modality

⁵⁵ See J. Dobbins et al., *Europe's Role in Nation-Building: From the Balkans to the Congo*, 2008, available at <http://www.rand.org/pubs/monographs/2008/RAND_MG722.pdf> (accessed 8 January 2010), pp. 226–31. The significant national contributions by EU Member States to the recent UNIFIL operation in Lebanon are remarkable in this respect. However, the European countries of UNIFIL still insisted upon creating a special Strategic Military Cell within the mission, clearly illustrating their continuing mistrust of UN operations. See J. Wouters and T. Ruys, 'UN-EU Cooperation in Crisis Management: Partnership or Rhetoric?', in S. Blockmans (ed.), *The European Union and Crisis Management: Policy and Legal Aspects*, The Hague, T.M.C. Asser Press, 2008, 215, pp. 228–29 and *infra*. For more on the European contribution to UNIFIL, see N. Pirozzi, 'UN Peacekeeping in Lebanon: Europe's Contribution', 30 *European Security Review* 2006, 1, pp. 1–3.

⁵⁶ UN Doc. A/47/277-S/24111, 17 June 1992. See further the various reports on the prevention of armed conflicts drafted by Kofi Annan in his capacity of UN Secretary General.

⁵⁷ T. Tardy, 'EU-UN Cooperation in Peacekeeping: A Promising Relationship in a Constrained Environment', in M. Ortega (ed.), *The European Union and the United Nations. Partners in Effective Multilateralism*, Chaillot Paper 78, June 2005, available at <<http://www.iss.europa.eu/uploads/media/cp078.pdf>>, p. 49 (accessed 15 February 2010); J. Wouters and T. Ruys, *supra* note 55, pp. 227–31. A possible exception is provided in instances where the EU would wish to include the use of force in the mandate of a given CSDP mission, in which case the authorisation of the UNSC should be obtained for reasons of legality or at least overall legitimacy.

⁵⁸ 'EU-UN Co-operation in Military Crisis Management Operations', adopted by the European Council of Brussels, 17–18 June 2004, implementing 'Joint Declaration on UN-EU Co-operation in Crisis Management', Council Doc. 12510/03, 24 September 2003 (hereinafter 'Elements of Implementation').

⁵⁹ *Ibid.*, p. 2. See also the language in the Joint Statement on 'UN-EU Cooperation in Crisis Management', 7 June 2007, available at the Council website <<http://www.consilium.europa.eu/>>, p. 2 ('The EU Battlegroup Concept also provides for the possibility of *EU-led* Crisis Management Operations being deployed in response to requests from the UN Security Council, *under a UN mandate where appropriate*' (emphasis added)). Compare the slightly more integrated modalities

remains subject to a purely national decision by EU Member States. At the same time, an operation under the terms of the second modality would remain under the separate political control and strategic direction of the Union.⁶⁰ It therefore appears that neither option is likely to be as effective in terms of facilitating EU efforts to *strengthen the UN* as would the contribution of an integrated EU contingent in a UN-led operation with a single command and control structure.

The operations carried out thus far by the EU appear to confirm that the focus in terms of CSDP is still on cooperation and coordination with the UN through autonomous operations rather than on fully fledged EU contributions to UN-led missions. Emblematic in this respect is the traditional EU reluctance to 're-hat' its troops under the so-called bridging model by integrating them at the end of an ESDP mission into a subsequent UN-led operation. The EU instead prefers to remain present in the region through separate crisis management initiatives of its own.⁶¹ Even though the UN has a clear predilection towards 're-hatting' EU troops, the Union itself rather chooses to rely on such related modalities as 'clearing house processes' and 'enabling capacities', both of which are grounded upon separate command structures and national decisions to contribute troops.⁶² The recent experience in Chad and the Central African Republic (CAR) may very well indicate a breakthrough in operational relations between the EU and the UN, however, inasmuch as the Union after the conclusion of its EUFOR Chad/CAR mission for the first time explicitly agreed for its sites, infrastructure and troops to be transferred to MINURCAT, the follow-up UN mission in these countries. The transfer suffered severe logistical and operational strain, however, revealing that much work remains to be done in order to maximise the effectiveness of EU contributions to UN operations.⁶³

Much as the ESS and its implementation report formally recognise the UN as the apex of the multilateral system,⁶⁴ the ESS arguably attaches even greater importance to the transatlantic relationship, embodied in NATO, which is deemed 'irreplaceable'.⁶⁵ Historical evolutions in the aftermath of the Second World War have shaped the current relationship between the EU and the US/NATO into an alliance of dependency largely dictated by the latter, thereby clearly distinguishing it from the nature of the EU's rapport with the UN. Indeed, it is no coincidence that the ESDP took off at a time when US capacities were facing overstretch due to their deployment in an ever-intensifying 'war against terror'. Long a taboo,

enumerated in the Elements of Implementation of EU-UN Co-operation in Civilian Crisis Management, 13 December 2004, Council Doc. 16062/04, Annex IV to the Annex. The Civilian Elements also stress the importance of increased EU visibility, thus concretising the meaning of effective multilateralism in this context (p. 62).

⁶⁰ Elements of Implementation, supra note 58, pp. 2-4.

⁶¹ J. Wouters and T. Ruys, supra note 55, p. 228, referring to the 2003 Operation Artemis in the DRC.

⁶² Elements of Implementation, supra note 58, recommendations p. 6.

⁶³ See in general the Reports of the UN Secretary General on the United Nations Mission in the Central African Republic and Chad, UN Doc. S/2009/359, 14 July 2009 and UN Doc. S/2008/760, 4 December 2008. See also M. Bakker and J. Voorhoeve, 63 *Internationale Spectator* 2009, pp. 67-71.

⁶⁴ Language taken from the 2008 Implementation Report, supra note 25, p. 11.

⁶⁵ European Security Strategy, supra note 1, p. 13. The 2008 Implementation Report further refers to the US as Europe's 'key partner' in this area (supra note 25, p. 11).

European Defence could finally count on US support, a gesture later to be reciprocated by France's rapprochement to NATO.⁶⁶ The increased cooperation between both organisations was formalised in the signing of the 2003 Berlin Plus arrangements, and, more recently, the entry into force of the Lisbon Treaty, which explicitly recognises NATO as 'the foundation of [the EU Member States'] collective defence and the forum for its implementation'.⁶⁷ The Berlin Plus arrangements, the importance of which is also underscored in the ESS,⁶⁸ allow for NATO support for EU operations in which the Alliance is not involved as such, *inter alia*, by providing for a NATO European command option for EU-led military operations. In practice, the EU under this modality makes use of NATO's operational headquarters (SHAPE) under the command of its Deputy Supreme Allied Commander Europe (DSACEUR).⁶⁹

Apart from highlighting the EU's operational dependency in terms of its relationship with NATO, the institutional framework of the cooperation between both organisations also serves to underscore the limited integrated nature of EU military crisis management.⁷⁰ The NATO option notwithstanding, the EU has only two types of planning and command structures at its disposal: those of a so-called 'EU framework nation' (either the UK, France, Germany, Italy or Greece) and the recently established EU Civil-Military Operations Centre (OpsCen). The latter is not a permanent structure, however, and in any case remains untested.⁷¹ Most ESDP operations undertaken so far have designated a framework nation, thus calling into question the true 'European' nature of these missions, at least from an operational perspective.⁷² However, the framework nation option does provide a practical and workable solution for those EU Member States whose crisis management actions for whatever reasons of political and historical sensitivities might not be easily accepted by the country in which they wish to intervene if undertaken unilaterally. As such, the CSDP framework, limited in its integrated nature though it may be, shrouds Member State actions with a fitting veil of legitimacy much needed to avoid claims of neo-colonialism.⁷³ France's designation as framework nation in the ESDP missions in the DRC, Chad and the CAR gains significant importance in this respect. Although unilateral demarches akin to the

⁶⁶ S. Keukeleire, *supra* note 52, pp. 51–61. ⁶⁷ Art. 42 (7)(2) TEU.

⁶⁸ European Security Strategy, *supra* note 1, p. 12.

⁶⁹ See the Berlin Plus press note of 11 November 2003 at the website of the Council of the EU. See also <http://www.nato.int/cps/en/natolive/topics_49217.htm> (accessed 7 January 2010).

⁷⁰ S. Keukeleire, *supra* note 52, pp. 63–4. This issue is also touched upon in the 2008 Report on the Implementation of the ESS, *supra* note 25, p. 10.

⁷¹ E. Hochleitner, 'Permanent EU Command and Control Structures: A Capability Deficit to Be Addressed', in S. Biscop and F. Algieri (eds), *The Lisbon Treaty and ESDP: Transformation and Integration*, Egmont Paper 24, June 2008, available at <<http://www.egmontinstitute.be/paperegm/ep24.pdf>> (accessed 15 February 2010), 27, pp. 27–29.

⁷² See, for example Operations Artemis (France), EUFOR DRC (Germany), EUFOR Chad/CAR (France), EU NAVFOR Somalia (UK). Many authors have suggested the establishment of permanent EU Headquarters in the context of CSDP missions: see, in general, S. Biscop and F. Algieri (eds), *The Lisbon Treaty and ESDP: Transformation and Integration*, Egmont Paper 24, June 2008, available at <<http://www.egmontinstitute.be/paperegm/ep24.pdf>> (accessed 15 February 2010). Whether such institutionalisation should be recommended remains to be seen (see *infra*).

⁷³ See A. Menon, *supra* note 51, pp. 240–1.

interventions of the UK and France in (their former colonies of) Sierra Leone and Côte d'Ivoire at the beginning of the 21st century may have become rather rare since the development of ESDP;⁷⁴ the consistent reluctance of EU Member States to 'europeanise' the CSDP framework a decade later does cast some doubt on the motivations behind the proclaimed goal of effective multilateralism.

Indeed, the development of a strong ESDP has not only been hampered by the US' wariness of a more independent Europe: EU Member States themselves are traditionally very reluctant to transfer sovereignty on issues of national defence, protective as they are of their respective defence industries.⁷⁵ This hesitancy is reflected in the provisions on CSDP in the current EU treaties, which, even though the pillar structure was formally abolished by the Lisbon Treaty, still prescribe decisions on common security and defence to be taken unanimously by the Council without the possibility of review by the European Court of Justice (Article 42 (4) TEU and Article 275 TFEU). Moreover, Article 42 (2)(2) TEU emphatically puts that the CSDP 'shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in [NATO], under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework'.

Taking into account that the capabilities of CSDP missions are to be provided by EU Member States (Article 42 (1) TEU), the above provisions make it clear that the Union's common security and defence policy constitutes merely one of the manifold modalities of multilateral action for EU Member States to maintain international peace and security. Effective multilateralism in this context becomes *opportunistic multilateralism*, enabling Member States to engage in crisis management through the EU when the political circumstances allow for maximum visibility and effectiveness of their intervention, taking into account the intricacies of the aforementioned relationships of dependency and considerations of *realpolitik*. This helps to explain the ad hoc nature and limited scope of the ESDP missions undertaken so far, as well as the specific geographical location of these operations and the absence of a clear security strategy, in spite of the formulation of the ESS. After all, it is hardly a coincidence that the main theatre of ESDP operations so far has been limited to Africa and Europe's immediate neighbourhood, regions of relatively low interest to global powers such as the US and, to a lesser extent, Russia (although China's rise in Africa may change this sooner rather than later), while the EU's impact on major scenes of international turmoil such as the Middle East, Afghanistan and Iraq has been rather limited.⁷⁶ Along with the requirement of unanimity for CSDP, the above helps to explain the apparently random

⁷⁴ See in general on these crisis management operations J. Dobbins et al., *supra* note 55.

⁷⁵ See A. Menon, *supra* note 51, pp. 236–9 and authors cited; A. Toje, 'The Consensus-expectations Gap: Explaining Europe's Ineffective Foreign Policy', 39 *Security Dialogue* 2008, pp. 121–41.

⁷⁶ A. Menon, *supra* note 51, pp. 243–4; A. Toje, *supra* note 23, pp. 208–9. Compare the geographical priorities as set out in the ESS, listing the Arab-Israeli conflict while at the same time omitting any reference to Africa. See also V. Kronenberger and J. Wouters, 'Conclusion: Towards a Comprehensive EU Policy on Conflict Prevention', in V. Kronenberger and J. Wouters (eds), *The European Union and Conflict Prevention*, The Hague, T.M.C. Asser Press, 2004, 573, pp. 583–5.

‘cherry-picking’ by EU Member States in terms of crisis management missions, alternately opting for national contributions to UN-led missions (UNIFIL), NATO operations, while sometimes even failing to take any action at all in situations that nevertheless appear tailor-made for CSDP intervention, such as Darfur.⁷⁷

Effective multilateralism in the context of CSDP should therefore mainly be understood as a means for EU Member States to demonstrate the progress made in terms of the Union’s foreign policy to the extent this enhances the visibility of the Member States themselves, as it is after all the Member States who bear the bulk of the operational risk and financial brunt of CSDP missions.⁷⁸ Reasons of legitimacy and dependency on the world’s leading powers force EU Member States to choose their partners for each mission carefully, autonomous military CSDP operations being possible only with the approval of the major powers gathered in the seat of the UNSC. For these reasons Toje⁷⁹ brands the EU a ‘small power’ in the context of crisis management: the Union’s policy is one of dependence and alliance, characterised by a geographical limitation to its own (historical) and immediately adjacent areas and based on the promotion of non-coercive multilateral measures.⁸⁰ In the current period of transition for EU foreign affairs, the idealist rhetoric of effective multilateralism is heavily curtailed by the realisation that interventionist initiatives by EU Member States may sometimes be more visible and effective if carried out through multilateral action with partners other than the EU itself. This observation, combined with the procedural and financial idiosyncrasies of the EU, can help to explain why the operationalisation of effective multilateralism by EU Member States, in spite of the ESS, does not necessarily coincide with the stated aim of strengthening the UN as the apex of the multilateral system.⁸¹

6. Effective Multilateralism and Non-Proliferation of Nuclear Weapons

The June 2003 Thessaloniki European Council strongly emphasised the EU’s commitment to multilateral disarmament, non-proliferation treaties and the multilateral institutions that are charged with their verification and compliance.⁸² The European Council called on Member States to elaborate a coherent EU strategy

⁷⁷ A. Toje, *supra* note 75, pp. 135–8.

⁷⁸ Compare A. Menon, *supra* note 51, p. 242.

⁷⁹ A. Toje, *supra* note 23, pp. 200–3.

⁸⁰ This is apparently recognised by the European Parliament in its draft resolution on the implementation of the European Security Strategy and the Common Security and Defence Policy, which stresses that ‘the Union must enhance its strategic autonomy through a strong and effective foreign, security and defence policy, so as to promote peace and international security, defend its interests in the world, protect the security of its own citizens, contribute to effective multilateralism in support of international law and advance respect for human rights and democratic values worldwide’: European Parliament, Committee on Foreign Affairs, ‘Draft Report on the implementation of the European Security Strategy and the Common Security and Defence Policy’, Doc. 2009/2198/(INI), 8 December 2009.

⁸¹ See also A. Menon, *supra* note 51, p. 242.

⁸² European Council, Presidency Conclusions, Annex II Declaration on Non Proliferation of Weapons of Mass Destruction, Thessaloniki, 19 and 20 June 2003, p. 37.

to address the threat of proliferation before the end of 2003. The resulting WMD Strategy (see *supra*) reaffirms the Thessaloniki commitment by situating EU action on weapons of mass destruction within a context of effective multilateralism aimed at (i) the implementation and universalisation of the existing disarmament and non-proliferation norms and (ii) the reinforcement of compliance with and the improvement of existing verification mechanisms and systems.⁸³ Both are important prongs of the EU's approach to effective multilateralism as described earlier.

The cornerstones of the nuclear non-proliferation regime are the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the NPT Safeguard Agreements and Additional Protocols. The NPT is the essential foundation for the pursuit of nuclear disarmament and should therefore be preserved in its integrity.⁸⁴ In pursuit of its commitments, the EU thus attaches great importance to its participation within the framework of the NPT Review Conferences that are held every 5 years. However, as the following analysis of the outcome and proceedings of the past NPT Review Conferences will show, the Union does not always succeed in upholding its commitment to all aspects of effective multilateralism as identified in the previous paragraph. Indeed, paradoxically, the effectiveness of the global multilateral approach to non-proliferation seems to have suffered a major breakdown *after* the formulation of the 2003 ESS, due to both developments outside the immediate reach of the EU and to fissures in coherence within the Union itself.

The Common Position agreed in preparation for the 2000 NPT Review Conference *inter alia* called for:

... efforts to convince States which are not yet parties to the NPT ... to accede to it as soon as possible; [the] early entry into force of the Comprehensive Nuclear Test-ban Treaty ...; immediate commencement and early conclusion of negotiations in the Conference on Disarmament ... on a non-discriminatory, multilateral, internationally and effectively verifiable Treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices.⁸⁵

The 2000 NPT Review Conference was largely seen as a success, as all Main Committees of the Conference⁸⁶ reached an agreement and the participating State Parties were able to adopt a final document with consensus.⁸⁷ Undoubtedly the most important element reflected in the Final Document were the so-called

⁸³ EU Strategy against proliferation of Weapons of Mass Destruction, *supra* note 35, pp. 5 and 6. Biscop and Drieskens refer to this second prong as so-called 'enforceable multilateralism', i.e. the enforcement of multilateral obligations by third countries: S. Biscop and E. Drieskens, 'The European Security Strategy: Confirming the Choice for Collective and Comprehensive Security', in J. Wouters, F. Hoffmeister and T. Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership*, The Hague, T.M.C. Asser Press, 2006, 267, p. 273.

⁸⁴ EU Strategy against proliferation of Weapons of Mass Destruction, *supra* note 35, p. 2.

⁸⁵ Art. 2 (1)(a) and (2)(a) and (b), Council Common Position 2000/297/CFSP of 13 April 2000 relating to the 2000 Review Conference of the Parties to the Treaty on the Non-proliferation of Nuclear Weapons, OJ L 97, 19 April 2000, 1.

⁸⁶ The three pillars of the NPT are non-proliferation, disarmament and the right to peaceful uses of nuclear energy. Each pillar is dealt with in a corresponding Main Committee.

⁸⁷ M. Kurosawa, 'The 2005 NPT Review Conference and Nuclear Disarmament', 53 *Osaka University Law Review* 2006, 47, p. 48.

‘Thirteen Practical Steps’, outlining the road to implementation of the nuclear disarmament provision of Article VI NPT.⁸⁸ These Practical Steps were the successful outcome of appeals by the New Agenda Coalition (NAC)⁸⁹ to the nuclear weapon States (NWS) to step up their efforts towards disarmament and reflected most elements of the EU Common Position. Importantly, the steps called on the NWS to embark on:

[a]n unequivocal undertaking...to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.⁹⁰

This landmark declaration notwithstanding, difficulties soon arose in the run-up to the 2005 NPT Review Conference with the refusal by the US (supported tacitly by France) to accept the 2000 declaration and to affirm their ‘unequivocal commitment’ to proceed towards complete disarmament. The US based its argument primarily on accounts of a ‘radically changed international security environment’ since 9/11, which – according to the US – rendered the agreements non-binding. The same argument had been used earlier by the US to motivate its withdrawal from the Anti-Ballistic Missile (ABM) Treaty and its vehement opposition to the Comprehensive Nuclear Test Ban Treaty (CTBT).⁹¹ This position further bolstered the already lingering suspicions among non-nuclear weapon States of a lack of dedication of the NWS to fulfil their commitments under Article VI, thereby further mortgaging the universalisation of existing disarmament and non-proliferation norms as a first major prong of the EU’s stated commitment to effective multilateralism.

The second prong, reinforcement of compliance with the non-proliferation regime, also failed to be realised at the 2005 Conference, partly due to incapacity of the EU to act on the issue. Even though all five NWS issued statements in the course of the conference in which they claimed to be upholding their commitments to disarmament, China’s statement was emblematic for exposing the bitter reality that hid behind these official proclamations. Not without a firm dose of hypocrisy,

⁸⁸ Art. VI NPT Treaty states that ‘[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control’.

⁸⁹ The NAC comprises seven non-nuclear weapon States (NNWS): Brazil, Egypt, Mexico, New Zealand, South Africa and EU Member States Sweden and Ireland.

⁹⁰ 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2000/28 (Parts I and II), available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/453/64/PDF/N0045364.pdf?OpenElement>> (accessed 15 February 2010), p. 14, point 6.

⁹¹ H. Müller, ‘The 2005 NPT Review Conference: Reasons and Consequences of Failure and Options for Repair’, Weapons of Mass Destruction Commission Paper 31, 2005, available at <<http://www.wmdcommission.org/files/No31.pdf>> (accessed 15 February 2010), pp. 2 and 15; M. Kurosawa, *supra* note 87, pp. 49–50 and 84. See also Statement by Ambassador Jackie Sanders to the 2005 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, US, Implementation of Article VI and the Future of Nuclear Disarmament, Main Committee I, May 2005, available at <http://www.nti.org/db/disarmament/npt_documents/nptrc_mcl_us_20050520.pdf> (accessed 15 February 2010).

China rightly clamoured the US' withdrawal from the ABM Treaty, its persistent refusal to abandon the 'Cold War mentality' and its pursuit of unilateralism and pre-emptive strategies. The statement also pointed at the incapacity of the international community to agree on the entry into force of the CTBT and to start negotiations in the UN Conference on Disarmament on a Fissile Material Cut-off Treaty (FMCT) and on the prevention of an arms race in outer space (PAROS).⁹² The non-aligned movement (NAM) and the NAC on their part voiced severe criticism and disappointment at the lack of progress in nuclear disarmament by the NWS.⁹³ Sweden even went as far as saying that only limited progress had been made towards disarmament, with worrying signs pointing in the opposite direction.⁹⁴ In light of these statements it is telling that neither the US, the UK, France, Japan nor the EU referred to the establishment of an appropriate subsidiary body with a mandate to deal with nuclear disarmament, as was agreed in the 2000 Final Document.⁹⁵ The failure to do so directly goes against the EU's stated aim of reinforcing compliance and seeking improvements to existing verification mechanisms and systems.

Overall, the 2005 NPT Review Conference was marred by procedural rifts, as a result of which the State Parties failed to reach any substantive agreement. Largely due to US opposition, the participating States were not even able to agree on the agenda until halfway through the Conference, thereby triggering vehement reactions from certain NAM States who wished to preserve the outcome and achievements of 1995 and 2000.⁹⁶ It was only when the President of the Conference picked up the pace and the EU took a unified position on procedure that deviated from the US position that some progress could be made. However, by that time the opportunities left for substantive discussions had been significantly reduced. For this reason, the conference is typically seen as a failure in general and of multilateralism

⁹² Statement given by Mr Zhang Yan, Head of Chinese Delegation in the General Debate at the 2005 NPT Review Conference, 3 May 2005, available at <<http://www.mfa.gov.cn/eng/wjbj/zjzg/jks/jkxw/t194498.htm>> (accessed 15 February 2010).

⁹³ See Statement by Hon. Marian Hobbs, Minister for Disarmament and Arms Control, New Zealand on Behalf of the New Agenda Coalition – Brazil, Egypt, Ireland, Mexico, South Africa, Sweden and New Zealand, 2005 Review Conference of the Parties to the NPT, 2 May 2005, available at <<http://www.un.org/events/npt2005/statements/npt02new-zealand.pdf>> (accessed 15 February 2010). Hobbs stressed the need for 'effective measures' to be undertaken in order to achieve nuclear disarmament, in light of the failure of the measures taken so far in terms of fulfilling the agreed outcomes of the last two NPT Review Conferences. See also Statement by the Hon. Syed Hamid Alber, Minister of Foreign Affairs of Malaysia on Behalf of the Non-aligned States Parties to the NPT at the General Debate of the 2005 Review of the Conference of the Parties to the NPT, 3 May 2005a, available at <<http://www.un.org/events/npt2005/statements/npt02malaysia.pdf>> (accessed 15 February 2010).

⁹⁴ Sweden referred to the modernisation of the nuclear arsenal of one NWS and the announced plans for developing new delivery vehicles by another. See Statement by HE Laila Freivalds, Minister for Foreign Affairs of Sweden, 2005 Review Conference of the Parties to the NPT, 3 May 2005, available at <<http://www.un.org/events/npt2005/statements/npt03sweden.pdf>> (accessed 15 February 2010).

⁹⁵ M. Kurosawa, *supra* note 87, p. 68. See also the 2000 NPT Review Conference Final Document, *supra* note 90, p. 14, point 4.

⁹⁶ See Procedural and other arrangements for the effective and successful outcome of the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2005/WP.17, 2 May 2005, available at <<http://www.un.org/en/conf/npt/2005/working%20papers.html>> (accessed 15 February 2010).

in particular.⁹⁷ Various factors and actors contributed to this failure, among which the US position and the incapacity of the EU to take a strong and unified position in reaction thereto were crucial.

The US refusal to have any reference whatsoever to the outcome of previous review conferences was a clear indication of a changed US policy on NPT, resulting from a transition in administration from Clinton to Bush, favouring unilateralism over multilateralism and neglecting rather than supporting international norms and institutions.⁹⁸ Equally indicative of this trend is the fact that much of the non-proliferation diplomacy has moved away from the NPT regime to a host of semi-institutional ad hoc fora, such as the Proliferation Security Initiative (PSI), the Nuclear Suppliers Group (NSG), the six-party talks on the issue of North Korea and the G8 efforts to decommission former Soviet nuclear material safely.⁹⁹

Counterproductive though the US stance may have been, it was rather France's position during the 2005 Review Conference that was most problematic from an EU effective multilateralism point of view. Indeed, it appears that France's central aim during the conference was to distance itself, like the US, from the 2000 Final Document, citing the Cold War as the main reason for why the 1995 and 2000 Conferences had been largely devoted to the implementation of Article VI NPT and, hence, for why such should not be the case in 2005, due to the changed security situation.¹⁰⁰ However, prior to the 2005 Conference, France, in its capacity as a EU Member State, had explicitly agreed to the common positions adopted by the EU Council, both of which hold clear references to the outcome of the 2000 Conference. Specifically, Common Position 2003/808/CFSP on the universalisation and reinforcement of multilateral agreements in the field of non-proliferation of weapons of mass destruction and means of delivery, states that:

[a]chieving universal adherence to the NPT is of crucial importance. To that end, the EU will ... support the Final Document of the 2000 NPT Review Conference and the Decisions and Resolution adopted at the 1995 NPT Review and Extension Conference.¹⁰¹

Moreover, Common Position 2005/329/PESC relating to the 2005 NPT Review Conference reads that:

[t]he objective of the European Union shall be to strengthen the international nuclear non proliferation regime by promoting the successful outcome of the [2005 NPT Review

⁹⁷ H. Müller, *supra* note 91, p. 4; M. Kurosawa, *supra* note 87, p. 54; C. Kuppuswamy, 'Is the Nuclear Non-Proliferation Treaty Shaking at its Foundations? Stock Taking after the 2005 NPT Review Conference', 11 *Journal of Conflict & Security Law* 2006, 141, p. 141.

⁹⁸ M. Kurosawa, *supra* note 87, p. 49; H. Müller, *supra* note 91, p. 5.

⁹⁹ C. Kuppuswamy, *supra* note 97, p. 146.

¹⁰⁰ Statement by HE Mr François Rivasseau, Ambassador, Permanent Representative of France to the Conference on Disarmament, 5 May 2005, available at <<http://www.un.org/en/conf/npt/2005/statements/npr05france.pdf>> (accessed 15 February 2010).

¹⁰¹ Art. 4, 4th indent, Council Common Position 2003/805/CFSP of 17 November 2003 on the universalisation and reinforcement of multilateral agreements in the field of non-proliferation of weapons of mass destruction and means of delivery, OJ L 302, 20 November 2003, p. 35. Furthermore, the WMD Strategy Action Plan mentions the importance of promoting the universalisation and strengthening of the main treaties as well, and in so doing explicitly refers to the aforementioned Common Position. See EU Strategy against proliferation of Weapons of Mass Destruction, *supra* note 35, p. 8.

Conference]. [To this end] the European Union shall . . . help build a consensus on the basis of the framework established by the NPT by supporting the Decisions and the Resolution adopted at the 1995 Review and Extension Conference and the final document of the 2000 NPT Review Conference. . . .¹⁰²

This common position served as the chief basis for drafting several working papers for the Main Committees of the 2005 Review Conference¹⁰³ as well as two separate papers concerning treaty withdrawal and cooperative threat reduction.¹⁰⁴ As the recommendations contained in these papers received strong support from many other States, it was expected that the EU could play a leading role during the review conference. However, for reasons described above, the Conference failed to agree on a final declaration and the Union's recommendations never made it into a final text.

In any case, notwithstanding the common positions and the panoply of working papers submitted by the EU, it is clear that the Union did not veritably act as a unitary and coherent actor during the 2005 Review Conference. On the one hand, France sided with the US in opposing any reference to previous conference outcomes, while the UK's primary concern appeared to be avoiding US isolation. At the same time, Ireland and Sweden vehemently supported the NAC, as they did before, albeit clearly less successfully than in 2000. Further, other coalitions such as the 'NATO-7' group brought together by the Netherlands, comprising Belgium, Italy, Spain, Norway, Lithuania and Romania, only served to further diffuse EU action across (ad hoc) regional coalitions.¹⁰⁵

The 2005 Conference profoundly illustrates that reaching and upholding intra-EU consensus on issues going beyond a general commitment to non-proliferation regimes proves very challenging. The disagreement on whether or not NWS are upholding their disarmament commitments and the inability of the EU to put forward a statement on this matter are telling signs in this respect. The strong basis for multilateralism in non-proliferation notwithstanding, it thus seems that the level of intra-EU coherence on these matters is not yet of such a level that it would preclude EU Member States from taking up diverging positions in multilateral fora, which ultimately serves to weaken the Union's effectiveness within the NPT

¹⁰² Arts 1 and 2(b), Council Common Position 2005/329/PESC of 25 April 2005 relating to the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, OJ L 106, 27 April 2005, pp. 32–3. See also Arts 5 and 6 of the Preamble of this document, which refer back to the 2000 Common Position and the Final Document of the 2000 NPT Review Conference.

¹⁰³ See working papers 43–5 submitted to the 2005 NPT Review Conference by Luxembourg on behalf of the European Union and several (potential) candidate countries, available from <<http://www.un.org/en/conf/npt/2005/working%20papers.html>> (accessed 15 February 2010).

¹⁰⁴ See working papers 32 and 37 submitted to the 2005 NPT Review Conference by Luxembourg on behalf of the European Union, available from <<http://www.un.org/en/conf/npt/2005/working%20papers.html>> (accessed 15 February 2010).

¹⁰⁵ H. Müller, *supra* note 91, p. 11. See also working paper 27 on nuclear disarmament for Main Committee I: Recommendations submitted by New Zealand on behalf of Brazil, Egypt, Ireland, Mexico, South Africa and Sweden as members of the New Agenda Coalition, NPT/CONF.2005/WP.27, 4 May 2005, available at <<http://www.reachingcriticalwill.org/legal/npt/RevCon05/wp/WP27.pdf>> (accessed 15 February 2010).

regime. This situation is further compounded by the fact that two EU Member States are both NWS and members of the P5.¹⁰⁶

Furthermore, the two most pressing issues in non-proliferation, i.e. the nuclear aspirations of North Korea and Iran, were not adequately dealt with in the framework of the 2005 Conference, in spite of the EU's determination to act resolutely on the matter.¹⁰⁷ This is by no means to imply that the EU does not deal with these issues *in general*. Indeed, the EU's engagement within the UN Security Council and the E3 Trilateral Talks with Iran show continued engagement to resolve these issues in a peaceful manner and work towards a satisfactory solution for all parties concerned. However, an effective multilateral treatment of these two issues presupposes that the EU should also strive for a comprehensive solution in the framework of the NPT Review Conference. The US on its part did push for measures to be taken to address the crisis on the occasion of the 2005 Conference, yet its efforts were hampered by criticism from the NAC and the NAM on its own lack of progress towards disarmament. It was here that the EU could have played an important intermediary role in pledging a united response to the North Korean and Iranian issues, whilst duly taking into account the NWS' unequivocal undertaking towards disarmament (effective multilateralism as a means of providing an exit strategy¹⁰⁸). The EU's ability to act coherently in this respect was undermined, however, by France's (tacit) support for the position of the US and its inability to present a coherent response to these changed circumstances.

7. Conclusion

This contribution has shown that the different elements fostering 'effective' multilateralism as implied by the ESS coexist at daggers drawn. The examples of crisis management and non-proliferation, key threats identified in the ESS, have demonstrated the intrinsic tension in the field of security between effective multilateralism as a strategy for the EU to enhance its strategic actorness and as a means of strengthening the multilateral system as a whole. The great pull of the US and

¹⁰⁶ The main objective of the French delegation during the Conference apparently was to achieve a P5 Statement, the failure to do so being a bitter defeat for France. It is clear, however, that the mere attempt of arriving at such statement only serves to further undermine EU coherence: see H. Müller, *supra* note 91, p. 9.

¹⁰⁷ See the Declaration by HE Mr Nicolas Schmit, Minister Delegate for Foreign Affairs of Luxembourg on behalf of the European Union in view of strengthening the international nuclear non-proliferation regime, 2 May 2005, available at <<http://www.eu2005.lu/en/actualites/discours/2005/05/03schmit/>> (accessed 15 February 2010) ('The EU reaffirms that it is firmly resolved to contribute to finding a peaceful, negotiated solution to the North Korean nuclear problem.... The EU considers that the review conference must seriously address the question of withdrawal [by North Korea from the NPT]. The European Union is united in its determination to prevent Iran from gaining access to military nuclear capabilities and to see the proliferating implications of its nuclear programme resolved.... The European Union calls on Iran to fully and in good faith respect all of its international commitments, as well as to furnish the international community with objective guarantees that its nuclear programme is exclusively for peaceful use by stopping development and operation of its fissile materials production capacities.').

¹⁰⁸ See also M. Kurosawa, *supra* note 87, p. 83.

the lack of internal coherence between EU Member States that are too often free to choose between the EU and other multilateral institutions as a forum for security action severely hamper the ability of the Union to play a leading role in the maintenance of international peace and security.

As regards CSDP, we have seen that the EU is faced with a difficult dilemma in terms of pursuing a balanced approach to effective multilateralism. Effective crisis management action by the EU would require diminishing opportunities and incentives for its Member States to act unilaterally or through other structures than the Union, by further institutionalising and centralising the CSDP. Such increased 'europeanisation', however, runs the risk of further moving away from an integral approach to crisis management within the framework of the UN, thus further separating two of the main elements of effective multilateralism as identified previously. Indeed, current power relations and political realities seem to preclude any real possibility of reconciling the EU's dependence on the unilateral approval of the US with reliance on the true multilateral organisation that is the UN. Furthermore, the Lisbon Treaty appears to carry with it the seeds of further mortgaging EU coherence as a bloc by introducing additional alternatives for crisis management tasks by smaller groups of Member States, either by those that are 'willing and have the necessary capabilities for such [tasks]'¹⁰⁹ or by establishing a so-called form of 'permanent structured cooperation within the Union framework (PSCo)'.¹¹⁰ However, the first option refers only to the *implementation* of a crisis management task by a limited number of Member States, the decision for which is still to be taken by the entire Council and as such rather reflects current practice. Moreover, the PSCo is concerned only with the further development of military *capabilities* of the EU through its Member States. Therefore, these added alternatives for crisis management by EU Member States should not necessarily result in a limited visibility of the EU as such. Still, true effective multilateralism will mainly depend on the EU being able to act as a bloc in support of UN operations, without stressing the need of EU visibility as an end in itself.

As regards the issue of non-proliferation of nuclear weapons, it is clear from the above that, if the NPT is to remain the essential foundation for the effective pursuit of multilateral nuclear disarmament, the international community cannot afford to live through 'another 2005'. Respecting the outcomes of previous review conferences is vital if the regime is to remain credible. For the EU a lot was at stake in the 2010 NPT Review Conference held in New York from 3–28 May 2010: it would essentially determine whether the EU's doctrine of effective multilateralism adds value to existing efforts in establishing a strong, negotiated and enforceable multilateral non-proliferation regime or whether it remains a mere 'catch-all phrase' to which Member States can sign up or from which they can opt out, depending on their interests. A preliminary assessment of the proceedings and outcome of the 2010 NPT Review Conference shows that there may be reason for

¹⁰⁹ Art. 44 TEU.

¹¹⁰ Arts 42(6) and 46 TEU. See also the Protocol on permanent structured cooperation established by Article 28 A of the Treaty on European Union, annexed to the Treaty of Lisbon.

optimism as to the EU's recommitment to multilateralism in the field of nuclear disarmament as proclaimed in the 2008 ESS implementation report. Spurred into action by the 2005 failure, the countries at the conference dispensed with procedural quibbles and spent significantly more of their time discussing substantive matters. This resulted in a final document that expressly reconfirmed the States parties' commitment to the effective implementation of the decisions and outcome of the 1995 and 2000 review conferences.¹¹¹ The EU for its part was arguably more successful in adhering to its Common Position than it was in 2005.¹¹² While the outcome document still does not fully reflect the wishes of the EU and internal divisions among the 27 Member States remain inevitable, some pointers indicate toward an increased influence of the EU at the multilateral forum of the NPT review mechanism.¹¹³ For the first time, the conference opened with a statement by a High Representative of the EU, Lady Ashton, formally presenting the view of the Union.¹¹⁴ More importantly, the EU, despite not being a party to the NPT, took part in the final stages of the negotiations, which resulted in the formulation of an all-important Action Plan on the Middle East.¹¹⁵ While it is still too early to assess the impact of the changes brought about by the Lisbon Treaty on the pursuit of effective multilateralism in the context of the NPT, the 2010 conference at least paints a brighter picture in this respect than the 2005 review. In the coming years, much will also depend on whether the EU succeeds in achieving full participatory status in the multitude of other fora addressing non-proliferation, both to prevent them from undermining the NPT and to provide an effective response to key challenges, in close cooperation with the US.¹¹⁶

The in-depth examination of the selected key threats to security in this contribution has served to illustrate the difficulties that emerge from the equivocal nature of the constituting elements of effective multilateralism as wielded by the EU when

¹¹¹ 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50 (Vol. I), available at <[http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I))> (accessed 18 August 2010), p. 2, point 5.

¹¹² Council Decision 2010/212/CFSP of 29 March 2010 relating to the position of the European Union for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, OJ L 90, 10 April 2010, 8.

¹¹³ See P. Sturm, 'The EU's Performance at the 2010 NPT Review Conference', July 2010, available at <http://www.isis-europe.org/pdf/2010_artrel_537_esr50-eunpt.pdf> accessed 18 August 2010.

¹¹⁴ Speech by HR Catherine Ashton, 3 May 2010, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/114169.pdf> (accessed 18 August 2010).

¹¹⁵ See section IV of the 2010 Final Document.

¹¹⁶ The EU no longer disregards these fora, nor are they seen as 'spoilers' to the NPT; it is now accepted that they are complementary to the work undertaken within the framework of the NPT: see Council of the European Union, Implementation of WMD Strategy – Updated List of priorities, Council Doc. 10747/08, 17 June 2008, pp. 3 and 12. The document mentions that the EU continues to work actively to receive at least an observer status in the PSI and to seek more coordination of initiatives within the Nuclear Suppliers Group (NSG). Furthermore, in June 2009, the EU Member States and relevant EU institutions actively participated in the Regional Operational Experts Group (ROEG) meeting of the PSI in Poland, with the objective to ensure the EU's full participation in the PSI. Consultations on the possibility to grant full participatory status to the EU in the PSI continue with the US: see the December 2009 progress report on the implementation of the EU Strategy against the proliferation of Weapons of Mass Destruction, *supra* note 111, pp. 11 and 39.

defining its role in the maintenance of international peace and security. The opacity of the notion is further compounded by the multiplicity of actors involved and the plurality of frameworks for cooperation between which they can choose freely in the absence of a strong cohesive element. For this reason, if 'effective' multilateralism is to become more than a patch on a tensely connected set of international actors, it is precisely the interlinked nature of the notion's constituent elements that should not be overlooked. The ultimate goal of effective multilateralism should remain the firm integration of a strong EU within an empowered UN.

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