

OXFORD

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EU ENERGY LAW AND POLICY
A Critical Account

energy policy has always been strongly statist and protectionist,⁵ and its participation in the ECT negotiations focused on maximizing Norwegian carve-outs from the ECT liberalization policies. In addition to ensuring a privileged role for the state in oil and gas, the Norwegian policies on ownership of its greatest source of electricity—hydropower—also aims at ensuring public control over these resources.⁶

The EU's wider-ranging foreign policy interests include building economic collaboration with Russia and the Central Asian/Caucasus countries where energy is again a major factor in economic growth, ever-growing supply interest and investment interest for the EU, but also a source of internal and external tensions over control of oil and gas wealth. The EU's direct interest in border security also extends to those Mediterranean countries which have energy resources but are unstable—particularly Algeria, but also Tunisia and Morocco (oil transit), as well as Syria and Egypt (oil supply). Iran is also a key country in this regard, in terms of regional security, oil and gas supply from Iran direct, and in terms of its political and transit leverage over the countries involved in oil and gas production in the Caspian region (Azerbaijan, Turkmenistan, Kazakhstan, and Uzbekistan). Tensions with the West over nuclear power (and other issues) are complicating supply and providing a window of opportunity to Chinese energy companies. Turkey is a pivotal country, for reasons of regional security and transit from the Caspian, both through the Bosphorus and through oil and gas pipelines (BTC oil pipeline but also many other oil and gas pipelines). Its relationship with the EU is unstable because of the uncertain fate of its accession requests. There are serious problems of cultural compatibility, both in terms of the EU's relationship with Turkey and in terms of Turkey's internal political make-up. The Middle East's role as a major supplier to the EU is likely to grow in the medium term and beyond, as North Sea oil and gas supplies fade and to the extent that Russian energy production is absorbed domestically as the Russian economy grows. Unconventional oil and gas will not be able to curb this trend, at least in the medium term. The Middle Eastern countries are all troublesome. Not one oil and gas producer in the Middle East (or the Mediterranean or Caspian region) reflects contemporary Western expectations of good governance, democracy, and respect for human rights. Violently divisive and modernized feudal structures predominate, although this might be changing with the events dubbed the 'Arab Spring'. At the time of writing, it is too early to tell. If there is a linkage between these values and political stability, then any of these countries can be thrown into political turmoil and external conflict, as was witnessed in spring 2011 (the 'Arab Spring'). If the EU takes seriously the resurgence, under a different label, of the 'civilised nation' concept, then it should not be doing business with countries like Syria—which are, however, crucial for the EU's energy supply. Whether Islam is a major risk factor for stable energy trade relations with the EU, or a factor which

⁵ S. Anderson, *The Struggle over North Sea Oil and Gas: Government Strategies in Denmark, Britain and Norway* (Oslo: Scandinavian University Press 1993). This type of approach is of course understandable and well in line with many other resource rich countries. Why would you not extract maximum rent for your resources.

⁶ Case E-2/06, *EFTA Surveillance Authority v The Kingdom of Norway*, Judgment of 26 June 2007, EFTA Court Report 2007, p. 164.

can stabilize the relationship based on mutual respect is an interesting question.⁷ While the EU increasingly relies, with no realistic alternative in the medium term, on these problematic countries as major oil and gas suppliers, one should not forget that these countries themselves rely at least to an equal extent—and probably more so⁸—on exporting their energy. With growing demands from growing populations and with no realistic industrial alternative (although some developments suggest that this might change in the future), the oil and gas producers—whatever their regime and even during civil war, as in Libya—are in much more desperate straits: they do have to export to the market and if they do not or the price is too low, the thin fabric of their countries' institutions is immediately and seriously in peril. Just consider the recent investment wave in the Middle East and Northern Africa (MENA) region, largely initiated as response to unrest among younger members of the population: Saudi Arabia: \$160 billion has been spent on new homes, decreasing education costs, stipends for students, 60,000 new jobs, increasing minimum wages; Kuwait: \$5 billion cash handouts and free food; Oman: a 40 per cent increase in minimum wages; Algeria: pay increases for public workers, higher subsidies on food, job creation, new homes; and Bahrain: wage increases, increased food subsidies, increased social welfare allowances. All of this requires a high oil price, and exports.⁹

The EU is also involved in energy relations outside this circle of core interest, both of a political and of an energy-based character. West African countries (notably Nigeria and Angola) have acquired a growing role in energy (oil, LNG) supplies which requires nurturing. In Asia, the EU has encountered a large, growing, and competing supply interest (e.g. for Siberian, Central Asian and Middle East oil and gas), but also a market for investment and export of equipment and services. In Latin America, there is both a traditional cultural (Spain) and economic (UK, Germany) interest for the EU. In both Asia and Latin America, there is a strong, not always clearly visible, counter-interest in balancing the overwhelming US interest by developing relations with the more economically-focused and less power-oriented EU. The US itself is one of the relations to consider in energy matters. Traditionally, US international energy policy has been more assertive (e.g. the Gulf War) and more self-confident—i.e. less interested in consensual, multilateral solutions (e.g. the US forced entry into and then made a surprise exit from the Energy Charter Treaty).¹⁰ Throughout the world, EU and US companies, often

⁷ N. Oystein, *Oil and Islam: Social and Economic issues* (Research Council of Norway: J. Wiley & Sons 1997); Samuel Huntingdon's clash of culture prediction—S. Huntingdon, *The Clash of Civilisation and the Remaking of World Order* (New York: Simon & Schuster 1997)—is one way of looking at it, but the modern European way would rather tend towards respect and tolerance for Islam; Islam itself is torn between a need to modernize and fundamentalist tendencies which may in due time lead to a modernization of Islam incorporating Islam's traditional respect for property, contract, and trade.

⁸ J. Mitchell (ed.), *The New Economy of Oil* (2001), pp. 177 and 203.

⁹ P. Stevens, *The Arab Uprisings and the International Oil Markets* (London: Chatham House 2012).

¹⁰ W. Fox, 'The United States and The Energy Charter Treaty: Misgivings and Misperceptions', in T. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London: Kluwer 1998).

with home-state and EU support, compete for access to oil and gas acreage, investment, and sale of equipment and services—with US companies often hindered by the use of domestically-motivated US economic sanctions: e.g. against Iran, Libya, Cuba, or North Korea.¹¹ The US has also played a key role in the Caspian region and was largely behind the success of the BTC oil pipeline. The US involvement in the Nabucco project seems to be much less central, possibly because of the different geopolitical significance of the two projects. China is the most recent major and global participant in the energy game. With strong government backing and less concern for international sanctions, Chinese oil and gas companies have signed deals in places and for products like US shale gas, Canadian oilsands, Australian coalbed methane, Russian oil and gas, but also in more problematic places, including many African countries and Iran.¹²

It would be wrong to portray the relevant actors only within the traditional model of states and their strategies. EU (and US, perhaps even Chinese¹³) foreign policy is very much influenced by non-state actors. These include: non-governmental organizations (NGOs), which now represent themselves as the truest guardians of Western cultural values; multinational companies, which are now obliged to present themselves not only as profit machines, but as 'forces for good';¹⁴ business organizations, which tend to represent the common denominator of corporate interest; and the press, through which the actions of all actors are filtered and magnified. Not all that is seen by governmental actors as good for business (e.g. the MAI negotiations up to 1998 or the ECT) is viewed in the same way by the companies themselves. Close corporate-government relations—e.g. between the former state company Elf and the French government—tend to give way to greater distance as international capital markets exercise more influence on corporate management than their home governments. International organizations in which the EU Member States or the EU itself participate develop at times a dynamic of their own, driven either by the secretariat or by a caucus of like-minded and similarly-oriented government delegates. Within WTO processes, the emphasis is on free trade; within the OECD, the emphasis is on free movement of capital; within the IEA, the emphasis is on identifying current trends and prospects and recommending governmental action, plus consultation with the producing countries; within the World Bank, the traditional emphasis on good project lending has given way to a much more diffuse effort to leverage lending to influence economic (and energy investment/privatization) policies and now the 'hard' imposition of 'soft' cultural policies (in relation to the environment, human rights, participatory democracy, and the eradication of

¹¹ T. Wälde, 'Managing the Risk of Sanctions in the Global Oil and Gas Industry', 36 *Texas International Law Journal* (2001), pp. 184–230 and K. Talus and M.A. Nunes, 'Regulation of Oil Imports in the United States and the European Union', 2 *OGEI* (2011), <<http://www.ogel.org>>.

¹² For the activities of Chinese oil and gas companies, and Chinese energy policies more generally, see the articles of Philip Andrew-Speeds on *OGEI* (<<http://www.ogel.org>>).

¹³ For the drivers behind policies of Chinese oil and gas companies, see International Energy Agency, *Overseas Investments by Chinese National Oil Companies: Assessing the drivers and impacts* (IEA 2011), pp. 25–8.

¹⁴ J. Mitchell (ed.), *Companies in a world of conflict* (London: RIIA 1998), pp. 209 et seq.

poverty).¹⁵ In UN fora (e.g. in particular United Nations Conference on Trade and Development (UNCTAD)), where the EU participates, but is not in a position of strength, the emphasis is rather on defending developing countries against the imposition of economic and now cultural policies mainly representing the Western countries. A critical assessment of liberalization and privatization in markets which may not be ripe for this, and a proposal for *quid pro quo* energy trade deals, is developed here.¹⁶ The financial institutions (the World Bank, mainly under US influence; European Bank for Reconstruction and Development (EBRD)—under European, but not EU influence; European Investment Bank (EIB)—under EU influence) have their own policy contribution to make.¹⁷ In the energy field, their role lies in exercising financing leverage to obtain favourable investment terms and in supporting infrastructure facilities for which private banks are by themselves and without public guarantees not ready. Generally speaking, the Member States prefer to retain their national powers and influence over international institutions like the IMF or the World Bank, and the role of the EU is reduced to that of seeking to reconcile the divergent opinions of its Member States.¹⁸

With OPEC, the EU has a dialogue (but possibly one of the deaf); both OPEC and EU environmentalist (and tax) interests are in favour of the consumer paying a high oil price, but they differ on who is to collect the rent (OPEC prefers taxes and high prices in favour of the producing country; the EU high consumption taxes in favour of EU Member States). OPEC is, however, politically very useful to the EU. First, it contributes, now perhaps more effectively than in the past, to the maintenance of reasonably high and stable oil prices by better production control. Secondly, because it is outside the jurisdiction of EU law and not vulnerable to internal EU political and public pressure, it serves where necessary as a convenient scapegoat for high energy prices. In a way, it now does the dirty business for consumers and international oil companies, neither of which, for competition law and public opinion reasons, can do it themselves.

Given the multitude of fora and elements in EU international energy policy, and the legal instruments deployed, its approach is not always to achieve a carefully planned outcome of a political process through a unitary actor such as the European Commission. In practice, the policy that emerges is rather the unplanned—and in fact unplanable—result of many players acting both within and outside the EU. The particular measures taken often require consent and involvement by outside actors. In most cases, these measures are generated by coalitions of like-minded actors:¹⁹ e.g. climate change policies by officials from DG Climate Action, DG Energy, and DG Environment, environmental ministries, NGOs and executives from climate-change divisions in major energy companies, international energy

¹⁵ H. Bergesen and L. Lunde, *Dinosaurs or Dynamos? The United Nations and the World Bank at the Turn of the Century* (London: Earthscan 1999).

¹⁶ UNCTAD, *Energy Services in International Trade: Development Implications* (10 April 2001).

¹⁷ For criticism, see in particular the work of Joseph Stiglitz.

¹⁸ D. Chalmers, G. Davies, and G. Monti, *European Union Law* (Cambridge: CUP 2010), p. 639.

¹⁹ R. D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-level Games', 42 *International Organization* (1988), pp. 427–60.

policy/legal assistance from linked groups in DG Energy, DGs with international focus (from development to trade to foreign policy), aid industry lobbies, NGOs and institutional and individual beneficiaries in the recipient countries. It is not surprising that the EU's international policy in the energy field is sometimes contradictory, with the transnational environmental coalitions transcending organizational borders producing multilateral environmental agreements (MEA) calling for trade restrictions, while the corporate-Commission trade-focused groups produce treaties and WTO panel-based trade law aimed at excluding MEAs.²⁰ In this process, certain dominant themes are generally present, though these are often dominant only in their particular arenas. These include energy security for DG Energy, integrated competitive markets for DG Competition, climate change for DG Climate Action and DG Environment, and building stability by economic and energy investment in former Soviet countries²¹ and the Mediterranean for the internationally focused DGs. Development aid plays a role here, but EU development aid suffers from lack of focus and the tension between 'selfless' aid, on one hand, and more 'selfish' aid tied to the donor's interest, on the other, with no clear understanding as to which approach is in the final analysis better for both donor and recipient. New themes pervading all other activities relate to the current enthusiasm for exporting Western cultural values to, and imposing them on, countries which do not conform to Western governance concepts—i.e. a revived form of nineteenth century concepts of missionary colonialism and the civilizing mission of the West. There are also more technical imperatives for external EU energy action: some issues (e.g. global warming) require global action, though national and EU-wide policies can serve as a laboratory for global policies (and provide a competitive advantage to EU companies thus forewarned of regulations to come). The chief example of this is the EU emissions trading scheme, though this scheme is used as an example both by those in favour of such a scheme and by those opposing it.²²

As global energy markets emerge (as is already largely the case for oil and to some extent now for gasoline, LNG, coal and—more slowly—pipeline gas), regulatory solutions have to be found,²³ and EU external energy policy will then be about creating a global regulatory framework. The harbingers of such developments are the—as yet unsuccessful—efforts to create a global investment code. The pooling of regulatory powers in the form of EU economic (including energy) law should only be a first step to pooling global regulatory powers in international institutions, although the resistance observable in the EU is likely to be even more

²⁰ T. Wälde, 'Sustainable Development and the 1994 Energy Charter Treaty: Between Pseudo-action and the Management of Environmental Investment Risk', in F. Weiss et al. (eds), *International Economic Law with a Human Face* (London: Kluwer Law 1998), pp. 223–71.

²¹ T. Wälde, 'International Good Governance and Civilised Conduct among the Caspian Sea States: Oil and Gas Lever for Prosperity of Conflict', in W. Ascher and N. Mirovitskaya (eds), *The Caspian Sea: A Quest for Environmental Security* (London: Kluwer 2000), pp. 29–51.

²² This has been the case in, for example, Australia.

²³ For an international regime for cross-border pipelines, see C.I.A. Siddiky, *Cross Border Pipeline Arrangement: What Would a Single Regulatory Framework Look Like?* (London: Kluwer Law International 2011).

intensive on a world scale, and thus progress is likely to be very gradual. In the fullness of time and an ideal world, external EU energy law should be nothing but a regional component of international energy law.

6.2 The Legal Instruments and Legal Authority of the EU's External Energy Policy

To pursue its energy goals, the EU primarily uses treaties and money. Treaties create a network of legal—and thus also political and administrative—obligations and procedures with the partner countries. No systematic analysis of the role of energy in such treaties has so far been conducted.²⁴ While energy is mentioned in most treaties of the economic cooperation type, it is rarely the focus of such a treaty.²⁵

For a long time, the 1994 Energy Charter Treaty was the only treaty dedicated to energy to which the EU had acceded, and only in 2005 was the Energy Community Treaty signed. It should be no surprise that the majority of the language in the more general treaties amounts to friendly expressions of goodwill with respect to trade, investment, and the environment—and in the more recent treaties (e.g. the 2000 Cotonou Agreement, etc.), good governance, civil society, and human rights are also mentioned.²⁶ Specific legal obligations are thin on the ground in these treaties, and mostly relate to trade. Energy trade has only recently become a more significant topic in EU treaty negotiations. One can perhaps understand EU treaty-making as, first, an effort to develop a significant, and acknowledged, foreign policy role, hamstrung by the absence of the traditional levers used to project political and military power abroad. Secondly, it is based on the explicit or implicit strategy to develop 'reasons to talk' with governments of interest to the EU. Treaties thus involve a process of dialogue, from negotiation to the stage of implementation, which in most cases is rather about discussing with governments the general, hortatory principles contained in such treaties.

Traditionally, international law is regarded as a creation made for states by states as the principal actors in international law and international legal relations. The emergence of the EU as a significant actor in international law and policy results from developments at both internal EU level (legal personality with the Treaty on the EU and growing competence to act within those areas specifically conferred to it by the Member States) and international level (the general recognition of the EU

²⁴ This is particularly so at bilateral level. On the environmental front, this type of study was carried out by Gracia Marin Duran and Elisa Morgera, see G. Marin Duran and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford: Hart Publishing 2012).

²⁵ This is the case even with the major energy exporting countries. See, for example, Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, OJ L 265/2, 10.11.2005.

²⁶ Article 9 of Cotonou Agreement refers to human rights, democratic principles, and rule of law. (The Cotonou Agreement was revised in 2005 ([2005] OJ L 209/27).)

as an international actor²⁷). The EU²⁸ has legal personality (Article 47 TEU) and by default also has international legal personality. It can therefore act on the international stage as a state-like actor. This means that it can conclude international agreements without the signatures of Member State representatives—although Member State interests are guarded by the Council of Ministers, which takes decisions alone or jointly with the Parliament (Article 218 TFEU, for common commercial policy, Article 207 TFEU). It can also take trade measures, such as imposing anti-dumping regulations. International agreements concluded by the Union are binding both on the institutions of the Union and on its Member States.²⁹

Given the innovative nature of EU as an actor in international stage (not really a federal state—yet, at any rate—but not really an international organization either), triggered some debate at first, but the initial difficulty of the EU acceding to international law instruments has been solved by defining the EU as a ‘Regional Economic Integration Organisation’. Today, the EU is a full member of numerous international organizations like the WTO. In other organizations, like the OECD it plays a less formal, but in practice often an influential, role.³⁰

The EU’s external competences are based either on the explicit authority of the Treaty or are the external manifestation of internal powers (‘external/internal parallelism’). Article 216(1) TFEU invests the EU with competence to conclude international agreements where this is necessary in order to achieve one of the objectives of the EU or is provided for in a legally binding act of the EU or is likely to affect common rules or alter their scope.³¹ In the *Open Skies* judgments of 5 November 2002,³² the Court did note that an international agreement was not necessary in these cases and that it had not been demonstrated that the internal competence could effectively have been exercised only at the same time as the external competence. However, in those cases the second option applied—i.e. the EU’s exclusive competence arising from a legally binding act of the EU. The judgments in these cases clearly meant that, because the EU had exclusive competence with regard to certain aspects of international air services, Member States could no longer enter into international agreements themselves.

²⁷ G. Marin Duran and E. Morgera, *Environmental Integration in the EU’s External Relations: Beyond Multilateral Dimensions* (Oxford: Hart Publishing 2012), pp. 6 and 7.

²⁸ More generally, see D. Chalmers, G. Davies, and G. Monti, *European Union Law* (Cambridge: CUP 2010), pp. 630–73.

²⁹ Article 216 (2) TFEU. This provision has been interpreted to extend to customary international law and general principles of international law (Cases C-T-115/94, *Opel Austria v Council* [1997] ECR II-39 and C-162/96, *Racke & Co v Hauptzollamt Mainz* [1998] ECR I-3655).

³⁰ Supplementary Protocol to the Convention on the OECD of 14 December 1960, the signatory countries agreed that the European Commission should take part in the work of the OECD. European Commission representatives work alongside Members in the preparation of texts and participate in discussions on the OECD’s work programme and strategies, and are involved in the work of the entire Organization and its different bodies (see <<http://www.oecd.org>>).

³¹ Case 22/70, *ERTA* [1971] ECR 263.

³² Court cases C-466–469/98, C-467/98, C468/98, C-469/98, C-472/98, C-475/98, and C-476/98 of 5 November 2002. See also Communication from the Commission on the consequences of the Court judgments of 5 November 2002 for European air transport policy (COM/2002/0649 final).

Articles 2 to 6 TFEU distinguish explicitly between ‘exclusive’, ‘shared’, and ‘supportive’ EU powers. In this context, energy appears as a ‘shared’ competence (Article 4(2)(i) TFEU), which is specified under title XXI (Energy) and in Article 194 TFEU. With the emergence of more and more detailed and comprehensive EU energy law through the three packages of energy directives and Article 194 TFEU, there are more and more areas where there are strong arguments for exclusive EU competence to conclude treaties with respect to energy. This is clearly the case in certain other areas of energy: mineral oil, natural gas, and even electricity are goods which are subject to trading and can therefore fall within the scope of the Common Commercial Policy under Articles 206 and 207 TFEU. The Common Commercial Policy is an exclusive competence of the Union in the sense of Article 3(e) TFEU. In this context, the European Parliament’s involvement in the formulation of the EU’s Common Commercial Policy, insofar as its consent is now required, is a significant change brought about by the Lisbon Treaty.³³

The second major instrument of EU international energy policy is money, mainly funds allocated to technical assistance projects in the energy field. The EU regularly requires a treaty before committing to the provision of technical assistance (the older term is ‘development aid’) funds. Treaties and money thus complement each other. Technical assistance provided under the manifold and (regrettably) periodically changing EU-typical acronyms, like TACIS, PHARE, SYNERGIE, ALTENER, SAVE, INOGATE and others serve multiple purposes. They are intended to help the recipients obtain expertise which they do not have and cannot pay for themselves. They represent a means of influencing partner countries’ policies in the EU direction. They provide work for the large EU consultancy industry. They help this industry and larger EU companies to penetrate new markets, often in competition with US (USAID) technical assistance pursuing a similar strategy. Their main benefit is probably that they facilitate the emergence of knowledge-based networks (consultants, academics, officials, corporate executives, NGO experts, specialized press), privileging the outreach of EU specialists.

Treaties (and money) never deliver what they promise in their high-sounding preambles and press releases. They are often not taken seriously on both sides: their hortatory language, replete with expressions of goodwill, friendship, and morally welcome purposes, lack direct impact. Nevertheless, it would be wrong to deny the usefulness of these instruments. Deployed *en masse*, they project the EU as a prosperous partner with overwhelmingly cooperative and commercial interests. The web of treaties and the professional networks created by technical assistance are a conduit for channelling EU influence through concepts, methods, models, precedents, and best practices to countries which need such models and are unable to develop effective approaches to governance on their own. The EU’s influence on partner countries’ energy policies is therefore rarely a matter of power and direct pressure, but of persuasion and intellectual osmosis facilitated by trust and the common quest for peace and prosperity. It is not the way of hard power, but rather that of collaborative dialogue.

³³ See Article 218(u) and (v), and Article 207(2) TFEU.

6.3 Technical and Financial Assistance Programmes

With its technical and financial assistance programmes, the EU tries to influence partner countries' energy policies in an EU-friendly direction: liberalization, the opening-up of the energy industries for (preferably EU) investment, increased trade relations (the export of EU equipment and services, import of partner-state oil and gas), better environmental performance—particularly in relation to greenhouse gas emissions and other emissions with a cross-border effect on EU environmental quality (e.g. air pollution, the survival of forests)—and nuclear safety. This sometimes direct, but more often informal, underpinning of EU assistance is not necessarily in conflict with the overall objectives of host states. Most of the countries which have an energy relationship with the EU—i.e. Russia and various countries in Central Asia, the Mediterranean, the Middle East and West Africa—are mired in systems of economic governance which obstruct development: communist organizational structures and attitudes³⁴ have been inherited and not replaced by a functioning market and a system of institutions and culture which supports the market.³⁵ The problem with most of these projects is not that they are supposed to preach EU principles and policies, but that their duration and impact is typically short, minimal, and localized. There seems to be no systematic reflection and strategic planning as to what the EU wants to achieve and how it is to be done, given the ever-complex circumstances of post-communist and developing countries where advice (rather than the perquisites of foreign aid) is often not wanted—at least, not by the right people—is not professionally rendered, relies more on the recounting of EU systems than on transposing concepts and experience to the often very different host state context, and is rarely absorbed with lasting effect. This problem affects the grant of all technical assistance in such circumstances (e.g. World Bank, UN, EBRD, bilateral agencies: DFID (Department for International Development) in the UK or GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit) in Germany), but may be particularly acute in the case of the EU, which lacks systematic in-house expertise on the giving of policy and legislative reform advice. While DG Energy (and other DGs) does have energy expertise,³⁶ it is elusive and not effectively transferred. It is sometimes hard to avoid the impression of a giant funding system operating without a focused and expert mind watching over such activities and learning from them. Managing administrative challenges seems to prevail over the more relevant challenge of thinking seriously about real, rather than purely formalized, objectives.

³⁴ See T. Wälde and J. Gunderson, 'Legislative Reform in Transition Economies', 43 *International & Comparative Law Quarterly* (1994), pp. 347–79, T. Wälde and C. von Hirschhausen, 'Legislative Reform in the Energy Industry of Post-Soviet Societies', in R. Seidman, A. Seidman, and T. Wälde (eds), *Making Development Work: Legislative Reform for Good Governance* (London: Kluwer 1999).

³⁵ M. Olson, *Power and Prosperity* (New York: Basic Books 2000).

³⁶ It is also worth noting that after the Lisbon Treaty the only DG responsible for implementation of instruments of EU external assistance is DG for Development and Cooperation (EuropeAid).

6.3.1 Examples of Earlier Cooperation Programmes

6.3.1.1 SYNERGY, PHARE, and TACIS

SYNERGY was a cooperation programme managed by the DG for Transport and Energy (DG TREN). It financed cooperation activities with non-EU countries relating to the formulation and implementation of energy policy. The scheme was based on earlier energy-related cooperation projects following the oil crises of the 1980s, beginning with the 'EC International Energy Co-operation Programme', which then evolved into the SYNERGY programme. SYNERGY was the international cooperation component of the 'Energy Framework Programme' which ran from 1998 to 2002. SYNERGY's aim was to improve the competitiveness of EU industries, enhance security of supply, promote sustainable development, and improve energy efficiency. Its guidelines³⁷ stated that the implementation of the programme should refocus on activities related to security of supply and the implementation of the Kyoto Protocol. Unlike other EU programmes, which were of a more general nature and included energy as one of several aims, SYNERGY was a specific energy policy programme covering the external dimension of EU actions in the energy policy sector.

PHARE can be characterized as the main channel for the European Union's financial and technical cooperation with Central and Eastern European countries (CEECs). It focused on preparing the then candidate countries for EU accession. In the energy field, this meant review of the regulatory and institutional situation in the CEEC countries to bring them—by legislative reform, institution-building, and training—into conformity with EU energy law. The EU energy directives, the Energy Charter Treaty and EU competition law were perhaps the most relevant benchmarks for reform of the energy sector in Eastern Europe. Support for a twinning mechanism between partner institutions was also provided.

In the end, these programmes were about creating professional networks, explaining the rationale, methods, and concepts of the energy directives and helping the accession countries gradually to reach a similar stage, first formally, and then, hopefully, also with proper understanding and absorption. The main weakness of most projects was their short-term nature. Developing a relationship of reciprocal understanding between the EU and the CEEC partner takes a year—by which time the project had usually come to an end. The cumbersome nature of the procurement machinery meant that the largest amount of funds and time was not spent on professional communication across often substantial cultural borders, but on dealing with the Commission's departments. The development of long-term partnerships between competent institutions—the only effective way to build a productive professional and intellectual partnership—failed to occur.

³⁷ Council Decision of 9 April 2001 laying down the new guidelines applicable to actions and measures to be taken under the multiannual programme to promote international cooperation in the energy sector (1998 to 2002) under the multiannual framework programme for actions in the energy sector and connected measures, OJ L/125, 5.5.2001, pp. 24–6.

The EU TACIS programme provided technical assistance to Russia and other post-Soviet countries.³⁸ The stated objective was to facilitate the transition to a market economy and to reinforce democracy and the rule of law. In the former Soviet Union, the situation was again very different from the accession countries. Here, there were sometimes, or even usually (except in the case of Ukraine), ample national reserves and production. The issue was rather that of how to create a regulatory regime that would encourage investment in upstream oil and gas development, fair access to transportation pipelines, and market-based incentives for efficient production, transport, and consumption. At all levels, these clear objectives were confronted by Soviet-style obstruction, involving: extensive resentment against foreign investment in Russia; an opaque, volatile, and corrupt culture interposed between investor and the government's licensing system; the absence of a culture of trust, commitment, and law; and a very close relationship between business and state, which prevented the state from regulating effectively and prevented business from focusing on commercial and competitive performance. The policy requirements here were very different. The energy directives had only limited usefulness as benchmarking models. The Energy Charter Treaty, with its emphasis on the introduction of a market economy, respect for property, non-discrimination, and access to transit and transport facilities, was probably more relevant at this stage.

Russia did not need to manage the importation and distribution of energy (as did the CEEC countries), but rather to produce and distribute more efficiently. Furthermore, it was not—and never will be—a candidate for EU accession, given that it is very large and has a tradition of perceived supremacy. The EU model should therefore have been offered, not on the basis of the obligation to adopt EU law for accession purposes, but through persuasion on the basis that it was the right model for Russia's needs. While the TACIS programme's funds were substantial, they were not sufficient to exercise financial leverage on Russia to adopt foreign-imported policies. There is, or rather was, also acute competition between the US (or Anglo-Saxon) models that underpinned Russia's early shock reform efforts (also driven by the IMF and the World Bank), and the EU model which contained the flexibility to emphasize more liberal (e.g. the UK) and more statist (e.g. France) versions. This programme ran from 2000 to 2006 and was then replaced by the European Neighbourhood and Partnership Instrument (ENPI)³⁹ for the period from 2007 to 2013.⁴⁰

6.3.1.2 Europe Agreements

Before moving to the agreements which now exist, an 'in between' group of agreements will be examined: the Europe Agreements. These were the instrument used

³⁸ Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

³⁹ Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ L 310, 9.11.2006, pp. 1–14.

⁴⁰ Similarly, the MEDA program in the Mediterranean region was replaced by ENPI from 2007 onwards.

to prepare Eastern European countries for accession to the EU. At the time of writing, only Bulgaria and Romania still have Europe Agreements.

With the EU as the dominant partner, the Europe Agreements established a programme for preparing the partner countries for eventual accession. They provided the means whereby the EU offered the associated countries the trade concessions and other benefits normally associated with full EU membership. The Europe Agreements aimed to establish free trade in industrial products and in services, limited freedom of movement, introduction of competition law (including state aid rules) over a gradual, transitional period, although the EU opened its markets more quickly than the associated country. As a result, industrial products from the associated countries had virtually free access to the EU from the beginning of 1995. The Agreements also contained provisions regarding the free movement of services, payments, and capital in respect of trade and investment, and the free movement of workers. When establishing and operating in the territory of the other party, enterprises were to receive treatment not less favourable than national enterprises. Under the Agreements, the partner countries also committed themselves to approximating their legislation to that of the EU, particularly in areas relevant to the internal market. Energy was mentioned as one of the areas of economic cooperation and nuclear safety was mentioned as a special concern.⁴¹ The form of the obligations was not specific; they referred to a general policy in the sector (e.g. the opening-up of the energy sector), defined a best-efforts obligation, enabled financial and technical assistance, and defined full approximation as the ultimate target, but without a specific timetable. They also formed the basis for several PHARE projects to assist the accession countries to develop regulatory regimes for energy (including competition) in line with EU law and the energy directives.

Sections 6.4 to 6.6 examine some of the current elements of EU external energy policy. In essence, EU action in this area can be, and often is, multilateral. The EU participates in international efforts in a given area like energy security, access to energy markets, or protection of energy investments. In addition to this, energy cooperation may be integrated in bilateral or inter-regional instruments. In this area, the EU negotiates bilateral legal and policy instruments with a range of developing and developed countries and regions. The chapter first focuses on examples of bilateral mechanisms (although the Cotonou Agreement is, arguably, regional in scope) (see section 6.4), and thereafter provides an overview of the multilateral mechanisms for energy cooperation using the ECT and the Energy Community Treaty as examples (see sections 6.5–6.7).

⁴¹ Articles 79 and 80 of the EU-Bulgaria Europe Agreement (Europe Agreements are virtually identical); these provisions mention as areas of cooperation energy efficiency, savings, development, transfer of technology, diversification of supply, transit, environmental impact, and opening up of the sector including modernization. This is an antechamber to full accession in the energy area. Article 81 includes, with a similar intention, environmental (including climate change) obligations.

6.4 Bilateral Aspects of EU External Energy Policy: From Associations to Dialogues

6.4.1 Association and Economic Cooperation Agreements

The EU has concluded several types of economic cooperation agreements. They differ in terms of the level of economic integration aimed at: goodwill discussions only; a basis for development aid and trade preferences involving an intention to move to a customs union; or a customs union plus gradual adoption of EU law by the partner state to prepare for accession. They have no specific energy focus, although energy may be mentioned as an object of development aid, included in a customs union and the adoption of EU law. They also tend to formulate goodwill declarations concerning foreign investment, but do not contain hard and specific legal obligations like those we see in the bilateral investment treaties, which now, post-Lisbon, are concluded by the EU and not by the Member States.

6.4.1.1 Association Agreements

Association agreements are a special case, and have been since the early days of the European Community. The Treaty of Rome invested the EU (then the EEC) with the competence to conclude agreements establishing an association with both third countries and international organizations. Without a formal definition of the objectives and scope of these associations, the EU has used this competence over the years to conclude associations with a large number of countries for very different purposes and objectives.⁴² Duran and Morgera distinguish between four categories of association: association as a prelude to EU membership (as is currently the case with Turkey and certain South-Eastern European countries); association as a substitute for EU membership (as is currently the case with Norway and the countries in the Euro-Mediterranean Partnership); association as a development tool (as is the Cotonou Agreement); and association as an instrument for inter-regional cooperation (e.g. the association agreements with Chile and South Africa).⁴³

These association agreements can also cover energy, as in the Association Agreement with Albania (which was signed on 12 June 2006 and entered into force on 1 April 2009), Article 107 of which states:

'Energy Cooperation shall focus on priority areas related to the Community acquis in the field of energy, including nuclear safety aspects as appropriate. It shall reflect the principles of the market economy and it shall be based on the signed regional Energy Community Treaty with a view to the gradual integration of Albania into Europe's energy markets.'

⁴² The current legal basis in Article 217 TFEU seems to suggest that association agreements can be concluded to cover all EU policies and activities. Similarly, see G. Marin Duran and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford: Hart Publishing 2012), p. 60.

⁴³ G. Marin Duran and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford: Hart Publishing 2012), pp. 58 and 59.

Certain factors stand out. First, for those associations that are a prelude to EU membership, the financial assistance offered is often tied to progress made in fulfilling the objectives of the association agreement.⁴⁴ The EU monitors progress in the association country in terms of approximation of laws. As such, it is ultimately the EU that evaluates the 'merits' of association countries' 'compliance'.⁴⁵ A somewhat similar issue can be raised in the context of EU relations with its neighbouring countries. Article 8 TEU states: 'The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union [...].' Examples of this type of neo-colonialism are readily available.

Association agreements can provide preferential access to EU markets, often with a view to a later customs union. There is institutional machinery for dialogue (a Council or Committee), which is increasingly also competent to deal with governance issues: i.e. a way for the EU (but never, in practice, for the partner country) to raise, with some financial, trade, and political leverage in the background, governance issues. There is an emphasis, pushed in particular by the southern EU countries, towards closer relations with the Mediterranean countries. Association agreements exist with most Mediterranean countries,⁴⁶ with Turkey being a special case.⁴⁷ These agreements were originally implemented by the MEDA programme, which contained a number of projects relating to energy. There are no specific 'energy' agreements in the EU-Mediterranean relationship; some of the countries have looked at the ECT, but felt that the 'hard law' obligation and direct enforcement (by investment arbitration) was not acceptable. This situation reflects the internal political circumstances of most Mediterranean countries: weak governance; religious problems where fundamentalist Islam is challenging governments which provide no significant popular participation; inter-ethnic strife; and suppression of minorities (e.g. Turkey, Israel, Algeria, and Syria). From an energy perspective, these countries are of great importance, in particular to southern Europe: oil and gas investment supply from Syria, Egypt and Algeria and through Turkey, Tunisia, and Morocco. As in the case with Russia and the Caspian/Caucasus countries, the EU wishes for good commercial relations with all of these countries. Through the use of treaties, dialogue, professional community-building, and assistance, it can help positive governance elements to grow, but in essence it cannot, on its own and

⁴⁴ Article 112 in the Association Agreement with Albania. Available at <http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf>.

⁴⁵ G. Marin Duran and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford: Hart Publishing 2012), p. 74.

⁴⁶ Just see Decision 2005/690/EC, Decision 2004/635/EC, Decision 2002/357/EC, Decision 2000/384/EC, Decision 2000/204/EC, Decision 98/238/EC, concerning the conclusion of a Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and, respectively, the People's Democratic Republic of Algeria, the Arab Republic of Egypt, the Hashemite Kingdom of Jordan, the State of Israel, the Kingdom of Morocco, and the Republic of Tunisia.

⁴⁷ Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ L 051, 26.2.2008, pp. 4–18.

without strong domestic allies, guarantee the creation of stable systems of good and democratic governance.

6.4.1.2 The Cotonou Agreement

The most important partnership agreement between the EU and the developing world is the Cotonou Agreement. Created in 2000, it functions as the framework for the EU's relations with 79 countries from Africa, the Caribbean and the Pacific (ACP). The ACP countries are most of the former colonies of EU Member States (the UK, France, Portugal, Belgium, and Spain), with some important exceptions (e.g. India, and the Latin American countries). It acts to some extent, and in tension with WTO commitments and former colonial preferences, as the legal basis for substantial development aid. Energy, which used to have a section devoted to it in the Lomé Agreement, appears in the Cotonou Agreement only as a series of passing references,⁴⁸ mainly to renewable energy. The promotion of investment promotion—relevant to the substantial investment of EU companies, for example, in Nigeria, Trinidad and Angola—is commented on positively, with the prospect of unspecific EU investment guarantees and future specific investment protection treaties. This aspect was also emphasized in the 2005 and 2010 revisions. The Cotonou Agreement is long on hortatory and other general policy declarations in the style of a preamble or UN General Resolutions, but short on specific mechanisms and obligations in the style of a BIT or the ECT. It reflects a neo-missionary revival in Western countries⁴⁹ by providing for a consultation procedure for human rights, democratic principles, the rule of law and corruption, but without the specificity of, for example, the OECD Anti-Corruption Convention.⁵⁰

In line with the current trend in international cooperation, the 2010 revisions also highlighted climate change as a new area of cooperation. This is logical, considering that many of the ACP countries are highly vulnerable to the potential negative effects of climate change (including extreme weather or rising water levels). In line with this, renewable-energy-related cooperation now has a more prominent role than before. As the other side of the coin, the new additions also include a specific reference to environmental measures not being used for protectionist purposes.⁵¹

It is hard to assess the effectiveness of both the very open-ended goodwill obligations and the massive development aid (including finance) for which the agreement

⁴⁸ In this context, also the ACP-EU Energy Facility is noteworthy. See Communication from the Commission to the Council and the European Parliament of 26 October 2004 on the future development of the EU Energy Initiative and the modalities for the establishment of an Energy Facility for ACP countries (COM(2004) 711 final).

⁴⁹ M. Ottaway, 'Reluctant Missionaries', July–August 2001, *Foreign Policy*, available at: <http://www.foreignpolicy.com/articles/2001/07/01/reluctant_missionaries> (last accessed 6.8.2012).

⁵⁰ See generally, L. Low, T. Sprange, and M. Barutciski, 'Global Anti-corruption Standard and Enforcement: Implications for Energy Companies', 3(2) *Journal of World Energy Law and Business* (2010), pp. 166–213.

⁵¹ Second revision, 19 March 2010. Text available at: <http://ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf>.

serves as a legal basis (for the period from 2008 to 2013, the amount allocated for this cooperation is EUR 22.7 billion⁵²—not an insignificant amount). One approach is to look at most of the language as a public relations exercise meant to placate the European Parliament and NGOs; the other is to view this as a step towards more effective measures to support good governance. Good governance itself can—if applied and imposed on weaker developing countries—be seen as the right move to make the world a better place, or as the continuation, albeit under different labels, of the economic and cultural dominance over what were formerly colonies, and are now underdeveloped and aid- and finance-dependent countries: i.e. the contemporary format of cultural colonialism with a newly revived, strong missionary element.

6.4.2 Partnership and Cooperation Agreements

Partnership and cooperation agreements envisage neither accession nor a customs union. They provide a basis for economic and trade policy dialogue, as well as for technical assistance. This form has been chosen for the EU's relationship with Russia and most post-Soviet states.⁵³

The 1994 Partnership and Cooperation Agreement with Russia is of particular interest from an energy perspective, given Russia's role in relation to the EU's energy supply. It entered into force in 1997, and is a general agreement with objectives ranging from democracy and cultural cooperation to free trade and the transition of the Russian economy to a market-based system.⁵⁴ Article 65 deals specifically with energy, cooperation in this field being carried out 'within the principles of the market economy and the European Energy Charter, against a background of the progressive integration of the energy markets in Europe'.⁵⁵ The parties agreed to initiate negotiations for a new EU/Russia Agreement to replace the current version at the EU-Russia Summit in June 2008.⁵⁶ Negotiations started in July 2008 but the 12 rounds of negotiations that were undertaken by the end of 2012 have not brought these discussions very far.⁵⁷ In the field of energy, this instrument has been

⁵² Details available at: <http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm>.

⁵³ Council and Commission Decisions 99/602/EC, 99/614/EC, 99/515/EC, 99/490/EC, 99/491/EC, 98/401/EC, 97/800/EC, 98/149/EC, 99/593/EC, 2009/989/EC on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, the Republic of Azerbaijan, Georgia, the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, the Russian Federation, Ukraine, and the Republic of Uzbekistan, Tajikistan of the other part, respectively.

⁵⁴ Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part—Protocol 1 on the establishment of a coal and steel contact group—Protocol 2 on mutual administrative assistance for the correct application of customs legislation—Final Act—Exchanges of letters—Minutes of signing, OJ L 327, 28.12.1997, pp. 3–69.

⁵⁵ Article 65(1) of the Agreement on partnership and cooperation.

⁵⁶ See 'The Joint Statement of the EU-Russia Summit on the Launch of Negotiations for a New EU-Russia Agreement'. Available at: <http://www.eu2008.si/en/News_and_Documents/download_docs/June/0627_eu_RUS-izjava.pdf>.

⁵⁷ Generally, see <<http://ec.europa.eu/russia/>>. See also, R. Leal-Arcas, 'The EU and Russia as Energy Trading Partners: Friends or Foes?' 14(3) *European Foreign Affairs Review* (2009), pp. 337–66.

largely mute. This is only logical when compared to the developments in other energy-related cooperation efforts aiming at pushing the ideal of a market economy into the Russian energy markets—the Energy Charter Treaty in particular.

6.4.3 Energy Dialogues

The EU has a number of institutionalized Dialogues in place. These Dialogues are often dominated by EU approaches and EU policies (even if coined as ‘shared values’ and ‘shared objectives’). The approach is often that of persuasion (i.e. the EU persuading the partner countries) instead of real negotiation. The Dialogues with developing countries—which enable EU supervision of third countries in terms of internal, domestic, implementation of the Dialogues based on EU standards and the EU’s understanding of sufficient performance—are a good example of this.⁵⁸ As noted by Leino-Sandberg, the problem is partly the special nature of the EU as an international actor. Given that the EU’s position is created through negotiations and bargaining between its 27 Member States, the EU’s approach is often already cemented prior to commencement of the Dialogue.⁵⁹ This is particularly problematic when institutionalized Dialogues are used to discuss negotiation positions for, say, climate change negotiations.⁶⁰

The situation is somewhat different in energy Dialogues with producing and supplying countries. Here, the EU cannot impose its solutions and views as it can in some other situations. Think of OPEC as the partner in the Dialogue,⁶¹ or Russia. An Energy Dialogue between the EU and Russia was initiated in October 2000, and covers issues such as energy security, energy efficiency, infrastructure, investment, and trade. In essence, the aim of this quite innovative institution established by EU and Russia is to improve the mutual understanding of the energy policies of the two partners. In some ways, the Energy Dialogue has been a successful institution, despite significant shortcomings.

This cooperation represents a policy level cooperation and the actual decision-making powers of the states involved are of course not affected in any way. The stated objective of this partnership is to promote energy security on the European continent, though its actual contribution remains thin. The main example of a positive effect in this respect, at least on paper, is the so-called Early Warning Mechanism, which requires mutual information-sharing in case of potential oil and gas supply and demand problems, including transit. Such problems may be technical, commercial, or political in nature.⁶²

⁵⁸ For this, see P. Leino, ‘The Journey Towards all that is Good and Beautiful: Human Rights and “Common Values” as Guiding Principles of EU Foreign Relations Law’, in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law* (Oxford: Hart Publishing 2008).

⁵⁹ P. Leino, ‘The Journey Towards all that is Good and Beautiful: Human Rights and “Common Values” as Guiding Principles of EU Foreign Relations Law’, in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law* (Oxford: Hart Publishing 2008), p. 679.

⁶⁰ G. Marin Duran and E. Morgera, *Environmental Integration in the EU’s External Relations: Beyond Multilateral Dimensions* (Oxford: Hart Publishing 2012), p. 231.

⁶¹ For details, see <http://ec.europa.eu/energy/international/organisations/opec_en.htm>.

⁶² On this and other developments, see <http://ec.europa.eu/energy/russia/overview/index_en.htm>.

While the Energy Dialogue may cover a wide range of issues, there are clear differences in emphasis between the parties: while the EU is mainly addressing issues of access to Russian markets and security of EU energy supply, Russia appears concerned about investment in export infrastructure. At least in part because of these differences, the success of the Energy Dialogue in the area of natural gas has been limited. The main point that has been resolved through the Dialogue is the resolution of the destination clause issue.⁶³ In this sense, the Dialogue has produced positive results.

In addition to these differences, there are also less sensitive areas which are therefore treated in more detail. It is important to note that the Dialogue is not only concerned with oil and gas, although it seems that this was the original emphasis of the parties. Electricity markets and electricity trade were included in the agenda at an early stage, and even nuclear issues are addressed as a central part of this cooperation. One area often debated in this context is energy savings.⁶⁴ The fact that this is a much less politically sensitive issue than the trade in natural gas, for example, undoubtedly has a bearing. There are many more common concerns and benefits here than in other areas. Similarly, electricity is much less sensitive because, unlike natural resources, it is not considered to be a strategic asset.⁶⁵

While this partnership might be beneficial for both parties, it still faces significant challenges. Some of the current issues affecting the cooperation with Russia include the gradual foreclosure on investment by companies established in one of these areas into another area. Russia has limited foreign investor participation in developing its natural resource base and the EU has, through the Third Country Clause,⁶⁶ done virtually the same.⁶⁷ It was specifically noted by the Russian representatives at a meeting as a ‘potential’ issue that could impair further cooperation. Similarly, environmental issues continue to be a difficult area.⁶⁸

In addition to cooperation, the Energy Dialogue is also used as a platform for discussing sensitive issues upon which the opinions of the parties might diverge. However, as mentioned, the tangible results from these discussions are limited. A good example of this is the fate of long-term upstream gas agreements. While discussions on the negative and positive effects of these agreements continue in the EU, the Dialogue has been used to exchange views on this question,⁶⁹ without major breakthroughs.

⁶³ EU-Russia Energy Dialogue, ‘The Second Progress Report’ (May 2008). Available at: <http://ec.europa.eu/energy/international/bilateral_cooperation/russia/doc/reports/progress2_en.pdf>.

⁶⁴ For the developments in this respect, see A.V. Belyi and K.V. Petrichenko, ‘Energy Efficiency Policy in Russia’, 1 *OGEI* (2011), <<http://www.ogel.org>>.

⁶⁵ Electricity is a secondary energy source, not primary like natural gas or oil.

⁶⁶ For the Third Country Clause and its relation to international law and EU-Russia relations, see A. Willems, J. Sul, and Y. Benizri, ‘Unbundling as a Defence Mechanism Against Russia: Is the EU Missing the Point?’, in K. Talus and P. Fratini (eds), *EU-Russia Energy Relations* (Rixensart: Euroconfidential 2010) and S.S. Haghghi, ‘Establishing an External Policy to Guarantee Energy Security in Europe? A Legal Analysis’, in M. Roggenkamp and U. Hammer (eds), *European Energy Law Report VI* (Antwerp: Intersentia 2009).

⁶⁷ <http://ec.europa.eu/energy/russia/joint_progress/doc/progress9_en.pdf>.

⁶⁸ <http://ec.europa.eu/energy/russia/joint_progress/doc/progress9_en.pdf>.

⁶⁹ Interim Report by the Parties of the EU-Russia Energy Dialogue, para. 3. Available at: <http://ec.europa.eu/energy/russia/joint_progress/doc/2006_05_25_interim_report_en.pdf> and The Ninth

There is also a bilateral EU-Norway Energy Dialogue mechanism in place. This Dialogue aims primarily at the coordination of energy policies (including research and technological development in the sector) and relations with other energy-producing countries. The current cooperation between Norway and the EU focuses, among other things, on the internal energy market, renewable energy (offshore wind in particular), and Carbon Capture and Storage projects.⁷⁰

Norway is a special case in many ways. It is in a very different position from other external energy producers. It is regarded as 'politically stable and secure'. EU-Norway relations are governed by the European Economic Area (EEA) Agreement, which covers areas such as the single market legislation, including competition law, public procurement and state aid and the free movement of goods. In these areas, Norway is in many ways much like an EU Member State, despite two negative referendums in 1972 and 1994. This is particularly so in the energy sector. First, Norway is under an obligation to implement the internal energy market legislation and must follow the competition law articles of the EEA Agreement, which are identical to those of the EU competition law provisions. Energy issues are, in particular, dealt with in Annex IV of the EEA Agreement. Secondly, in electricity Norway is an integral part of the common Nordic wholesale electricity market and the Nordpool power exchange. The Norwegian energy market authorities are also part of the Nordreg cooperative organization.

Section 6.5 focuses on the multilateral side of EU external energy relations.

6.5 Multilateral Aspects of the EU's External Energy Policy: From Energy Charter Treaty to Energy Community Treaty

Even with the emergence of the Energy Community Treaty, the ECT is still the EU's primary international (institutional) instrument in the energy area, although its importance for EU decreased significantly (but has not disappeared altogether) after Russia indicated that it would not ratify the ECT and would cease its provisional application.⁷¹

From its inception, the ECT was conceived, initiated, promoted, and supported by the EU. It expresses the EU interest in safe energy supplies, stable political relationships, and trade and investment along its borders (parallel to TACIS, PHARE,

Progress Report, October 2008. Available at: <http://ec.europa.eu/energy/russia/joint_progress/doc/progress9_en.pdf>.

⁷⁰ Commission press release, 'EC-Norway Energy Dialogue: Boosting Cooperation in the Internal Energy Market, Offshore Wind and Carbon Capture and Storage Projects', IP/08/817, 29.5.2008. See also Press Release, 'CCS, Market Liberalisation and Energy Security Dominate the Agenda of the EC-Norway Energy Dialogue', IP/09/849, 28.5.2009 and the Press Release from 22.6.2012, available at: <http://ec.europa.eu/energy/international/bilateral_cooperation/doc/norway/120622_press_announcement.pdf>.

⁷¹ For this, see A. Konoplyanik, 'A Common Russia EU Energy Space (The New EU Russia Partnership Agreement, Acquis Communautaire, The Energy Charter and the New Russian Initiative)', in K. Talus and P. Fratini (eds), *EU-Russia Energy Relations* (Rixensart: Euroconfidentiel 2010).