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ENERGY SECURITY IN INTERNATIONAL ECONOMIC LAW BALANCING LEGAL AMBITIONS AND GEOPOLITICAL REALITIES*

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ABBREVIATIONS

AB	Appellate Body
ABMs	Appellate Body Members
bcm	billion cubic metres
BITs	Bilateral Investment Treaties
CBAM	Carbon Border Adjustment Mechanism
CEER	Council of European Energy Regulators
CJEU	Court of Justice of the European Union
DCR	domestic content requirements
DSB	Dispute Settlement Body
ECT	Energy Charter Treaty
EU	European Union
Euratom	European Atomic Energy Community
FOU	full ownership unbundling
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
IEA	International Energy Agency
IRA	United States Inflation Reduction Act
ISO	independent system operator
ITO	independent transmission operator
JNNSM	Jawaharlal Nehru National Solar Mission
LCR	local content requirements
LNG	liquefied natural gas
MFN	Most Favoured Nation
MoUs	Memoranda of Understanding
NAFTA	North-American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of Petroleum Exporting Countries
OU	ownership unbundling
PCIs	Projects of Common Interest
PEEREA	Protocol on Energy Efficiency and Related Environmental Aspects
PPAs	power purchase agreements
PTAs	Preferential Trade Agreements
TEN-E (measure)	Trans-European Networks for Energy measure
TEP	Third-Energy Package
TFEU	Treaty on the Functioning of the European Union
TRIMS	Trade-Related Investment Measures Agreement
TSO	owner and operator of a transmission system

UAE	United Arabic Emirates
UN	United Nations
UNDP	United Nations Development Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNTS	United Nations Treaty Series
USMCA	US-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
VIU	Vertically Integrated Undertaking
WTO	World Trade Organization

INTRODUCTION

International energy law is a dynamic, yet rather novel and complex area of law. 'Novel' not so much for the fact that there were no rules regulating energy transactions until recently. Rather to the contrary, national, cross-border and international energy transactions have been taking place since the start of the era of coal dominance from the mid-1800s onwards.[1] However, various public and private energy transactions were usually studied through the prism of other areas of (international) law, including, amongst others, property law, private law, sovereignty over natural resources, and environmental law. International energy law as a separate branch of legal scholarship roughly emerged from the end of the 1980s onwards, coinciding with the conceptualisation of an internal European energy market and the realisation that a dependency on fossil fuels was detrimental to the environment and a shift to a green economy unavoidable. Prior to that period, and for the greatest part of the twentieth century, global as well as national energy markets were largely dominated by vertically integrated enterprises and closely tied to national security and industrial policy and competition in these markets was not a given.

In the same vein, the relevance of multilateral trading rules of the World Trade Organization (WTO) for energy was for a long time overlooked, downplayed, and underestimated. This is remarkable, as cross-border trade in energy falls within the WTO's remit as it concerns international trade in goods and services.[2]

The settlement of high-level disputes concerning energy trade is therefore a relatively recent **phenomenon** within the multilateral trading system, although their number is steadily growing.[3] The emergence of such disputes has introduced energy-related concepts novel to WTO panels and the Appellate Body (AB).

One crucial concept in this regard is that of 'energy security'. Although no international legal definition of this multi-layered notion exists, and the concept has been recognized as 'vague' in international relations literature, it remains a term that is used time and time again by states when referring to measures taken in connection with safeguarding their national energy supply. WTO panels and the AB have recently been confronted with interpreting its meaning and considered arguments connected to 'energy security' in two disputes.[4] In *India – Solar Cells,* the

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1 See on this generally Chapter 1, 'Energy in International Law' and Chapter 2, 'Foundational Approach, International Energy Transactions', in J.E. Viñuales, *The International Law of Energy*, Cambridge, Cambridge University Press 2022.

2 See Chapter 3, 'The Current WTO Framework Relevant to Energy', in A.A. Marhold, *Energy in International Trade Law*, Cambridge, Cambridge University Press 2021, p. 66.

3 See A-A. Marhold, *supra* n. 2, pp. 101-108; for example, DS412, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*; DS456, *India – Certain Measures Relating to Solar Cells and Solar Modules* and DS476, *European Union and Its Member States – Certain Measures Relating to the Energy Sector.*

4 See a deeper discussion on the notion of 'energy security' in A. Marhold, 'Externalising Eu-

AB examined India's invocation of the Article XX(j) GATT exception (essential to the acquisition or distribution of products in general or local short supply) in the context of the overall objectives of 'energy security'.[5] Moreover, the panel in *EU – Energy Package* had to decide on energy security-related issues in two instances. First, in connection with the EU's security of supply assessment accompanying third-country certification measures for pipeline transport services, and second, regarding Europe's 'gas diversification supply'-criterion in connection with gas infrastructure incentives. These measures were ultimately considered discriminatory under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) respectively.[6]

The goal of this contribution is twofold: Part I explains the international legal landscape of energy security and its role in international economic law prior to the Russian invasion of Ukraine. Part II then focuses on how the Russian invasion of Ukraine was a shock to both multilateralism and the international energy landscape, and how it is forcing the European Union (EU) to adopt a so-called 'security-centred' energy trade regulation, with the field predictably becoming a moving target for years to come. It will focus on questions of securing Europe's energy supply, navigating away from one dominant supplier, Russia, while simultaneously decarbonizing Europe as soon as realistically possible.

PART I – THE LEGAL LANDSCAPE PRIOR TO THE RUSSIAN INVASION OF UKRAINE

This part sheds light on the emerging notion of 'energy security' within WTO law, taking a two-pronged approach: It starts out by studying the meaning of the concept of energy security and its evolving role in international (trade) law. Subsequently, the contribution will critically assess how panels and the AB have dealt with energy security in its case law, and anticipate its handling in future disputes.

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rope's energy policy in EU Free Trade Agreements: A cognitive dissonance between promoting sustainable development and ensuring security of supply?', 3(1) *Europe and the World: A Law Review* (2019), pp. 5-6 and S. Yergin, *The Quest – Energy, Security, and the Remaking of the Modern World*, New York, Penguin Publishers 2011, pp. 266ff.

5 DS456, *India – Certain Measures Relating to Solar Cells and Solar Modules,* Report of the AB, pp. 34ff.

6 DS476, *European Union and Its Member States – Certain Measures Relating to the Energy Sector*, report of the panel, paras. 7.1061-1063 and paras. 7.1296-1300; the panel report has not been adopted by the Dispute Settlement Body (DSB) because it was appealed but the AB did not issue its report (due to the block on the appointment of new Appellate Body Members (ABMs) by the United States), see statement on https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds476_e.htm (accessed 5 October 2023).

1. THE CONCEPT OF ENERGY SECURITY AND ITS ROLE IN INTERNATIONAL LAW

1.1 Energy security as a concept in international relations

Our societies have been faced with energy interdependence for centuries. However, it is clear that in the era of technological and digital advancements in an ever more globalized world, our dependency on energy systems has become increasingly complex. In that light, it is evident that a secure energy supply is necessary to ensure a proper and reliable functioning of those systems and that it is of vital importance for our economies (and therefore arguably for our national security). The term 'energy security' is often used both in the international relations context and in international and national policy debates regarding a country's energy supply. Yet, when asked, we may be hard-pressed to provide an accurate definition of the concept. One indeed would likely relate it to the idea that there should be no shortage of energy supply to keep the economy going. Daniel Yergin very poignantly remarked the following about energy security: 'Energy Security may seem like an abstract concern – certainly important, yet vague, a little hard to pin down.'[7]

Our inability to define energy security in more detail, even though we are familiar with the term, is not a coincidence. The underlying cause for this is that in international relations literature and policy, the definition of the term energy security has been subject to fierce academic debate for decades.[8] In essence, the issue lies in the fact that there are two major lines of thought about the notion of energy security. One is extremely narrow, focusing on the technical issues surrounding, inter alia, the energy infrastructure, demand and supply, the energy mix, pricing

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7 S. Yergin, *supra* n. 4, p. 266.

8 See on the discussion of the concept of energy security e.g., Energy Charter Secretariat, 'International Energy Security – A Common Concept for Energy Producing, Consuming and Transit Countries' (Energy Charter Secretariat, Brussels 2015), pp. 10ff; The Council of European Energy Regulators (CEER), Energy Regulation and Security of Supply – The European Regulators' Approach' presentation of 8 March 2010, http://www.ceer.eu; I. Dreyer and G Stang, 'What Energy Security for the EU', 1 European Union Institute for Security Studies 2013; J. Lilliestam and A. Patt, 'Conceptualising Energy Security in the European Context', *SEFEP Working Paper* 2012-4; R. Metais, 'Ensuring Energy Security in Europe: The EU between a Market-based and a Geopolitical Approach', *College of Europe EU Diplomacy Paper* 03/2013; A. Goldthau, 'Conceptualizing Energy Security', 46 *Energy Policy* (2012), p. 36; B.K. Sovacool and M.A. Brown, 'Competing Dimensions of Energy Security: An International Perspective', 35 *Annual Review of Environment and Resources*, (2010) pp. 77-108; B.K. Sovacool et al., 'Exploring propositions about perceptions of energy security: An international survey', 16 *Environmental Science & Policy* (2012) p. 44; A. Goldthau, 'A Public Policy Perspective on Global Energy Security', 13 International Studies Perspectives (2012), p. 65; A. Goldthau and B.K. Sovacool, 'The uniqueness of the energy security, justice, and governance problem', *Energy Policy* (2012) p. 232; D. Yergin, 'Ensuring Energy Security', *Foreign Affairs* (2006); L. Chester, 'Conceptualising energy security and making explicit its polysemic nature', 38 *Energy Policy* (2010) p. 887.

and varying types of energy consumers and producers.[9] The other line of thought, on the other hand, is very broad, taking into account comprehensive, geo-political energy challenges and their various defence-related and historical narratives, thereby arguably lacking precision and coherence.[10] Yergin underlines the complexity of the concept, but does, however, offer a straightforward, 'everyday life' definition of the term, namely 'the availability of sufficient supplies at affordable prices'.[11] He proceeds with exploring the concept further by discussing its various dimensions. These are 1) the physical dimension (for instance the need to protect energy assets, infrastructure and supply routes); 2) the crucial dimension of access to energy; 3) the regulatory dimension, i.e., ensuring a system of governance of energy supply and demand on a national and global level; and, finally, 4) the importance of investment for long-term energy security.[12] It thus becomes clear that energy security is a multifaceted concept with many practical and political implications. The ensuing status quo remains, however, that although a vast number of academics and policymakers have discussed and attempted to frame the definition of 'energy security' and 'energy security of supply' legally or otherwise, no clear consensus on its meaning yet exists.[13] As a result, there is no legally binding definition of 'energy security', either on the international level, or in regional contexts (e.g., EU law).[14]

In the opinion of the author, the closest one can therefore get to an 'official' and internationally agreed upon description of the term energy security would be to consider the explanations given by the International Energy Agency, the Organisation for Economic Co-operation and Development (OECD)-affiliated agency set up in the wake of the 1970s oil crises, tasked with balancing the interests of energy importing and exporting countries.[15] While the original 1974 founding document of the Agreement on an International Energy Programme (IEA) does not mention energy security in so many words, it does contain a wide array of provisions emphasizing the importance of preventing 'supply emergencies', in addition to reminding governments of their special responsibility regarding energy supply.[16] Today, the IEA describes the concept of 'energy security' in the broadest sense as 'the uninterrupted availability of energy sources at an affordable price'.[17] The United Nations Development Programme offers an additional description and

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9 Energy Charter Secretariat, *supra* n. 8, p. 10.

10 Ibid.

11 S. Yergin, *supra* n. 4, p. 268.

12 Ibid., p. 269.

13 See *supra* note 8.

14 The EU in its energy security strategy in so many words confirms that there is no legal definition of energy security on the European level, see EC, Commission Staff Working Document, 'In-depth study of European Energy Security', SWD(2014)330final, 166, accompanying document EC, 'European Energy Security Strategy', COM(2014)330 final.

15 International Energy Agency, http://www.iea.org (accessed 5 October 2023).

16 Preamble, OECD, Agreement on An International Energy Programme (signed 18 November 1974, entered into force 19 January 1976) 1040 UNTS 271.

17 See International Energy Agency Secretariat, 'What is Energy Security?', http://www.iea.org/topics/energysecurity/subtopics/whatisenergysecurity/ (accessed 5 October 2023).

characterizes 'energy supply security' as 'the continuous availability of energy in varied forms, in sufficient quantities, and at reasonable prices'.[18]
It is important to further distinguish between two aspects of energy security: long-term energy security, which implies timely investments considering sustainable development needs, and short-term energy security, suggesting that the system should react adequately to sudden changes in supply and demand.[19]
Despite the many unresolved issues that remain around the framing of the concept of energy security, it is commonly understood that it covers elements of i) a reliable supply that is ii) accessible, and iii) affordable.[20] Moreover, it is crucial to add that the supply should be *sustainable* in the long term. It follows that by guaranteeing energy security, energy markets should be resilient in the event of shocks (in the European context one could for instance think of the recurring gas transit disputes between Russia and Ukraine that took place in the 2000s that affected a great number of EU Member States directly).[21] In essence, energy security must go hand in hand with a sustainable energy supply, one that can be guaranteed for future generations. This notion is also consistent with Goal 7 of the United Nations Sustainable Development Goals to ensure access to affordable, reliable, sustainable, and modern energy for all.[22] In this sense, the sustainable development aspect is inseparable from the concept of energy security. Consider, for instance, Japan or the EU, which are heavily dependent on imports of fossil fuels from abroad to maintain a secure energy supply. Such a supply cannot be considered sustainable.[23]

1.2 The role of energy security in public international law

Notwithstanding the absence of an international legal definition of energy security, as the concept is relevant in regulating international energy relations and international affairs more broadly, it by definition becomes subject to regulation in international law. All sources of international law (Article 38.1 International Court of Justice (ICJ) Statute: treaty, custom, general principles, judicial decisions, and writings of publicists) are of importance for the regulation of international energy relations, and some are specifically relevant for guaranteeing energy security.[24] Treaties perhaps offer us the most straightforward and searchable

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18 United Nations Development Programme (UNDP), *World Energy Assessment: Energy and the Challenge of Sustainability* (UNDP, New York 2015) Chapter 4: 'Energy Security', p. 112.

19 Ibid. Also see International Energy Agency, *World Energy Outlook 2016*, IEA, Paris (2016) p. 86.

20 See *supra* n. 17.

21 See e.g., on this generally A. Marhold, 'The Russo-Ukrainian Gas Disputes, the Energy Charter Treaty and the Kremlin Proposal – Is There Light at the End of the Gas Pipe?', 3 *Oil, Gas & Energy Law Journal* (OGEL) Special issue on Cross-Border Pipelines (2011).

22 UN Sustainable Development Goals – Goal 7: Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for All, Target 7.A and 7.A.1 on clean energy technologies.

23 See International Energy Agency, 'Japan', https://www.iea.org/countries/japan and Eurostat, 'How Dependent is Your Country on Oil Imports', https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20190828-1 (accessed 5 October 2023).

24 Art. 38.1, Statute of the International Court of Justice, (18th April 1946) 33 UNTS 993; also

source in this respect and will therefore be the focus here, before the paper turns to the treatment of energy security in WTO law. It should be mentioned, however, that other sources of international law besides treaties, as well as other principles of public international law, for instance the Principle of Sovereignty over Natural Resources, as it evolved from UN General Assembly Resolution 1803, can evidently be considered to be of importance for the notion of energy security in so far as it pertains to energy resources that are primary energy commodities (i.e., fossil fuels) and national sovereignty over these.[25]

With regard to treaties, we distinguish between two types of these legal instruments that are of particular significance in connection with safeguarding energy security: a) treaties that are explicitly tasked with setting multilateral or bilateral rules in the energy sector, and b) those that do not have an express mandate to regulate energy matters, but where energy is considered to fall within their greater competence. Regarding the former (energy sector specific agreements regulating energy), these can again be divided into three sub-types: i) multilateral treaties pertaining to regulating (economic) activity in the energy sector, such as the Energy Charter Treaty (ECT) (international trade and investment in energy);[26] ii) multilateral treaties establishing international organisations tasked with particular strands of energy regulation, such as the Treaty Establishing the European Atomic Energy Community (Euratom) Treaty,[27] the Statute of the Organization of Petroleum Exporting Countries (OPEC)[28] and the abovementioned International Energy Agency Agreement;[29] and, finally, iii) bilateral treaties between two or more countries, e.g. regulating gas trade, or joint development in the energy sector.[30] Some of these types of treaties expressly refer to ensuring energy security as part of their mandate.[31] Examples of the latter kind, i.e. non-energy specific treaties, where energy (security) nevertheless falls within their purview, are the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, as well as the rules of the World Trade Organization or Bilateral Investment Treaties (BITs).[32] Multilateral or bilateral Preferential Trade Agree-

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see S. Bruce, 'International Energy Law', in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press 2008-, online edition, http://www.mpepil.com (accessed 5 October 2023).

25 UNGA Res. 1803 (XVII) (18 December 1962) 'Permanent Sovereignty over Natural Resources'.

26 The Energy Charter Treaty (18 April 1998) 2080 UNTS 100.

27 Treaty establishing the European Atomic Energy Community (Euratom) (1 January 1958) 294 UNTS 261.

28 OPEC Statute: Statute of the Organization of Petroleum Exporting Countries (1 May 1965) 443 UNTS 427.

29 *Supra* n. 16.

30 See for example of the discussion of such an agreement (the regulation of the Nord Stream 2 pipeline) L. Hancher and A. Marhold, 'A Common EU Framework Regulating Import Pipelines for Gas? Exploring the Commission's proposal to amend the 2009 Gas Directive', 37(3) *Journal of Energy and Natural Resources Law* (International Bar Association) (2019) pp. 289-303.

31 E.g., the Energy Charter Treaty (*supra* n. 26).

32 The COP21 Paris Agreement: United Framework Convention on Climate Change (UNFCCC),

ments (PTAs) that contain energy specific chapters may also be grouped into this category (for example the EU-Ukraine Deep and Comprehensive Free Trade Agreement, which does contain a chapter specifically dealing with energy).[33] Energy security in the first category of energy-specific treaties in their various forms will be briefly discussed below. We will then turn to covering the second category, more specifically on the role of energy security in international trade law, before we discuss the emergence of the concept in selected WTO case law.

1.3 Energy security in energy specific treaties

i) Multilateral treaties regulating (economic) activity in the energy sector: The example of the ECT

The ECT is the most comprehensive multilateral treaty regulating international economic activity in existence and is currently undergoing the process of modernization.[34] In 2023, its future is as yet unknown, due to criticism that the treaty with its investment protection provisions locks states too much into fossil fuel dependency and leaves little space to pursue the goals set out in the Paris Agreement.[35] It was originally conceived to integrate the energy markets of the countries of the former Soviet Union into the global economic system and attract investment in this sector in that part of the world.[36] It could therefore be argued that, quite understandably, the ECT was conceived with long term energy security as its backdrop, although a concrete definition of this term is not to be found anywhere in the ECT's legal texts. Nevertheless, 'energy security' looms large in the ECT treaties and accompanying documents. For example, the founding document of the ECT, the 1991 European Energy Charter, states that the representatives of the signatories are, *inter alia*, 'willing to do more to attain the objectives of security of supply and efficient management and use of resources'.[37] Moreover, the objec-

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UN Doc. FCCC/CP/2015/L.9/Rev.1 'Adoption of the Paris Agreement' (12 December 2015) in Art. 2(c) could be seen as implicitly referring to long-term, sustainable energy security, in the sense that it could serve as a basis for fossil fuel subsidy reform ('Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development'); WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization (April 15 1994) 1867 UNTS 154.

33 Chapter 11 of the EU-Ukraine Deep and Comprehensive Free Trade Agreement is part of the wider EU-Ukraine Association Agreement: European Commission, 'Association Agreement between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part', OJ L 161/3 (29 May 2014).

34 The ECT, *supra* n. 26.

35 See J. Tropper and K. Wagner, 'The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties', 23 *Journal of World Investment and Trade* (2012) pp. 813, 821-823.

36 See generally on the origin and purpose of the ECT T.W. Waelde, *The Energy Charter Treaty – An East-West Gateway to Investment & Trade*. London, Kluwer Law 1996.

37 Preamble of the 1991 Energy Charter, also known as the European Energy Charter, was the founding document for the Energy Charter Treaty and provides the political foundation for the

tives in Title I of the ECT mention that 'The signatories are desirous of improving security of energy supply and of maximising the efficiency of production.'[38] The additional ECT protocol on Protection of Energy Efficiency and Related Environmental Aspects refers to energy security in the context of protecting the environment.[39] However, the importance of energy security was re-discovered only later, when the concept took centre stage in the 2015 political declaration to the ECT (the so-called International Energy Charter).[40] In this political document, a link is repeatedly made between supply security and the trilemma of energy security, economic development and environmental protection, however yet again without venturing into defining the concept itself.[41]

ii) Multilateral treaties concerned specialized strands of the energy sector

International Energy Agency (IEA)

Already briefly alluded to above, the IEA was created first as a separate energy programme and subsequently a standalone agency under the auspices of the OECD to regulate relations between energy exporting and energy importing countries following the 1970s oil crises.[42] The purpose of creating this agency indicates that energy security was inherent to its mandate, as it was the energy importing countries which suffered the most from the energy crises and a lack of stable energy supply. As mentioned above, the term 'energy security' did not feature explicitly in its founding document, though implicitly it was its greater goal: the Preamble stresses the importance of preventing supply emergencies and its desire to 'promote secure oil supplies', which is a strong indicator that energy security was at the heart of the establishment of the organization.[43] Many of the core rules of the Agreement are directly connected with energy security of supply, especially those obligations that signatories must undertake to ensure they have emergency reserve commitments, e.g., in the form of oil stocks, in the Annex on Emergency Reserves.[44]

Energy Community Treaty

The Energy Community Treaty is a noteworthy example of a regional energy treaty where the EU energy acquis, especially the energy packages mandating the unbundling of the production, transmission and sale of energy is extended to a particular group of non-EU countries (Ukraine, Moldova, Georgia and several

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Charter process.

38 ECT, *supra* n. 26, Title I: Objectives.

39 Preamble of the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) to the ECT, *supra* n. 26.

40 International Energy Charter, 'Concluding Document of the Ministerial ('The Hague II') Conference on the International Energy Charter, 20 and 21 May 2015'.

41 International Energy Charter, *supra* n. 40, p. 11.

42 See *supra* text to n. 15 and 16.

43 Preamble, OECD, Agreement on An International Energy Programme, *supra* n. 16.

44 See e.g., Art. 3.1 OECD, Agreement on An International Energy Programme, *supra* n. 15 and generally the Annex on Emergency Reserves.

Balkan states).[45] Here, as well, one of the underlying purposes was to ensure greater security of supply for the EU as well as for the parties to the treaty. The Preamble in so many words states:

> Desiring to enhance the security of supply of the single regulatory space by providing the stable regulatory framework necessary for the region in which connections to Caspian, North African and Middle East gas reserves can be developed and indigenous reserves of natural gas, coal and hydropower can be exploited.[46]

Article 35 of the treaty is entirely devoted to security of supply, ensuring that signatories put in place plans towards this end, in addition to making the connection to renewable energy.[47] However, the article remains limited in scope, setting out a duty of conduct obligation for parties, rather than a duty of result.

International Atomic Energy Agency (IAEA) and Euratom

Unsurprisingly, one of the areas of energy regulation where security is of the essence is in the nuclear energy sector. However, here, the reference to security is predominantly connected to the safety of the technology used, rather than security of supply. This is reflected clearly in the treaties concluded under the auspices of the International Atomic Energy Agency (IAEA). Energy security as a concept does not feature in these treaties, as their security dimension is largely themed around nuclear safety, safety of nuclear workers and powerplants and nuclear security.[48] The same is true for the Euratom Treaty, which creates a specialized market for nuclear energy in Europe.[49] While the establishment of a specialized European market for nuclear energy fits within the notion of energy security in terms of a varied energy mix, the Treaty emphasizes the safety and security of nuclear energy policies, rather that security of supply as such.

Organization of Petroleum Exporting Countries (OPEC)

OPEC is an international organization based in Vienna established in the 1960s by major petroleum producing and exporting countries to represent their interests.[50] Having had a significant influence on the supply side of the market, one could say that the impact of OPEC members on the energy security of net-importing countries of petroleum was great and (still) continues today. Considering OPEC

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45 Energy Community Treaty: 'Treaty Establishing the Energy Community Treaty', OJ L 198 of 20/07/2006, p. 18 (1 July 2006).

46 Preamble of the Energy Community Treaty, *supra* n. 45.

47 Art. 35 Energy Community Treaty, *supra* n. 45 states: 'The Energy Community may adopt Measures to foster development in the areas of renewable energy sources and energy efficiency, taking account of their advantages for security of supply, environment protection, social cohesion and regional development.'

48 See the variety treaties on nuclear safety and nuclear security concluded under the auspices of the IAEA, https://www.iaea.org/resources/treaties/treaties-under-IAEA-auspices (accessed 5 October 2023).

49 See *supra* n. 27.

50 See http://www.opec.org (accessed 5 October 2023).

on the 'flip side' of energy security, their statute, understandably, was conceived from this angle. Energy security is not mentioned explicitly, but phrased in the manner that OPEC's goals are, namely to 'devise ways and means of ensuring the stabilization of prices in international oil markets with a view *to eliminating* harmful and unnecessary fluctuations' [emphasis my own].[51] The emphasis is on the importance of a steady income for producing nations, vis-à-vis an 'efficient, economic and regular supply of petroleum to consuming nations'.[52] This element of energy security can be considered the other side of the coin of security of supply, which for many nations is the 'security of energy demand', in other words, the guarantee of an income for the energy security supplied.

iii) Bilateral treaties

This is the last category of energy specific treaties.[53] Bilateral treaties in the energy sector come in various forms and are also known under the name *Lex Petrolea*, as they often incorporate terminology from various legal traditions as well as legal-technical fields.[54] These types of treaties are broad and range from agreements on transportation by pipeline, joint development in the oil, gas, or renewable energy sector, to cooperation and research and development in energy. Depending on the type of bilateral treaty, its mode of cooperation and the specific energy sector concerned, energy security will inherently implicitly, and at times explicitly, play a role in agreements of this type.[55] After briefly having reviewed specialized treaties in the energy sector, we can determine that energy security in various degrees plays a role in energy specific treaties. Perhaps the broader the scope of the treaty in question is, the more space it allows for the increased use of the concept of energy security, as is the case with the ECT. In more specialized regimes, such as the IEA or OPEC, energy security also comes into play, but always from the thematic angle of the treaty in question (e.g.. the need for minimum oil stocks to prevent disruptions, or ensuring a stable flow of energy supplies, on the one hand, and a steady income for producers, on the other).[56]

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51 Art. 2(b) OPEC Statute, *supra* n. 28.

52 Ibid., Art 2(c).

53 See for a comprehensive overview of such contracts the University of Cambridge, CEENRG 'Energy Bilaterals' database established under the auspices of T Morgandi, http://www.energy-bilaterals.org (accessed 5 October 2023).

54 An excellent explanation of this phenomenon in given in K. Talus, S. Looper and S. Oitillar, '*Lex Petrolea* and the internationalization of petroleum agreements: Focus on Host Government Contracts', 5 *Journal of World Energy Law and Business* (2012) p. 181.

55 Examples of where energy security is specifically mentioned are manifold, but see e.g., the 2007 Agreement among the Hellenic Republic, the Republic of Turkey and the Italian Republic concerning the Development of the Turkey-Greece-Italy Gas Transportation Corridor, ITGI project agreement Preamble on p. 119, available via the 'Energy Bilaterals' database, *supra* n. 53.

56 See *supra* text to n. 43, n. 50 and n. 51.

1.4 Energy security in international trade law: WTO and PTAs

We will turn to international trade law, where energy regulation in principle is not at the heart of its subject matter, but where it falls within its broader scope when it concerns cross-border trade. Energy security in the general context of WTO law and in PTA's will first be examined before venturing into the analysis of recent WTO case law.

i) World Trade Organization

The WTO regulates international trade in goods, services, and intellectual property.[57] While cross-border energy trade was mostly dealt with outside of the multilateral trading system for a long time, nothing in the provisions of the GATT 1947 or WTO Agreements stipulates that trade in energy is excluded from its scope. Debates surrounding energy security first entered GATT discussions through the back door in the Tokyo Round (1973-1979) during the 1970s oil crises. In the 1960s, the major oil exporting countries formed the abovementioned OPEC, which initially was not very influential. The 1970s oil crisis changed the course of history when most energy producing countries took control over their natural resources production and nationalized their petroleum industries. Only then did it become evident how powerful the OPEC cartel was and how vulnerable and dependent some countries were on the import of natural resources from abroad.[58] Industrialized countries such as the United States experienced a shortage in fossil fuels and, as a result, petroleum talks, namely on export restrictions and export taxes, were included in the agenda of the Tokyo Round.[59] These so-called debates on 'energy dual pricing' and restrictive practices in natural resources kept on resurfacing in the multilateral trading forum over the decades.[60] However, since

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57 See the various agreements concluded under the umbrella of the WTO Agreement, *supra* n. 27; Trade in goods is regulated by the GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994); Trade in services is taken up in the GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994); trade-related intellectual property rights can be found in the TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994).

58 See e.g. GATT, Committee on Trade and Development, COM.TD/W/208 28 January 1974, 'The Impact of Higher Petroleum Prices on Developing Countries – Note by the Secretariat' and discussion in AA Marhold. 'WTO Law and Economics and Restrictive Practices in Energy Trade: The Case of the OPEC Cartel', 9(6) *Journal of World Energy Law and Business* (Oxford), Special Issue on Antitrust in Energy (2016) p. 475.

59 During the Tokyo Round, export restrictions were taken up in various fora, namely in Group 3(b), see GATT doc (MTN/3B/9); See WTO, Export Restrictions and Charges, Background Note by the Secretariat, Multilateral Trade, Negotiations, the Uruguay Round, Doc, MTN. GNG/NG2/W/40, 8 August 1989.

60 See on this in particular AA Marhold, International Centre for Trade and Sustainable Development (ICTSD), 'Fossil Fuel Subsidy Reform and Climate Change Mitigation: Options for

issues concerning energy regulation were only considered remotely relevant in the GATT and later the WTO, energy security as such was never at the centre of the discussion. The Dispute Settlement Body was only confronted with arguments concerning energy security once parties brought cases to dispute settlement that linked trade measures with elements of energy security.

ii) Preferential trade agreements

PTAs tend to elaborate on specific matters and themes when consensus at the multilateral level cannot be reached. The recent batch of Free Trade Agreements concluded by the EU are a good example. Several of these include specialized chapters on energy and raw materials, in particular the EU-Singapore FTA, the EU-Ukraine DCFTA and the current text of the new EU-Mexico FTA (still undergoing a legal-linguistic revision).[61] In Chapter 7 of the EU-Singapore FTA, which is mostly geared towards non-tariff barriers in the renewable energy sector, the 'safety of energy supply' is only mentioned in the context of Exceptions in Article 7.6.[62] Following the gas transit disruptions between Ukraine and Russia in the 2000s, energy security played a much more prominent role in the EU-Ukraine DCFTA.[63] In its Preamble, the parties express their commitment

> to enhance energy security, facilitating the development of appropriate infrastructure and increasing market integration and regulatory approximation towards key elements of the EU acquis, promoting energy efficiency and the use of renewable energy sources as well as achieving a high level of nuclear safety and security.[64]

Chapter 11 of the Agreement on 'Trade-Related Energy' contains several provisions that are pivotal for energy security, inter alia prohibiting energy dual pricing (Article 269) as well as regulating cooperation on infrastructure (Article 274) and supply interruptions (Article 276).[65]

The newly negotiated text in Chapter 7 of the EU-Mexico Free Trade Agreement (FTA) on 'Energy and Raw Materials' also reaffirms the commitment to eliminate energy dual pricing and promote the diversification of energy resources, although energy security as such does not feature in the draft text.[66] Understandably, the

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Constraining Dual Pricing in the Multilateral Trading System' (Geneva, October 2017).

61 See for a detailed discussion of these chapters A.A. Marhold, 'Externalizing Europe's Energy Policy in EU Free Trade Agreements: A Cognitive Dissonance between Promoting Sustainable Development and Ensuring Security of Supply?', 3(1) *Europe and the World: A Law Review* (2019) pp. 1-18 (UCL Press).

62 EU-Singapore Free Trade Agreement, Authentic text as of May 2015.

63 EU-Ukraine DCFTA, *supra* n. 33.

64 Preamble of the EU-Ukraine DCFTA, *supra* n. 33.

65 Arts. 269, 273 and 276 of Chapter 11 of the EU-Ukraine DCFTA, *supra* n. 33.

66 See 'New EU-Mexico Agreement – the Agreement in Principle' (Brussels, 23 April 2018), http://www.trade.ec.europa.eu (accessed 5 October 2023). Note, however, that energy security did feature in Art. 1 of the EU's textual proposal in 2016.

EU, which is extremely dependent on energy imports, makes efforts to ensure that energy security is reflected in its relations with its trading partners.[67] On the other side of the Atlantic, the newly negotiated US-Mexico-Canada Agreement (USMCA) no longer contains an energy specific chapter as was the case with its predecessor, the North-American Free Trade Agreement (NAFTA).[68] However, in the accompanying bilateral US-Canada Side Letter on Energy (the Annex on Energy Regulatory Measures and Regulatory Transparency), both the US and Canada have reaffirmed the importance of energy security in their cooperation (Article 3).[69]

2. ENERGY SECURITY AS AN EMERGING CONCEPT IN WTO DISPUTE SETTLEMENT: LESSONS FROM *INDIA-SOLAR CELLS* AND *EU-ENERGY PACKAGE*

While the multilateral trading system thus for a long time steered clear of matters pertaining to energy, let alone its security of supply, energy security recently managed to make its way into WTO case law. After the WTO's establishment in 1995, the nature of WTO Membership gradually started changing with the steady increase of major energy producing and exporting countries joining the organization.[70] This process coincided with major technological developments and the commercialization of the renewable energy sector, leading to a steady rise of energy-related trade disputes being brought before the WTO.

In two recent WTO disputes concerning energy trade, *India-Solar Cells* and *EU-Energy Package*, both India and the EU brought in arguments connected to energy security in justifying their respective trade-restrictive measures.[71] The disputes

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67 The EU imports almost 60 per cent of its fossil fuels from abroad, see Eurostat, Energy Production and Imports, https://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_production_and_imports (accessed 5 October 2023).

68 The Agreement between the United States of America, the United Mexican States and Canada (USMCA) (signed 30 November 2018) (ratification pending); Chapter 6 – Energy and Basic Petrochemicals of the North American Free Trade Agreement (NAFTA), 1 January 1994, 1867 UNTS 14.

69 Art. 3 of the Annex on Energy Regulatory Measures and Regulatory Transparency to the USMCA (US-Canada Side Letter on Energy).

70 While several major energy producing countries were already WTO Members, in the last two decades more of these countries joined the Organization, such as Russia, Saudi Arabia, Kazakhstan; see on a discussion of their accession commitments A. Marhold and F. Weiss, 'Energy and Fossil Fuels as a Topic in WTO Accession Protocols', in: M. Bungenberg, M. Krajewski, C. Tams, J.P .Terhechte and A.R. Ziegler (eds.), *European Yearbook of International Economic Law, Vol. 9*, Cham, Springer Verlag 2019, p. 61.

71 DS456, *India – Certain Measures Relating to Solar Cells and Solar Modules* (*India-Solar Cells*), report of the panel, WT/DS456/R, 24 February 2016, and report of the Appellate Body, WT/DS456/AB/R, 16 September 2016; DS476, *European Union and Its Member States – Certain Measures Relating to the Energy Sector (EU – Energy Package)*, report of the panel, WT/DS476/R, 10 August 2018 (note that the latter case has been appealed by both parties, but is

each represent one side of the spectrum of energy resources, renewable energy (solar) and fossil fuels (natural gas). We will discuss the cases in turn and analyse how energy security was used as a concept in various ways in these cases, as well as how the panel and the AB interacted with parties' arguments connected to energy security.

2.1 *India-Solar Cells*: Long-term energy security as a justification for domestic content requirements?

In DS456 *India-Solar Cells* (India-United States), the United States complained against India's measures on solar cells and solar modules. India had taken the measures in question in the context of the deployment of solar energy in particular regions as part of their larger Jawaharlal Nehru National Solar Mission (hereafter the JNNSM).[72] As a part of this mission, India concluded long-term power purchase agreements (PPAs) with solar power developers.[73] The JNNSM Guidelines for the terms and conditions of the PPAs set out mandatory domestic content requirements for large parts of these projects, requiring the use of solar cells and modules manufactured in India.[74] The US argued that these measures were a domestic content requirement inconsistent with GATT Article III:4 (National Treatment) and Article 2.1 of the Trade-Related Investment Measures Agreement (TRIMS, paragraph 1(a) Illustrative List).[75]

India first sought to justify the measure by (unsuccessfully) invoking the GATT Article III:8 government procurement derogation.[76] However, more importantly, it attempted to defend the measure by invoking the GATT Article XX(j) exception (essential to the acquisition or distribution of products in general or local short supply) by linking it to India's overall energy security. It was the first time a WTO panel had to decide on this exception.

According to India, the overarching goal of the JNNSM was to 'establish India as a global leader in solar energy, by creating the policy conditions for its diffu-

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currently unable to undergo review because of the impasse in the WTO Appellate Body).

72 See for a schematic overview of the phases of the mission, EA, 'Jawaharlal Nehru National Solar Mission (Phase I, II and III)', https://www.iea.org/policies/4916-jawaharlal-nehru-national-solar-mission-phase-i-ii-and-iii (accessed 5 October 2023).

73 *India-Solar Cells*, *supra* n. 71, Report of the panel, para. 7.2.

74 Ibid., paras. 7.4-7.14.

75 As well as with the Agreement on Subsidies and Countervailing Measures; Art. III:4 GATT, *supra* n. 51; Annex to the Trade-Related Investment Measures Agreement (TRIMS), Illustrative List paragraph 1(a) mentions: 'TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require: (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production'.

76 Art. III:8 GATT, *supra* n. 57.

sion across the country as quickly as possible'.[77] Energy security was the larger underlying objective of the JNNSM, as it, in India's words, 'aims "to promote ecologically sustainable growth while addressing India's *energy security challenge*", and […] will "constitute a major contribution by India to the global effort to meet the challenges of climate change"' [emphasis my own].[78] The country argued the GATT Article XX(j) exception on the grounds that its lack of domestic manufacturing capacity in solar cells and modules, and/or the risk of a disruption to imports, made these 'products in general or local short supply' within the meaning of that provision.[79] US imports of solar cells would, in India's opinion, risk local solar cell production in India in general or local short supply.[80]

India moreover tried to justify the measures under GATT Article XX(d) ('necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this agreement'), arguing that the measures were necessary in view of wider climate change mitigation and sustainable development commitments.[81]

In both justifications sought by India, XX(j) and (d), the concept of energy security loomed large in its arguments. In doing so, India moreover on more than one occasion referred to the IEA and UNDP's definition of energy security and stressed the overall importance of attaining energy security throughout its arguments.[82] The country, inter alia, stated that the domestic content requirements were 'the only way in which India can 'guarantee' that manufacturing units for solar cells and modules are actually set up in India, and achieve the objective of energy security by the creation of a manufacturing base for solar cells and modules'.[83] India argued that the DCR measures needed to be seen in the context of India's overall energy scenario and the challenges it is currently facing, which are characterized by India's rising energy deficit, as well as its dependence on fossil

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77 *India-Solar Cells*, *supra* n. 71, Report of the panel, para. 7.1 and Resolution, Jawaharlal Nehru National Solar Mission, Ministry of New and Renewable Energy (11 January 2010), (Exhibit USA-4), paras. 1 and 2.

78 Ibid., para. 7.15. See also paras. 7.16-7.19 on energy security.

79 Art. XX(j) GATT, *supra* n. 57 reads: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.'

80 *India-Solar Cells*, *supra* n. 71, Report of the panel, para. 6.6.2.

81 GATT Art. XX(d) GATT, *supra* n. 57.

82 *India-Solar Cells*, *supra* n. 71, Report of the panel, paras. 7.16-7.17; India's first written submission, para. 188 (citing United Nations Development Programme, World Energy Assessment definition, *supra* n. 18: 'the continuous availability of energy in varied forms in sufficient quantities at reasonable prices'.

83 *India-Solar Cells*, *supra* n. 71, Report of the panel, para. 6.6.2. (India's request for review of the interim report).

fuels and imported materials for its energy requirements.[84] It stated, *inter alia*, that 'one of the main goals for India is to secure the assured supply of environmentally sustainable energy and technologies at all times'.[85]

However, India was unsuccessful in its endeavours. The panel indeed found that India's domestic content requirements (DCR) were trade-related investment measures in the sense of paragraph 1(a) of the TRIMS Agreements Illustrative List.[86] The panel also established that India could not justify the DCR under GATT Article III:8 (government procurement).[87]

The panel was restrictive and established that Article XX(j) GATT did not cover products at risk of becoming in short supply, and, therefore, India's invocation of the exception was not successful. The panel found that the terms 'products in general' or 'local short supply' refer to a situation in which the quantity of available supply of a product, from all sources, does not meet the demand in a relevant geographical area or market.[88] It also found that the terms 'products in general' or 'local short supply' do not cover products *at risk* of becoming in short supply in the future, and found that in any event India had not demonstrated the existence of any imminent risk of a short supply (emphasis my own).[89] When looking at Article XX(j) through the prism of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), the panel moreover noted that the ordinary meaning of (j) of products in short supply indicates that these products are *presently* in short supply (emphasis my own).[90] To complete the analysis, the panel reviewed supplementary means of interpretation to confirm the meaning of Article XX(j), related to the history of the article.[91] Here, as well, nothing points to the provision covering potential shortages but to the contrary confirms the view of the panel, as the provision was originally intended to remain in force only for a specified three-year transitional period to deal with shortages that existed following World War II.[92]

When linking this to the various dimensions of energy security (long term versus short term energy security) discussed in the first section of this article, it seems that India attempted to build their arguments for the Article XX(j) defence around

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84 Ibid.. para. 7.17.

85 Ibid., para. 7.16.

86 See Art. III:4 GATT, *supra* n. 57 (*National Treatment on Internal Taxation and Regulation)* and Art. 2.1 TRIMS Agreement, *supra* n. 76.

87 *India-Solar Cells*, *supra* n. 71, Report of the panel, para. 7.135.

88 Ibid,. para. 7.207.

89 Ibid., para. 7.238.

90 Ibid., paras. 7.243 and 7.244.

91 Ibid., para. 7.249.

92 Ibid., The panel continues: 'Furthermore, when the decision was taken to retain the provision indefinitely, in what became Article XX(j), it was agreed that the scope of the exception was 'not limited to shortages subsequent to the war, but might be needed in the event of a natural catastrophe'. While the text of Article XX(j) refers to product shortages without limitation to war, natural catastrophe, or other particular situations, the foregoing does not suggest that the concept of 'products in … short supply' was envisaged as c*overing prospective shortages.*' (emphasis my own).

long term (and, arguably, sustainable) security of supply, while it is likely the panel would have only accepted arguments connected to *immediate, present*, short-term security of supply (think, i.e., of a concrete supply disruption that hampers the supply of power to a region).[93]

On appeal, India lost again although the Appellate Body afforded some recognition of the long-term dimension of security of supply. The AB did venture into an interesting discussion on the relationship between energy security and GATT Article XX(j) GATT.[94] It made the connection between the exception and energy security by venturing into the discussion of balancing different considerations when assessing whether products are in 'general or local short supply'.[95] While not overturning the panel, the AB set out the following guidance for comparable future cases. First and foremost, the AB recommended future panels to examine 'the extent to which a particular product is "available" for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market.'[96] This would enable panels to take into account

> factors as the relevant product and geographic market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad.[97]

While it may be argued that there is a plausible connection between the overarching objectives of GATT Article XX(j) and safeguarding long-term energy security, defences connected to long-term energy security, or, in this case, a *prospective* shortage of energy supply, will likely not hold if they are discriminatory. Based on the panel and Appellate Body's reasoning, one can deduce that possibly only a present disruption in energy supply might satisfy these criteria.

In conclusion, in its arguments India explicitly connected (long-term) energy security to sustainability and the obligations under the Paris Agreement, the environment and renewable energy.[98] Though increasing a country's energy security by means of incentivizing renewable energy may seem a noble goal, current WTO rules do not provide space for such schemes if they are discriminatory. A value judgment on this reality goes beyond the scope of this paper, but is connected to the built-in balance in the multilateral trading system between trade versus non-(strictly) trade values, such as sustainable development and the environment.[99]

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93 See discussion on the various dimensions of energy security, see above Section 2.1; also see the discussion in G. Isaac and T. Menon, 'When Good Intentions Are Not Enough: Revisiting the US-India Solar Panels WTO Dispute', 10 *OIDA International Journal of Sustainable Development* (2017) pp. 37, 41.

94 *India-Solar Cells*, *supra* n. 71, report of the Appellate Body, paras. 5.2.3 and 5.2.4.

95 Ibid., para 5.7.

96 Ibid.

97 Ibid.

98 UNFCCC Paris Agreement, *supra* n. 32.

99 See on this discussion the recent debates on the WTO crisis and the space afforded to non-trade values, e.g., G. Marceau, 'Never Waste a Good Crisis: The End of the WTO Dream, or

2.2 *EU-Energy package*: Energy security as an exception under the GATS or GATT?

It would be an oversimplification to assume that EU-Russia energy trade was without issues prior to the invasion. Much to the contrary. After the first Nord Stream I gas pipeline became operational in 2011, Russia started exploring opportunities to lay a second pipeline, the Nord Stream II.[100] From the start, Russia started objecting to EU energy regulations mandating it to comply with EU gas regulations, in particular ownership unbundling in connection with the follow up Nord Stream II.[101] It challenged these regulations, including Article 11 of the Gas Directive (certification) EU Third Energy Package, both at the political level, and in a legal case brought to the Court of Justice of the European Union (CJEU).[102] The various aspects of essentially the same core issue, Russian objections to unbundling, were litigated in three arenas: at the CJEU, in investment arbitration under the ECT and, as discussed below, before the WTO.[103] In essence, Russia was reluctant to break up vertically-integrated operations of the state-owned energy company Gazprom, and in this way forfeit control over the company's operations in Europe. A major thorn in Russia's side was the so-called 'Gazprom clause' discussed below.[104]

In DS476 *EU-Energy Package* (Russia-EU), the WTO panel was thus confronted with a larger geopolitical conflict between the EU and Russia that had already been simmering for years prior to the Russian invasion of Ukraine.[105] It concerned Europe's energy legislation, introducing competition policy into the energy sector by means of the so-called Third-Energy Package (TEP), a set of rules

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the Beginning of Something Greater?', 17 *International Organizations Law Review* (2020) p. 345; A. van Aaken and J. Kurtz, 'Beyond Rational Choice: International Trade Law and the Behavioral Political Economy of Protectionism', 22 *Journal of International Economic Law* (2019) p. 601; S. Charnovitz, 'In Clinical Isolation – Is There a Meaningful Place for the World Trade Organization in the Future of International Economic Law? A WTO if you can keep It', *Questions of International Law* (2019) pp. 1-12.

100 See V. Chornyi and A.A. Marhold, 'Chapter IX – The Contested Legal and Political Landscape of Nord Stream 2 – In Uncharted Waters', in M.M. Roggenkamp and C. Banet (eds.), *European Energy Law Report – Vol XIV*, Antwerp, Cambridge, Intersentia 2021, pp. 171, 172; The Nord Stream II pipeline was sabotaged in September 2022 beyond repair.

101 See generally V. Chornyi and A.A. Marhold, *supra* n. 100.

102 CJEU, Order of the General Court (Eighth Chamber) in Case T-526/19, *Nord Stream 2 AG v. European Parliament and Council of the European Parliament*, paras. 116 and 124.

103 Ibid.; *Nord Stream 2 AG v. European Union*, Notice of Arbitration in accordance with Art. 3 of the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (the UNCITRAL Rules) and Art. 26(4)(b) of the Energy Charter Treaty (Notice of Arbitration), paras. 40, 47 and 49.

104 See *infra* n. 115.

105 *EU – Energy Package*, *supra* n. 71, Report of the panel; see on the discussion about the geopolitical conflict between the EU and Russia regarding the legal regimes surrounding the regulation of import gas pipelines to Europe (e.g., the Nord Stream II pipeline) notably L. Hancher and A. Marhold, *supra* n. 30, as well as K. Talus and M. Wüstenberg, 'WTO Panel Report in the *EU – Energy Package* dispute and the European Commission Proposal to amend the 2009 Gas Market Directive', 37 *Journal of Energy and Natural Resources Law* (2018) p. 327.

that was adopted to dismantle vertically-integrated energy companies and introduce competition into the sector in EU Member States. The central legislative tool in accomplishing this in the EU internal market for gas was the Gas Directive (2009/73/EC).[106] A key concept in the TEP is full ownership unbundling (OU), i.e., the mandatory separation of extraction, transmission and sales activities, prescribed by Article 9 of the Gas Directive.[107] Because of the broad variation in how EU Member States have structured their respective energy sectors, taking into account also their geographical location, access to natural resources and (recent) history, the TEP provided several options to achieve full ownership unbundling in their legislation. Especially considering the fact that several EU member states still had vertically-integrated energy sectors, and were therefore not able to quickly realize full ownership unbundling, the TEP provided for (temporary) milder forms of unbundling.[108] In practice, this led to three possible models of unbundling: the ownership unbundling (OU) model, according to which a pipeline transport service supplier (also known as a Transmission System Operator – TSO) must be completely structurally separated from entities engaged in the production or supply of natural gas in order for it to supply pipeline transport services in the EU;[109] the independent system operator (ISO) model, according to which a Vertically Integrated Undertaking (VIU) may own the transmission system, but the TSO is required to be separate from the VIU by complying with the OU rules;[110] and the independent transmission operator (ITO) model, under which the owner and operator of a transmission system, the TSO, belongs to a VIU, but certain behavioural and organizational requirements apply to the relationship between the two entities.[111]

Russia, which supplied the EU with large quantities of natural gas and is still, post-invasion, active in the gas markets of several EU Member States, objected against different aspects of the Third Energy Package, including the national laws of Croatia, Hungary, and Lithuania implementing the Package, under various WTO provisions, claiming that the TEP measures were discriminatory.[112] A large part of Russia's claims were targeting the transposition of the Gas Directive into the national legislation of these EU Member States, claiming that the milder forms of unbundling disadvantaged Russia's commercial presence in these countries. Two measures Russia objected to, in particular, were centred around the concept of energy security.

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106 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94 (hereinafter the Gas Directive); Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005 [2009] OJ L211/36.

107 Art. 9 Gas Directive, *supra* n. 106.

108 A. Johnston and G. Block, *EU Energy Law,* Oxford, Oxford University Press 2012, pp. 73ff.

109 Art. 9 Gas Directive, *supra* n. 106.

110 Ibid., Art. 9(8).

111 Ibid.

112 See Eurostat, *supra* n. 67; see Russia's claims in in the case *EU – Energy Package*, *supra* n. 71, Report of the panel, section 2.2.

The first measure concerned the 'third-country certification measure'.[113] At the heart of this claim were Russia's larger objections to Article 11 of the Gas Directive, also known pejoratively as the 'Gazprom Clause'.[114] The requirements under this Article have been a thorny issue for Russia since the adoption of the Third Energy Package, as it requires the certification of third countries' (non-EU) Transmission System Operators (in this case gas pipeline operators) active on the EU internal energy market (the Russian state-owned company Gazprom is active on the gas market in several EU Member States). A condition for receiving this certification from the Member State in question (and, ultimately, the EU) is that this 'certification will not put at risk the security of supply of the Member State and the Community'.[115]

Since this concerns a matter pertaining to service supplier issues, and therefore has to be litigated under the GATS, it must be connected to WTO members' individual services schedules (read: those of the separate EU Member States), instead of the EU-wide schedule on goods. The reason for this is that from the EU perspective, WTO membership is 'mixed', meaning that both the Union and its Member States are WTO Members, and both have the authority to act depending on the EU competence involved. When it is within the EU's competence, the EU will act and vice versa, competences retained by the Member States remain under their purview, as is the case with services schedules. Although Russia arguably objected to the EU-wide application of the rule, it for this reason had to connect the claim to a services schedule of an individual EU WTO Member. The result was that Russia objected to the transposition of the directive in these three Member States.[116] Russia challenged the third-country certification measure as implemented in the national laws of Croatia, Hungary, and Lithuania under Articles II:1 (Most-Favoured Nation), VI:1, VI:5(a) (Domestic Regulation) and XVII (National Treatment) of the GATS.[117]

The panel was of the opinion that Russia's only relevant claim under the GATS with respect to services was the transmission of natural gas via pipeline systems, excluding supply and LNG services.[118] With regard to this measure, the EU invoked the general exception under the GATS in Article XIV(a) ('necessary to protect public morals or to maintain public order').[119] Footnote 5 to this article states that 'The public order exception may be invoked only where a genuine and

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113 *EU – Energy Package*, *supra* n. 71, Report of the panel, para. 2.2.7.

114 See B. van Voorden and R. Wessel, *EU External Relations Law – Text, Cases and Materials*, Cambridge, Cambridge University Press 2014, p. 451.

115 Art. 11 Gas Directive, *supra* n. 106.

116 Art. 24 of Croatia's Gas Market Act, Section 128/A of Hungary's Gas Act, and Art. 29 of Lithuania's Law on Natural Gas, and not in respect of Sections 123(5) and 123(6) of Hungary's Gas Act, Panel Report, *EU – Energy Package*, *supra* n. 71 [7.1116].

117 GATS, *supra* n. 57.

118 See *EU – Energy Package*, *supra* n. 71, Report of the panel, para. 7.322; also see on this V. Pogoretskyy and K. Talus, 'The WTO Panel Report in EU–Energy Package and Its Implications for the EU's Gas Market and Energy Security', *World Trade Review* (2019) pp. 1-19.

119 Art. XIV(a) GATS, *supra* n. 57.

sufficiently serious threat is posed to one of the *fundamental interests* of society' [emphasis added].[120] The EU raised this defence to the third country certification measure, arguing that it was necessary to ensure the EU's security of energy supply and hence to maintain public order.[121] The EU furthermore in connection with this claimed that security of energy supply was a fundamental interest of society, in the sense that energy is 'one of the most basic necessities of modern societies' and supply disruptions can have 'severe social, economic and, ultimately, political consequences'.[122] It further maintained that its security of supply policy is reflected in various laws, regulations and strategies, and that the third country certification measure in the Gas Directive is one of the legal instruments used for that purpose.[123] Similarly to in the India case (although concerning fossil fuels instead of renewable energy), the EU in its arguments relied on arguments centred around long-term energy security. In *EU-Energy Package*, however, the arguments were connected to ownership of energy infrastructure and the implications thereof.

Interestingly enough, Russia took no issue with the fact that the security of energy supply was a fundamental interest of society.[124] However, it did object to the way the EU framed energy security of supply to, in Russia's words 'maximize [the European Union's] discretion to define security of supply in the manner most advantageous to its overall objectives, to include reducing reliance on Russian pipeline transport services and natural gas imports'.[125] In essence, Russia's criticism was that, on the one hand, the Directive or other EU legal sources did not contain a definition of the term security of energy supply and, on the other, that the EU more generally failed to provide a clear definition of security of energy supply when advancing its defence under Article XIV(a) of the GATS.[126]

The EU's defence was not successful. The panel *did* agree with the EU that energy security 'is a fundamental interest of society within the meaning of footnote 5 to Article XIV(a) of the GATS.'[127] It also agreed that 'foreign control of TSOs poses a genuine and sufficiently serious threat to a fundamental interest of the EU society, namely its security of energy supply […]'.[128]

But the panel reiterated that the responding Member must show that the measure is (i) 'designed' to protect public morals or to maintain public order; and (ii) 'necessary' to protect public morals or to maintain public order.[129] In short, the panel

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120 Footnote 5 to Art. XIV(a) GATS, *supra* n. 57.

121 *EU – Energy Package*, *supra* n. 71, Report of the panel, para. 7.1135.

122 Ibid., para. 7.1145.

123 Ibid.

124 *EU – Energy Package*, *supra* n. 71, Report of the panel, para. 7.1146.

125 Ibid., and Russia's opening statement at the second meeting of the Panel, para. 153.

126 *EU – Energy Package*, *supra* n. 71, Report of the panel, para. 7.1147.

127 Ibid., para. 7.1156.

128 Ibid., para. 7.1202; also see para. 7.1239.

129 EU – Energy Package, *supra* n. 71, Report of the panel, para. 7.230, citing Appellate Body Report, *US – Gambling*, para. 292. The Appellate Body has also articulated this legal standard for a provisional justification of a challenged measure under a similar general exception contained in Art. XX(a) of the GATT 1994 (for measures 'necessary to protect public morals') (Appellate Body Reports, *Colombia – Textiles*, para. 5.67; and *EC – Seal Products*, para. 5.169).

was not convinced by the EU's energy security-based argument in connection with invoking the Article XIV(a) defence to Russia's claim.[130] First and foremost, the panel decided that similar threats to the security of gas supply were posed by both foreign and domestic TSOs.[131] Moreover, the panel saw 'no reason to conclude that there is no risk of domestic persons having commercial interests and/or personal and family links in foreign countries, which would render them vulnerable to requirements and inducements emanating from foreign governments'.[132] In conclusion, the panel found that the measure did not pass the legal test of the chapeau of Article XIV, hence deciding that it was discriminatory under the rules of the WTO for non-EU Transmission Systems Operators to undergo security of supply certification.[133]

Russia's second claim connected to energy security of supply concerned the so-called Trans-European Networks for Energy (TEN-E) measure, challenged under Articles I:1 and III:4 of the GATT 1994.[134] The EU TEN-E Regulation sets out criteria to designate certain cross-border infrastructure projects as Projects of Common Interest (PCIs).[135] These projects benefit from certain incentives from the EU, inter alia, facilitating their timely implementation and providing financial incentives.[136] For a project to benefit from the TEN-E Regulation, it must fulfil several requirements, some of which concern enhancing the energy security of the EU. Article 4(2)(b) of the TEN-E Regulation prescribes that the projects must contribute to '(ii) security of supply, inter alia through appropriate connections and diversification of supply sources, supplying counterparts and routes' and '(iii) competition, inter alia through diversification of supply sources, supplying counterparts and routes'.[137] Russia was of the opinion that this diversification criterion of the TEN-E measure and the benefits accorded to earmarked energy infrastructure projects by the EU *de facto* discriminated against the imports of Russian gas under the GATT.[138]

In its defence, the EU, much in the same vein as India, resorted to invoking GATT Article XX(j), arguing that the TEN-E measure was necessary as natural gas may become a product in local short supply in the event of the disruption of the gas

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130 *EU – Energy Package*, *supra* n. 71, Report of the panel, para. 7.1217.

131 Ibid., para 7.1217.

132 Ibid., para 7.1250; V. Pogoretskyy and K. Talus, *supra* n. 118, p. 16 (in the author's opinion, one way to fix the issue would be for the EU to require a degree of security of supply risk assessments for intra EU Transmission System Operators).

133 Ibid., para 7.1254.

134 GATT, *supra* n. 57 and *EU – Energy Package*, *supra* n. 71, Report of the panel, section 3.

135 *EU – Energy Package*, *supra* n. 71, Report of the panel, section 2.2.8; Art. 1.2 TEN-E Regulation: Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No. 713/2009, (EC) No. 714/2009 and (EC) No. 715/2009 Text with EEA relevance.

136 Ibid.

137 Art. 4(2)(b) TEN-E Regulation, *supra* n. 135 and *EU – Energy Package*, *supra* n. 71, Report of the panel, para. 2.56.

138 V. Pogoretskyy and K. Talus, *supra* n. 118, pp. 16-17.

supply, since 'the transmission of gas requires especially dedicated fixed infrastructure that is costly and time-consuming to build'.[139] However, the Panel, recalling the analysis of the AB in *India-Solar Cells,* accordingly found that GATT Article XX(j) exclusively concerns situations where a product is 'presently in short supply' and not situations where a product is at risk of becoming in short supply in the future.[140] The Panel thus rejected the EU's defence and decided that the EU was not able to prove that natural gas is a product in short supply in the EU.[141] Confirming the findings of *India-Solar Cells, EU-Energy Packages* strengthens the assumption that GATT Article XX(j) defences connected to long-term security of supply will not hold.

In sum, energy security was a crucial concept in *EU-Energy Package.* The overall takeaway with regard to energy security is that measures taken by WTO Members to safeguard the (long-term) energy security of supply are more likely be successful under Article XIV(a) of the GATS than under Article XX(j) of the GATT. The reason for this is that the standard of posing a genuine and sufficiently serious threat to a fundamental interest of society (in the sense of energy security) under Article XIV(a) GATS is easier to meet than the threshold of Article XX(j) GATT with regard to a prospective shortage of supply. The former shows that there is enough risk for energy security measures to be inserted within the public policy exception, while arguments concerning a threatened shortage of goods, i.e., goods that are not (yet) in shortage are harder to place within subparagraph (j) of Article XX GATT. While in the present cases, neither India nor the EU were successful, the AB in *India-Solar Cells* did open the door to a stronger connection between long-term security of supply and subparagraph (j), and the panel in *EU-Energy Package* was receptive to considering energy security measures within the ambit of the public policy exception. The treatment of the concept of energy security by the panel and the AB therefore gives some guidance for future cases concerning energy security measures taken in connection with cross-border trade in renewable energy, as well as fossil fuels. Nevertheless, many questions remain to be investigated, such as the (theoretical) relationship between energy security measures and their relationship with national security exceptions in the WTO.

Following the publication of the Panel Report in 2018, both parties decided to appeal the case (into the void).[142] Nevertheless, the case highlighted wider problematic issues with regard to how international trade rules may interact with geopolitically sensitive areas. In this case, it concerned Europe's measures taken to guarantee its energy security, by arguably 'discriminating' against certain suppliers. *EU-Energy Package* demonstrated that WTO rules are inflexible with regard to geopolitically sensitive, network-bound, a-typical, non-manufactured good

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139 Art. XX(j) GATT, , *supra* n. 57 and *EU – Energy Package,* , *supra* n. 71, Report of the panel, para. 7.1336.

140 See the panels summary of AB in *India-Solar Cells* in *EU – Energy Package*, *supra* n. 71, Report of the panel, paras. 7.1331-7.1335.

141 Ibid., para. 7.1382.

142 Panel Report under appeal on 21 September 2018.

sectors such as the natural gas trade. It may be conceivable that discriminating against certain suppliers at the expense of trade liberalization may be the only way out of an uncomfortable (and dangerous) relationship of energy dependency. What we can extrapolate from the case is that WTO rules do, in principle, not allow a Member to a) treat non-EU energy infrastructure entities less favourably than EU entities; b) restrict gas imports from particular members to decrease its dependency on them; or c) favour certain energy infrastructure projects for energy security purposes and diversification of energy supplies without resorting to justifying such measures under the available exceptions.[143] One may argue that in the current geopolitical landscape, the conclusions drawn by the panel, even more now than before the Russian invasion, lead to highly unfavourable outcomes for Europe in practice. The bigger question is how to then deal with this reality in a structural manner and to reconcile it with existing notions on which the system of trade liberalization has been built. It may be unavoidable to reconsider altogether the premises on how some core rules of the multilateral trading system play out in practice for strategically sensitive areas such as the gas and electricity sector.[144]

PART II – TOWARDS 'SECURITY-CENTRED' ENERGY TRADE REGULATION IN EUROPE FOLLOWING THE RUSSIAN INVASION

It is imaginable that if a similar case such as *EU-Energy Package* was ever to be litigated at the WTO today (post-invasion), the outcomes may well be very different. First and foremost, the EU's Article XX(j) GATT defence may be reconsidered, as the argument could convincingly be made that natural gas is in *actual* local short supply at present, not merely at 'risk of becoming in local short supply'. Second, it is not inconceivable that the 'nuclear option', the invocation of Article XXI(b)(iii) Security Exception of the GATT or the public order of the GATS, may be a way out for the EU under the current circumstances. That said, these remain solutions in the area of resorting to defences, which do not comprehensively address the structural problem of the unsuitability of the WTO legal framework to offer the required flexibility in the geopolitically sensitive area of energy security of supply.[145]

In 2023, the EU is confronted by a pressing, multi-level energy crisis propelled by the perfect storm of Russia's war in Ukraine and rapidly progressing climate change.[146] As a result, the EU is scrambling to ensure it has sufficient energy supplies for the foreseeable future, while the trading block is simultaneously rein-

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143 A.A. Marhold, *supra* n. 2, pp. 198ff.

144 Think of subsidies in the WTO Canada-Renewable Energy case, but also local content requirements (LCR) in the renewable energy sector (India and US respectively).

145 Other areas that face similar issues are strategic raw materials and dual-use technologies.

146 See generally A.A. Marhold, 'Responses of international legal academia to the Russian invasion of Ukraine', 36(3) *Leiden Journal of International Law* (2023) pp. 487-494.

venting its energy strategy in the long term. Although this crisis poses significant challenges, it has also forced the EU to find unprecedented and creative solutions, some of which will be highlighted in this article (e.g., the creation of an EU Gas Purchasing Platform, the EU ban on Russian seaborne crude oil, and capping the price of oil and petroleum products to third countries, together with G7+ partners, as well as entering into new energy partnerships).[147] EU energy regulation and policy have become a moving target since February 2022. EU governments, policymakers and the public are presented with new challenges almost every week in connection with weaning themselves off Russian fossil fuels.[148] In all likelihood, there will be unprecedented developments within European energy law and policy in the coming months and years.[149] At present, we may not see the wood for the trees. But the EU has 'pressed reset' on its energy policy, and the contingency plans we are putting in place now will likely lay the foundations for European energy security regulation for decades.

Since we are at a critical juncture to square EU energy security with European and international legal commitments, this part of the contribution attempts to capture some elements of this radical shift and its consequences in a dynamic manner. After briefly reflecting on the EU's internal energy market and energy security ambitions from the 1990s until the Russian invasion, this section will analyse several recent steps the EU has taken through newly developed Union-wide crisis-response tools and ad hoc bilateral arrangements with third countries against existing legal commitments. These were taken with three goals in mind: to 1) secure its energy supply; 2) navigate away from one dominant supplier, Russia; and 3) decarbonize the EU as soon as is realistically possible.[150] This part only discusses a selection of crisis response tools, i.e. the main tools that have impacted the external trade dimension of EU energy security. Several of these regulatory initia-

147 European Commission, Press Release, 'G7 agrees oil price cap: reducing Russia's revenues, while keeping global energy markets stable', 3 December 2022 and 'Ukraine: EU and G7 partners agree price cap on Russian petroleum products' 4 February 2023 (all visited 5 October 2023); Note that while oil and petroleum products were banned by the EU, natural gas and LNG were not, in what has been called the 'glaring exception' in European Union's sanctions', see B. McWilliams, G. Sgaravatti, S. Tagliapietra and G. Zachmann, 'The EU can manage without Russian liquified natural gas', *Bruegel Policy Brief Issue* n°16/23 (2023) p. 1. However, natural gas imports to Europe have fallen by 80% compared to prior to the invasion.

148 Starting with a steady decrease in Russian gas supplies to Europe following the invasion, the EU crisis response in relaxing EU state aid rules, the perils surrounding the Zaporizhzhia nuclear power plant and sabotage of the ever-controversial Nord Stream I and II gas pipelines.

149 Coinciding with (unilateral) policies as part of the EU Green Deal, as well as the EU Open Strategic Autonomy; see also generally T. Gehrke, 'EU Open Strategic Autonomy and the Trappings of Geoeconomics', 27 *European Foreign Affairs Review* (2022) pp. 61-78.

150 Note that the notion of 'energy security' as discussed in this contribution uses the term as interpreted by the International Energy Agency. This notion includes short-term aspects, such as the ability of the energy system to react promptly to sudden changes in the supply-demand balance, and long-term considerations, i.e., timely investments to supply energy in line with economic developments and environmental needs, see IEA, 'Energy Security – Reliable, affordable access to all fuels and energy sources', https://www.iea.org/topics/energy-security (visited 5 October 2023).

tives may run contrary to most of the footings of the EU internal (energy) market and WTO rules, whose inherent values were accepted for decades. What is more, the geopolitical realities have had paradoxical consequences for the EU. On the one hand, the invasion has forced EU's energy security policy to reinvent itself in ground-breaking ways. Simultaneously, there is competition with third countries, such as the United States and Japan with regard to the green technology shift and the limits imposed within the EU by State Aid rules. On the other, continuing fossil fuel dependency and shared competences on energy between the EU and its Member States, constrain the extent to which the Union can take a strong stance against the bloc's dependency on Russian fossil fuels.

This part concludes that current developments are likely only the beginning of a much larger re-evaluation of some of the core notions of the 'trade-energy security' nexus. It argues that the EU must move towards a 'security-centred' energy transition, implying that European energy policy should be designed with 'security first, compliance second' in mind while decarbonizing energy supply. This is against the background of the EU competing in a rapidly changing global market, as green industrial policy goes beyond mere considerations of energy security and decarbonisation, but incorporates a strong competitive component. The EU should not shy away from revisiting challenging themes, such as reassessing the notion of 'protectionism' when it concerns cross-border trade in geopolitically sensitive areas in an age of geo-economic fragmentation and reconsidering the implications of the current division of competences between the Union and its Member States in its energy policy.[151]

3. PRIOR TO THE RUSSIAN INVASION: CORNERSTONES OF THE EU INTERNAL ENERGY MARKET AND TENSIONS WITH WTO LAW

For the past three decades, roughly since 1990, the goal of the European internal energy market was the gradual liberalization of energy exploration, transmission and supply of the electricity and gas sectors.[152] The underlying idea was that the opening up of the energy sectors was a logical, though more challenging extension of implementing the European single market for goods and services, which would ultimately benefit the market and European consumers. Additionally, the Union was convinced that for energy security purposes, it was pertinent to have fully interconnected markets for electricity and gas.[153] The breaking-up of the traditionally highly nationalized energy markets of the EU Member States could only happen progressively, first by barring the restriction on cross-border energy

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151 Consider how this would fit into the current policy of 'Open Strategic Autonomy', see Gerhke, *supra* n. 3; on geo-economic fragmentation, see IMF, *Geoeconomic Fragmentation and the Future of Multilateralism*, Washington, IMF 2023.

152 See for a discussion A.A. Marhold, *supra* n. 2, pp. 188-195.

153 Several gas disputes between Russia and Ukraine in the mid-2000s highlighted this need: Slovakia and Hungary without gas for weeks during the winter, A.A. Marhold, *supra* n. 21.

flows between Member States, followed by increasingly progressive legislative packages to 'unbundle' electricity and gas networks.[154] In essence, these legislative packages forced the break-up, legal and ownership separation, of various aspects of the value chain of energy trade: exploration, transmission and sale. In practice, this implied that Europe's major energy companies had to separate these activities, and, ultimately, had to ensure that these separate elements were not part of one and the same undertaking. The most advanced of these legislative packages was the Third Energy Package, which introduced the full ownership unbundling (FOU) of the market.[155] While the implementation of FOU was not without its challenges, delays and exceptions, the EU and its Member States were largely convinced that the liberalisation of the gas and electricity sectors was serving the greater good of a competitive and open energy market, one that would also free up the supply side, allowing both different players and types of (cleaner) energy to enter the system.[156] As discussed above, it was this element of full ownership unbundling of the European Internal Energy Market that Russia objected to in its various legal disputes with the EU in connection with the Nord Stream II pipeline. From the 1990s onward, European countries in parallel started to realize the seemingly promising benefits of increasingly integrating former socialist and Soviet countries into the European energy system. This was one of the underlying rationales of the ECT, whose mission was to incorporate these countries into the global energy market by providing foreign investors with investment protection while preparing these economies for WTO accession.[157] It would be a mistake, however, to assume that energy trade between Europe and (former) Soviet countries only started taking place after the fall of communism in 1989. In fact, Soviet natural gas was flowing into (what was then) West Germany from 1973 onwards.[158] In fact, the USSR-Europe energy trade flow was one of the main global energy trade

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154 Directives 2003/54/EC for electricity and 2003/55/EC for gas, OJ 2003 L 176.

155 The 2019 Clean Energy Package is geared towards greening the energy system and making it ready for demand-response measures.

156 Various degrees of implementations; missed implementation deadlines; Lack of infrastructure investments.

157 The Energy Charter Treaty, *supra* n. 26; the future of the Energy Charter Treaty, is, during the writing of this article, unclear, not in the least due to the criticism that the treaty is outdated in terms of living up to the commitments under the Paris Agreement, see e.g., J. Tropper and K. Wagner, 'The European Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?', 23 *Journal of World Investment and Trade* (2022) pp. 813, 814; also see A. Daszko, 'The Energy Charter Treaty at a Critical Juncture: Of Knowns, Unknowns and Lasting Significance', 26(4) *Journal of International Economic Law* (2023) pp. 720, 724.

158 Amongst others driven by German Chancellor Willy Brandt's *Ostpolitik* and the 1970s energy crisis; Extensions of the Yamal, Druzhba and Soyuz gas pipelines to Eastern Europe made this possible, see D.W. Arthur Sullivan, 'Russian Gas in Germany: A 50-year relationship', 3 September 2022, https://www.dw.com/en/russian-gas-in-germany-a-complicated-50-year-relationship/a-61057166 (visited 8 October 2023) and K. Bennhold, 'The Former Chancellor Who Became Putin's Man in Germany', *New York Times* (23 April 2022), https://www.nytimes.com/2022/04/23/world/europe/schroder-germany-russia-gas-ukraine-war-energy.html (visited 8 October 2023); see in this light also the discussion on the 'primacy and availability and security' dominating energy governance in J.E. Viñuales, *supra* n. 1, pp. 23-25.

arteries, and the ECT was also designed to secure the flow (the famous access to markets in exchange for access to resources of the 1991 European Energy Charter conference).[159]

In the following decades, a progressive interdependence developed, as (several) Western European countries were convinced that projects such as the Nord Stream I (and later the far more controversial Nord Stream II) would be a win-win for EU economies and Russia. While various EU Member States had diverging approaches to cooperation with Russia in the area of energy, the German notion of *Wandel-durch-handel* (freely translated as 'Change through Trade') perhaps best illustrates the period up until the Russian invasion.[160] From 2000-2014, the EU imported around 45 per cent of its natural gas from Russia, which dropped to 8 per cent by May 2023.[161] Although there had been several gas transit disputes between Ukraine and Russia throughout the 2000s that left Eastern EU Member States (i.e., Hungary and Slovakia) in the cold, the Western EU Member States in particular were convinced that their energy cooperation with Russia was an optimal solution to the EUs energy security of supply.[162] The first cracks in this self-inflicted dependency realistically started to appear after the 2014 Russian annexation of Crimea. This did not stop several EU countries (chiefly Germany, but also the Netherlands and the UK via then Royal Dutch Shell) from pursuing the Nord Stream II pipeline, and most EU countries did not cease to import Russian oil and natural gas.[163]

Wary of another major challenge, climate change, the EU as of the mid-1990s onwards has also been progressively making efforts to decarbonize the European economy. The Commission has introduced binding targets for Member States for the share of renewables in their energy mix as of 2009 through the Renewable Energy Directive.[164] Targets were provided for EU Member States separately, assessing what was realistically attainable for each Member State. In 2017, following the Third Energy Package, the 'Clean Energy Package' was introduced, geared toward energy efficiency and attempting to integrate 'demand-response' to the European electricity grid.[165] As of 2019, the EU started to position itself as

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159 See 1991 European Energy Charter, Title 1 – Objectives. In the decades before that, it was access to resources in exchange for access to foreign currency by the USSR (Eurodollars).

160 Originally developed as part of the *Ostpolitik*, mentioned *supra* n. 158.

161 See Politico, 'EU balks at adding Russian gas pipeline ban to sanctions package' (16 May 2023) https://www.politico.eu/article/eu-balks-add-russia-natural-gas-pipeline-ban-sanctions-package-g7/ (visited 8 October and International Energy Agency, 'How Europe can cut natural gas imports from Russia significantly in a year' (3 March 2022) https://www.iea.org/news/how-europe-can-cut-natural-gas-imports-from-russia-significantly-within-a-year (visited 8 October 2023).

162 From the start, twenty Eastern EU member states such as Poland and the Baltics have been much more sceptical.

163 See Ost-Ausschuss, 'Klare Mehrheit für Fertigstellung von Nord Stream 2' (20 May 2021) https://www.ost-ausschuss.de/de/PM%20Umfrage%20Forsa%20NS2 (visited 8 October 2023).

164 Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ I, 140, 5.6.2009, pp. 16-62.

165 It is more geared towards accommodating 'prosumers', i.e., those that simultaneously consume

a global frontrunner in the area of sustainable development and the green energy transition by introducing the EU Green Deal in 2021, a political strategy aimed at a net-zero carbon economy by 2050.[166] As part of this, in November 2023, a revised Renewable Energy Directive was adopted, which no longer sets targets for the Member States separately, but for the Union as a whole.[167] It sets the overall binding EU target for renewable energy at 42.5 per cent by 2030. To this end, it is imperative to, in the long run, not only balance but try to solve the trilemma of energy security, decarbonization and decentralization to ensure a steady energy supply that is as 'clean' as possible. This also emphasizes how energy security inevitably contains a 'sustainability' dimension. For energy supply to be secure, energy systems must also be sustainable in the long run, not depending on finite and polluting resources. Before the Russian invasion of Ukraine, the EU was well on its way to presenting the most ambitious climate plans of any global, regional trading block. The Carbon Border Adjustment Mechanism (CBAM), whereby EU-based importers of energy-intensive commodities such as steel, cement and aluminium, must pay an additional border tax, calculated on the embedded emissions of the good in question, is an integral part of the EU Green Deal.[168] The Green Industrial Plan, unveiled in February 2023, would provide the necessary incentives to further the EU's climate ambitions, while ensuring that the EU works towards a green industrial policy that can compete globally (given the US Inflation Reduction Act and Chinese subsidies).[169]

4. GEOPOLITICAL REALITIES: RECONSIDERING CORE DIMENSIONS OF EU ENERGY LAW AND POLICY FOLLOWING THE INVASION – EMERGENCY TOOLS

As of February 2022, we find ourselves in the dawn of a new geopolitical era. The Russian invasion of Ukraine was a wake-up call that the EU must detox from its dependency on Russian fossil fuels as soon as possible and to diversify supplies to more reliable suppliers, while at the same time decarbonizing and reducing demand the Union as soon as possible.[170]

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and produce energy (e.g., by solar panels).

166 See the discussion in L Hancher, 'EU Energy Governance – Moving Targets and Flexible Ambitions between Opacity and Opportunism?', *Yearbook of European Law* Vol 00 (2020) pp. 15-16.

167 Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652.

168 Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (Text with EEA relevance); CBAM is hotly debated in connection with issues around WTO compatibility, amongst other issues (such as widening the gap between developed and developing countries).

169 European Commission, 'A Green Industrial Plan for the Net-Zero Age', Brussels 1.2.2023 COM(2023) 62 final; United States Inflation Reduction Act of 2022 (IRA).

170 See European Commission, 'REPowerEU: Joint European Action for more affordable, secure and sustainable energy', Strasbourg, 8.3.2022 COM(2022)108 final.

In quick succession, the EU rolled out measures aimed at diversifying away from Russia as a dominant energy supplier, while developing multifaceted strategies that would guarantee its long-term energy supply. While some initiatives, such as the EU Gas Buying Platform, have thus far been successful, other initiatives may have more mixed results and uncertain futures. An example of this is the massive state aid across Europe to households to whither the EU energy crisis.[171] While this aid is necessary from a social security point of view, it also amounts to problematic fossil fuel subsidies that keep existing dependencies afloat. Moreover, the energy partnerships the EU has hastily entered into post-invasion should also be regarded with caution, as these may solve short-term supply problems, but may not be the preferred answer in terms of geopolitical dependencies on fossil fuels on the long term.

The legal tensions illustrated by *the EU-Energy Package* discussed in Part I above can be seen in a new light through the lens of the various crisis response measures the Union was forced to take. Two remarks are in place here. First, it is questionable to what extent the measures discussed below are compatible with the principles of the internal market and WTO law, as they exist in their current form. Indeed, compliance with multilateral trade rules may not be the EU's main concern in these times of crisis, in times of war and with a WTO that may be on the brink of hibernation.[172] Nevertheless, this is an angle that must be kept in mind as the rule of law is important, and (the option of returning to) multilateralism should not be abandoned in the long run. Second, they force us to reconsider to what extent competition and free market principles are realistically attainable or should even be the main focus of the EU energy market at present, or whether the EU should conceive energy policy as part of a new industrial policy in line with open strategic autonomy and a general de-risking of its trade relations.[173] This also begs more uncomfortable questions on whether competition and free market principles are consistent with pursuing energy security, sustainability and possibly, social justice. Managing these concerns only through exceptions may lead to unfavourable outcomes.

4.1 EU ad hoc emergency tools following Russia's invasion

The unprecedented emergency measures the Union has resorted to since the Russian invasion, have energy security as a paramount goal for the years to come,

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171 See European Commission, 'EU action to address the energy crisis', https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/eu-action-address-energy-crisis_en#diversifying-our-supply (accessed 8 October 2023).

172 Reuters, 'At WTO, growing disregard for trade rules shows world is fragmenting October 3 2023', https://www.reuters.com/business/wto-growing-disregard-trade-rules-shows-world-is-fragmenting-2023-10-02/ (accessed 8 October 2023).

173 See G7 Hiroshima Leaders' Communiqué, 20 May 2023, stating: 'We are taking concrete steps to coordinate our approach to economic resilience and economic security that is based on diversifying and deepening partnerships and de-risking, not de-coupling', https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-hiroshima-leaders-communique/ (visited 8 October 2023).

preceding the liberalisation of the EU energy market, or, in some instances, even reversing it. Thus far, this approach has successfully secured an energy supply for the foreseeable future. While sustainable development and energy transition goals remain important and attempted to be seamlessly integrated into EU energy policy, they are currently treated flexibly and, at times, put on the backburner in favour of short-term energy security.

Following the Russian invasion, the EU has bundled its measures under the so-called 'REPowerEU Plan'.[174] EU Broadly speaking, the Union's measures mitigating the energy crisis triggered by the Russian invasion of Ukraine are: Diversifying supply (in the form of import bans and newly concluded bilateral partnerships, reducing demand, new gas storage rules, collective purchasing of energy (via the newly set up AggregateEU platform), reducing bills for European households and businesses, strengthening EU solidarity and investing in infrastructure.[175] Multifaceted strategies can be grouped into various categories, e.g. reconsidering what type of energy is considered 'sustainable', focusing on different energy sources (e.g. hydrogen strategy), financial measures to ensure a fairer division of profits, entering into new energy partnerships with third countries, and curbing energy demand.[176]

This section discusses a selection of the most pertinent energy security measures the Union has taken: *i*) the G7 EU import ban on Russian oil and refined petroleum products; *ii*) the establishment of a Gas Buying Platform; and *iii*) ad hoc bilateral arrangements with third countries to diversify supplies.

i) EU import ban Russian oil and refined petroleum products and G7 price cap

In June 2022, the EU agreed to impose a partial embargo on Russian seaborne crude oil by December 2022.[177] As an extension of the EU ban, the so-called international Price-Cap Coalition headed by the G7 and Australia added a price cap for Russian-origin crude oil.[178] A further price cap on seaborne petroleum products (diesel and fuel oil) was introduced in February 2023.[179] For the cap to be effective, it must be adjusted regularly. In practice, the bans amount to a total import ban on Russian crude oil by the EU but allow European operators to trans-

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174 See note 171 and European Commission, 'REPowerEU', https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en (accessed 29 October 2023).

175 See European Commission, 'EU action to address the energy crisis', *supra* n. 171; A. Boute, 'Energy Justice in Times of Crisis: Protection of Consumers and Market-Based Renewable Energy Investments', 26(4) *Journal of International Economic Law* (2023) pp. 770. 775-776.

176 Ibid.

177 European Commission, 'G7 agrees oil price cap: reducing Russia's revenues, while keeping global energy markets stable' (3 December 2022).

178 German Federal Foreign Office, 'Statement of the G7 and Australia on a price for cap for seaborne Russian crude oil' (2 December 2022).

179 European Commission, Ukraine: EU and G7 partners agree price cap on Russian petroleum products.

port Russian oil to third countries if the price remains below the cap. It is hard to assess whether the price cap is effective. Some argue that Russian oil revenues are likely to increase due to constant hikes in crude prices and the reduced discount on its own oil.[180]

Under normal circumstances, such an import ban maintained by the EU and its Member States, as well as a price cap by the non-EU members of the G7 would likely amount to an unjustifiable violation of the laws of the WTO in the form of a *de jure* import restriction inconsistent with Article XI.I of the GATT.[181] While multilateralism, and thereby the relevance of the WTO, is now seriously questioned, in the unlikely event that Russia challenges these measures before the panel, the EU could arguably justify such a ban under the guise of the national security exception of Article XXI (b)(iii).[182] The EU would, however, have to argue that the connection between the measure and the 'emergency in international relations' is sufficiently connected.[183]

ii) EU gas buying platform

In April 2022, the Union set up the EU Energy Platform, whereby it intends to act on behalf of the member states to purchase and divide natural gas across the EU.[184] It is set up as a 'voluntary coordination mechanism that plays a key in pooling demand, coordinating infrastructure use, negotiating with international partners and preparing for joint gas and hydrogen purchases'.[185]

One of the most important features is a 'joint purchasing mechanism', through which the Commission intends to introduce a demand aggregation tool that will support EU countries in reaching their storage targets.[186] The Platform works based on regional groups and aims to replace Russian gas with gas and liquefied natural gas (LNG) from 'reliable suppliers'.[187] The concrete tasks of Platform are presently to coordinate the filling of gas storage facilities while also laying the ground for introducing partnerships on hydrogen.[188] Regarding the joint purchas-

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180 *Financial Times*, 'Russia dodges G7 price cap on most of its oil exports' 24 September 2023.

181 GATT Art. XI.1.

182 B. Hoekman, P.C. Mavroidis and D.R. Nelson, 'Non-economic objectives, globalisation, and multilateral trade cooperation', https://cepr.org/voxeu/columns/non-economic-objectives-globalisation-and-multilateral-trade-cooperation (11 September 2023).

183 See the reasoning of the panel in WTO, DS512, *Russia – Measures Concerning Traffic in Transit (Ukraine v. Russian Federation)*, paras. 7.124-7.125.

184 European Commission, EU Energy Platform – AggregateEU: 'AggregateEU, is the Commission flagship initiative under the EU Energy Platform, to implement demand aggregation and support more coordinated purchase of natural gas at European level. It is operated by the service provider, Prisma European Capacity Platform GmbH.'

185 Ibid.

186 European Commission Communication to the Parliament, 'Energy Emergency – preparing, purchasing and protecting the EU together', Strasbourg, 18.10.2022.

187 Emergency regulation, *supra* n. 186 under 1. Note that what a 'reliable supplier' is remains undefined.

188 Ibid.

ing mechanism, the idea is that both EU Member States and countries from the European Energy Community (including Ukraine) group together their gas import needs to see offers on that basis. By forming a 'gas purchasing consortium' together with European energy companies, it wants to ensure more equal access to 'new suppliers, international markets and negotiating weight to European importers. Russian supply sources will be excluded.'[189] While it concerns a 'voluntary' mechanism, some elements are mandatory for EU member states (for at least 15 per cent of storage filling obligations). In May 2023, the Commission announced that it attracted more than 1.34 billion cubic metres (bcm) of natural gas in its first joint gas purchasing tender, surpassing the 11.6 bcm demanded by EU companies to guarantee its security of supply.[190] The Platform attracted bids from 25 supplying global companies. In essence, it could be said that this new form of tendering has been a success for the EU to meet its natural gas needs and guarantee its energy security. But will this be a new form of states acting as wholesale buyers? Many questions remain.

It is first and foremost unclear what kind of 'legal animal' the EU Energy Platform is or will turn out to be or how it fits into existing EU internal market and international trade law structures. In terms of WTO law, one could ask whether the platform could somehow be conceived as fitting within the definition of a State Trading Enterprise in the sense of GATT Article XVII. If this is the case, such an enterprise should 'act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.'[191]

One important question is whether the Platform is conceived as a long-term or ad hoc short-term tool. The Commission is itself understandably aware that Platform may run afoul of internal market rules by pre-emptively stating that when forming a consortium of this kind, there should be a rapid decision on the inapplicability of state aid and competition Articles 101 and/or 102 Treaty on the Functioning of the European Union (TFEU).[192] Although the practical operation of the Platform and more detailed rules on its functioning have to be developed, it is obvious that the EU realizes that leaving energy security to the forces of the market is not an option at present. Rules on state aid to the energy sector have been relaxed significantly in the EU post-invasion, making it e.g., possible for Member States to 'bail out' energy giants, and support industry and consumers. While this is understandable given the current geopolitical circumstances, several important legal issues cannot be ignored in this respect. This, for instance, concerns the consistency of loosened EU State Aid rules with subsidy rules under the Agreement on Subsidies and Countervailing Measures. The second issue is that relaxed State Aid rules in energy will often amount to qualifying as a fossil fuel subsidy, as the aid provided

189 Ibid.

190 European Commission News Announcement, 'EU Energy Platform: EU attracted over 13.4 bcm of gas in first joint gas purchasing tender' (16 May 2023).

191 Art. XVII.1(a) GATT.

192 Arts. 101 and 102, Treaty on the Functioning of the European Union.

is disproportionality given to the fossil fuel industry and private consumers consuming fossil fuels.

iii) Ad hoc bilateral arrangements

Finally, the EU is hastily scrambling to secure fossil fuel supplies from elsewhere by concluding Memoranda of Understanding (MoUs) with other third countries: be it a trilateral MoU with Egypt and Israel, an MoU with Azerbaijan, additional gas deals with Algeria, Angola, Nigeria and Senegal, as well as additional LNG guarantees from the United States.[193]
The trilateral MoU between the EU, Egypt and Israel does not contain hard obligations in terms of fossil fuel supplies. Still, they lay a foundation of intensified cooperation with regard to fossil fuel supplies.[194] What is striking, is that the Preamble to this MoU perfectly illustrates the tightrope the EU must walk on in balancing its energy security in the wake of a war on European soil, while squaring this with preventing a climate emergency. Justifying its natural gas imports from the region, it states:

> Emphasising the importance of regional cooperation between natural gas producing and consuming countries to support the security of the energy supply;
>
> Recalling the objectives defined under the Paris Agreement that the Sides have ratified and that defines their commitment to reducing greenhouse gas emissions;
>
> Acknowledging that natural gas shall continue to play an important role in terms of energy consumption and electricity generation in the European Union until 2030, after which its use in the European Union will decline in line with its climate neutrality commitment by 2050;[195]

The EU concluded gas deals with Saudi Arabia, United Arabic Emirates (UAE), Algeria and Azerbaijan.[196] Under the new Azerbaijan MoU, for instance, Azerbaijan commits to double the capacity of the Southern Gas Corridor to deliver at least 20 billion cubic meters of natural gas annually.[197]

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193 See MoU on Cooperation Related to Trade, Transport and Export of Natural Gas to the European Union between the European Commission, Egypt and Israel (15 June 2022); MoU on a Strategic Partnership between the European Union and the Republic of Azerbaijan in the field of Energy (18 July 2022); European Parliament Briefing July 2023, 'EU Energy Platform – Facilitating joint purchases of gas'.

194 EU-Egypt-Israel MoU Section 1 (Affordable, Stable and Secure Natural Gas Supply) and Section 2 (Implementation).

195 EU-Egypt-Israel MoU, Preamble; note: many countries are struggling with the balance of decarbonization and energy security, see H. Gao and W. Zhou, 'Competition Amongst Purposes: The Chinese Experience in the Governance of Climate Change and Energy Transition', 26(4) *Journal of International Economic Law* (2023) pp. 803, 817.

196 See the excellent tool developed by the ECFR, EU Energy Deals Tracker, https://ecfr.eu/special/energy-deals-tracker/ (accessed 8 October 2023).

197 European Commission, 'EU and Azerbaijan enhance bilateral relations, including energy coop-

In terms of the law, it is questionable whether the deals for imports of natural gas are concluded on a Most Favoured Nation (MFN) basis, certainly vis-à-vis Russia whose seaborne imports are banned in connection with the war in Ukraine. But more fundamentally, the long-term risks of this strategy must be considered, while these partnerships are understandable to prevent the Union from running out of energy in the short run in the wake of its crisis. The EU remains highly dependent on fossil fuel imports, and this will not diminish overnight. Prioritizing the supply of cheap fossil fuels regardless of the country that supplies them is not a viable long-term strategy in the current geopolitical landscape. At the time of finalizing this contribution, we find ourselves in November 2023, with the conflict between Israel and Hamas destabilizing the region and rising tensions between Israel and Egypt. Can the EU afford to rely on fossil fuels from these countries, which, moreover, may find it challenging to constructively cooperate at present?[198] Other countries that the EU is keen to import fossil fuels from, likewise, may not be stable countries or natural European allies (such as Azerbaijan or Saudi Arabia).
It is hard to say to what extent the EU emergency tools discussed above are long-term measures. They could change and adapt to what the crisis demands in the coming year. Certain is that they do not neatly fit within existing WTO and EU law frameworks, notwithstanding the withering importance of the former.[199]

4.2 The added challenge of shared energy competences in the EU

A complicating factor is the shared competence on energy between the Union and the Member States. This makes it particularly challenging to ensure everybody is on board with any Union-wide measure that affects the energy mix of a Member State.[200] For it is within the rights of the member states to determine that mix, including in their contracts with third countries (hence the exceptions that have been made on Russian sanctions for several EU Member States, such as Hungary and Slovakia). Pursuant to Article 194(2) TFEU, each member state has the right 'to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply...'[201] This explains why the EU, while on one hand taking unprecedented action to wean off Russian energy, cannot legally constrain individual member states from entering into contracts with Russia's state-owned company Gazprom. Indeed, these countries have continued to conclude long-term contracts with Gazprom since February 2022.[202]

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eration' (Press Release 18 July 2022).

198 See the discussion in S. Lokenberg, G. Cretti and L. van Schaik, 'A Tale of Two Dependencies', 28 *European Foreign Affairs Review* (2023) pp. 417, 528-536.

199 See *supra* n. 172.

200 Art. 194.2 TFEU.

201 Art. 194(2) TFEU.

202 Hungary and Austria have renewed contracts with Gazprom, see Euronews, 'Austria imports of Russian gas hit pre-war levels, exceeding aid to Ukraine' (12 July 2023) and Politico, 'Hungary signs new gas deal with Gazprom' (31 August 2022).

Tensions between EU member states' energy policies, as well as between the Union and its Member States are inherent to the institutional design of the Union. Questioning or interpreting the division of competences in the EU in a different light remains a sensitive subject. Unless the Union decides to exercise its energy competence more proactively, voting in the EU changes to majority voting, energy becomes an exclusive competence of the EU, or the EU transforms into a federation (the latter two scenarios are improbable in the near future), the complicated (and frustrating) nature of energy policy between the Union and its Member States will remain.

5. TOWARDS 'SECURITY-CENTRED' ENERGY TRADE REGULATION IN EUROPE (AND BEYOND?)

For decades, the EU energy market was targeted towards liberalisation and decarbonisation, and with good reason. The Russian invasion should not mean that the EU should abandon these long-term goals. However, there is an argument to be made for working towards a 'security-centred' energy transition in the EU while at the same time ensuring the EU remains competitive globally and does not lose out in the green technology shift.

Both the EU and WTO leave ample space for regulating matters pertaining to security. But two issues are challenging in this respect: first, if WTO members wish to regulate matters that pertain to energy security in a way that violates WTO obligations (for instance by banning imports from one particular supplier, Russia, or favouring imports of another), venturing into the exception is the default option to defend such measures. Second, and more important, however, is that Article XX GATT general exceptions must also meet the chapeau. With regard to energy security measures that violate WTO rules, as they may be purposefully discriminatory (and for good reason), this may be a high threshold to meet. Imagine that the EU wants to ban Russian natural gas from its market completely. If challenged, it may try to, for instance, invoke the public morals exception of paragraph (a) of Article XX GATT. Based on *Brazil-Retreaded Tyres,* one would have to look at the objective, what the risk is you are trying to protect yourself from and whether the measure contributes to pursuing a particular objective.[203] An objective in this case could for instance be 'Russia is violating peremptory norms'. Or, 'Russia threatens European security'. Or both. And how to be consistent if you have multiple objectives?[204] The issue of consistency will likely pop-up. As *EC – Seals* has demonstrated, it is hard to be consistent when it concerns public morals. If we look at the first hypothetical objective, it would likely fail under the chapeau vis-à-vis other WTO members that EU is importing natural gas from and that may likewise violate jus cogens. In other words, differential treatment between various

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203 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

204 See the discussion in Appellate Body Reports, *EC – Seal Products*, paras. 5.192-5.193.

WTO Members may be necessary for a variety of legitimate objectives in securing the EU's energy. But differential treatment is often equated with protectionism in the case law and the GATT Article XX chapeau may not necessarily catch this.[205] In those instances, resort to the 'nuclear option' in Article XXI iii b) exception is more likely to succeed. That is in principle possible, as there is established precedent to litigate the article by now. And national security issues, including those pertaining to supply security, may sometimes trump market values.[206] However, the drawback of Article XXI is that it can also attempt to hide a large amount of protectionism under the guise of national security.

However, this also begs the bigger question of whether it may be a worthy exercise to view the notion of 'protectionism' in international trade in a new light. In this day and age, when the geopolitical paradigm is shifting, we should ask whether the traditional broad notion of protectionism as differential treatment still works in strategically sensitive sectors, such as global energy trade, raw materials and dual-use technologies. The argument here is that protectionism as conceived in the GATT in 1947 is perhaps too 'black-and-white' and does not leave enough space for the shades of grey in a time of trade fragmentation and the emergence of regional trading blocks that at times must be 'protectionist' to de-risk their trade relations and safeguard their economic security.[207]

For now, it seems inevitable that the EU must move towards a 'security-centred' energy trade regulation. While some may say that global energy trade has always been 'security-centred', this would disregard the opportunistic and dangerous dependencies created over the last century in Europe and globally. 'Security-centred' here implies that when designing European energy policy, both in its grand architecture and its concrete energy trading amongst EU Members States and non-EU members, dimensions of energy security (long-term, meaning including the concept of decarbonization, and short-term, the readiness to deal with supply shocks) should take precedence over compliance with core international trade rules and EU internal market law. Some may find this a radical idea, but this is de facto already happening in practice, illustrated by the emergency tools applied by the EU. It is not to say that multilateral trading rules or EU internal market law should be disregarded. But it could imply the following: For WTO rules, the notion of protectionism in connection to strategic sectors (energy, but also beyond, i.e., raw materials and sensitive technology) should be carefully re-evaluated and creatively interpreted. Discrimination in some of these sectors seems unavoid-

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205 See the discussion how the WTO Appellate Body has dealt with its case law in on this with respect to Art. III:4 GATT by P.C. Mavroidis, *The Regulation of International Trade*, (Boston, Massachusetts, MIT Press 2016) Chapter 7.6.

206 See the discussion on the relationship between trade and security in H.G. Cohen, 'Nations and Markets', 23 *Journal of International Economic Law* (2020) pp. 793, 800-801 and M. Pinchis-Paulsen, 'Let's Agree to Disagree: A Strategy for Trade-Security', 25 *Journal of International Economic Law* (2022) pp. 527, 529-533.

207 See the discussion on how the challenges facing the trade (and investment) regime impact international economic law in A. Roberts, 'Risk, Reward and Resilience Framework: Integrative Policy Making in a Complex World', 26 *Journal of International Economic Law* (2023) pp. 233, 262-265.

able – and the question is whether the legal space a WTO member has in those instances should limited to defences or security exceptions. The current impasse of the multilateral trading system is discouraging. Still, it could perhaps also be used effectively to 'test' the ground with regard to new and controversial unilateral policies deployed by the various trading blocks, such as the Carbon Border Adjustment Mechanism and the US Inflation Reduction Act.[208]

While the EU is a far cry from becoming a federation, 'security-centred' energy trade regulation from the perspective of EU law would also mean not shying away from avoiding talking about the elephant in the room: certain problematic aspects of shared competences on energy between the EU and its Member States and how this may negatively affect the EU's energy security. While there are good reasons that competences in the area of energy between the Union and its Member States are shared, as it concerns vital sectors, closely tied to a state's industrial policies and touching its permanent sovereignty over natural resources, complicated discussions on what the implications are when some Member States chose to trade energy with certain countries should not be avoided. The implications of shared competences in energy should be re-examined, leaving separate Member States enough space to determine their own energy mix, while at the same time ensuring that the Union can develop policies that de-risk the energy future for the whole Union.

CONCLUSION

Energy security is undoubtedly a crucial concept in international relations and international law. While no internationally agreed upon legal definition of the concept exists, it is generally understood to cover the continuous availability of energy resources at affordable prices. This contribution first explained the various dimensions of energy security, including its short-term, long-term and sustainability aspects, as well as debates surrounding the content of the concept in international relations. It then turned to discuss the role of energy security in various categories of energy-specific treaties, before researching the treatment of the concept in international trade law (WTO and Preferential Trade Agreements). While energy security until recently only played a limited role in the multilateral trading system, mainly connected to restrictive natural resources practices in the 1970s, contemporary EU and US PTAs do include energy-specific chapters and regularly contain energy security-specific provisions. Recently, the WTO Dispute Settlement Body has been confronted with the concept of energy security in Members' defences in connection with measures relating to renewable energy (solar) and fossil fuels (gas). The panel and AB reports in *India – Solar Cells* and *EU – Energy Package* demonstrate that, while energy security as such may be a valid concern in defence, it will not hold if a measure is applied in a discriminatory manner. This confronts us with significant issues, as one could argue that one

208 *Supra* n. 169.

crucial purpose of safeguarding a WTO Member's energy security is to have the possibility to discriminate against energy supplies from other Members based on geo-political and strategic considerations. Especially measures concerning long-term security of supply are unlikely to fit within the Article XX(j) GATT exception, as this article seems to have been tailored towards *present* shortages, not considering prospective shortages. However, measures of energy security presented as a matter of public policy, under article XIV(a) of the GATS, are more likely to meet the standard in this article, according to the panel in *EU – Energy Package.* While this gives an indication of how future disputes concerning these matters may be litigated, important questions concerning energy security and the link to national security exceptions remain and could potentially be clarified in future dispute settlement.

Part II of this contribution demonstrated how Europe must reconsider its legal ambitions for its International Energy Market as a result of the Russian invasion in Ukraine, and questioned whether this can be squared with its obligations under EU and WTO law. While Europe's original goals are to decentralise the European energy market for gas and electricity while realising the green energy transition and decarbonize the Union as soon as possible, emergency measure have forced the Union to try and reconcile its ambitious goals with short term needs. Europe's larger energy ambitions connected to decentralisation do not, per se, run counter to the rules of multilateral trade, though certain rules are problematic when they affect trade in geopolitically sensitive sectors, such as (though not exclusively) energy. The panel report in *EU-Energy Package* case has shown that Europe finds itself between a rock and a hard place when it wants to ban energy imports from suppliers it wishes to decrease dependency on, while at the same time not providing space to diversify away from one supplier in favour of others. Additionally, the contribution discussed the geopolitical realities of several energy security emergency tools that the EU took in connection with the Russian invasion. While some of these tools, such as the EU wholesale-buying coordination of natural, the price cap on natural gas and the ban on Russian crude imports are pioneering and may lead to creative long-term solutions, it remains to be seen how these fit within EU and WTO rules. These findings justify re-evaluating the notion of 'protectionism' in international trade and how it may apply to trade flows that affects geopolitical dependencies.

6. PROPOSITIONS AND POINTS FOR DISCUSSION

1. The ad hoc energy security emergency tools adopted by the EU to mitigate the EU energy crisis (by necessity) undermine core notions of EU Internal Market rules and multilateral trading rules. Question: Is this a blessing or a curse?
2. In this light, it is worth revisiting the notion of 'non-discrimination' in the multilateral trading system when it concerns strategic sectors that affect geo-political dependencies such as energy (but likewise, for instance, in

connection with raw materials and dual use technology).

3. The demise of multilateralism and thereby the authoritative position of the WTO offers opportunities for trading blocs to pursue their own interest. While we must accept that multilateralism may go into hibernation, geopolitical trading blocs should not 'throw away the baby with the bathwater' and be ready to multilateralise progressive results when there is an appetite to do so again.
4. Ad hoc energy partnerships concluded with third countries such as Egypt, Azerbaijan and are not a stable long-term solution both in terms of geographical and fossil fuel dependencies. Question: What way forward?
5. In Europe, we should not shy away from revisiting and critically reflecting on how the legal competences between the EU and its Member States in the area of Energy (Article 194 TFEU) are divided and whether the status quo is viable for Europe on the long term.