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Article

## Externalising Europe's energy policy in EU Free Trade Agreements: A cognitive dissonance between promoting sustainable development and ensuring security of supply?

Anna-Alexandra Marhold

Assistant Professor at the Grotius Centre of International Legal Studies, Leiden Law School, the Netherlands;  
a.a.marhold@law.leidenuniv.nl

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### Abstract

It is no secret that while the European Union (EU) has taken up commitments to combat climate change under the United Nations Framework Convention on Climate Change Paris Agreement and its own 2020 and 2030 climate and energy package strategy, the Union continues to be heavily dependent on the import of fossil fuels from abroad. One may even say that this leads to a cognitive dissonance, i.e. the discomfort which ensues if one holds two contradictory values, with respect to the externalisation of the Union's energy and sustainable development policy. On the one hand, the EU aims to become a global frontrunner in the field of promoting renewable energy and sustainable development. This expresses itself through the inclusion of specific chapters on Trade and Sustainable Development in the EU's Free Trade Agreements (FTAs) (standard since the 2011 EU-South Korea FTA). On the other, the EU realises

that it is imperative to secure the Union's security of energy supply, still largely guaranteed by fossil fuels. Therefore, the Union in parallel attempts to eliminate discriminatory practices in international fossil fuel trade in its bilateral agreements (e.g. in the EU-Ukraine Deep and Comprehensive Free Trade Agreement). This paper will explore the root causes of this cognitive dissonance and research what elements could contribute to ensuring more coherence in EU external energy policy. The objectives of sustainable development and security of supply are not necessarily contradictory per se. However, clearer delineations between the two objectives are necessary in EU external relations in general, and in the Union's FTAs more specifically. This also applies to relations between Member States and the Union in this area, as well as to the interactions between the relevant EU institutions tasked with energy, sustainable development and the environment.

**Keywords:** EU external relations law; EU Free Trade Agreements; EU energy policy; sustainable development; trade and investment law

## 1. Introduction

It is no secret that while the European Union (EU) has taken up commitments to combat climate change under the United Nations Framework Convention on Climate Change (UNFCCC) Paris Agreement (hereinafter the Paris Agreement) and its own 2020 and 2030 climate and energy package strategies, the Union continues to be heavily dependent on the import of fossil fuels from abroad.<sup>1</sup> One may even say that this leads to a cognitive dissonance (i.e. the discomfort which ensues if one holds two contradictory values) with respect to the externalisation of the Union's energy and sustainable development policy. On the one hand, the EU aims to become a global frontrunner in the field of promoting renewable energy and sustainable development. This expresses itself through the inclusion of specific chapters on Trade and Sustainable Development in the EU's Free Trade Agreements (FTAs) (standard since the 2011 EU-South Korea FTA).<sup>2</sup> On the other hand, the EU realises that it is imperative to secure the Union's security of energy supply, which is still largely guaranteed by fossil fuels.<sup>3</sup> Therefore, the Union in parallel attempts to eliminate discriminatory practices in international fossil fuel trade in its bilateral agreements (e.g. in the EU-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA)).<sup>4</sup> Beyond that, the EU even goes as far as aspiring to include provisions that legally secure access to fossil fuel energy sources (mainly natural gas) in its FTAs with third countries (e.g. in the currently dormant, but nevertheless controversial EU-US Transatlantic Trade and Investment Partnership (TTIP) negotiations).<sup>5</sup>

It is therefore safe to say that the behaviour of the Union is, at a minimum, contradictory in attempting to reconcile these objectives. On the one hand, the EU is promoting sustainable development in its relations with third countries. On the other, it continues to be heavily dependent on imported fossil fuels, therefore actively attempting to secure the supply of polluting fossil fuels in its external relations. While the Union's current reliance on energy from imported fossil fuels is understandable from the viewpoint of short(er)-term energy security, it should strive to move away from them in the long run if it wants to 'practise what it preaches' in terms of sustainable development abroad.

The shared competences in the field of energy (Article 194 Treaty on the Functioning of the European Union (hereinafter TFEU)) and the environment (Article 191 TFEU) pose additional challenges in forming a coherent external strategy in this area.<sup>6</sup> The result is that the EU must constantly walk on a tightrope in two directions as regards its external energy policy: not only does it have to balance between promoting decarbonisation and securing its energy supply, it also has to ensure that the internal relationship between the Union and its Member States in this area is reflected adequately in its relations with third countries.

This paper will explore the root causes of the ensuing cognitive dissonance in EU external relations and suggest ways in which the EU can behave in a more uniform manner, accommodating both objectives in its relations with third countries. To this end it will also research three (types of) FTAs: the EU-Singapore FTA (2014), the EU-Ukraine DCFTA (2014) and the draft chapters of the TTIP. It should be pointed out from the outset that the objectives of sustainable development and security of supply are not contradictory per se. However, clearer delineations or coordination between the two objectives would favour EU external relations in general, and the EU's FTAs more specifically. Moreover, Member States and the Union would

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<sup>1</sup>COP21 Paris Agreement: United Nations Framework Convention on Climate Change (UNFCCC), UN Doc FCCC/CP/2015/L.9/Rev.1 'Adoption of the Paris Agreement' (12 December 2015); See European Commission, DG Climate Action, '2020 Climate and Energy Package' and '2030 Climate and Energy Framework'; the EU imports almost 60 per cent of its fossil fuels from abroad, see Eurostat, Energy Production and Imports: <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy\\_production\\_and\\_imports#Imports](http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_production_and_imports#Imports)> (accessed 1 March 2019).

<sup>2</sup>OJ L 127, 14 May 2011.

<sup>3</sup>European Commission, 'European Energy Security Strategy' COM (2014) 330 final.

<sup>4</sup>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) (provisionally in force).

<sup>5</sup>European Commission, DG Trade, 'In focus: Transatlantic Trade and Investment Partnership' <[http://ec.europa.eu/trade/policy/in-focus/ttip/index\\_en.htm](http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm)> and United States Trade Representative, 'Transatlantic Trade and Investment Partnership' <<https://ustr.gov/ttip>> (accessed 1 March 2019).

<sup>6</sup>Article 191 (Environment) and Article 194 (Energy) of the Consolidated Version of the Treaty on the Functioning of the European Union, 2008 OJ C 115/47.

themselves benefit from more uniformity and coordination in this area, as would the EU institutions tasked with developing energy, sustainable development and environmental policy.

## 2. Europe's energy security and sustainable development ambitions: A balancing act

Several of the normative tensions alluded to in the introduction to this paper originate in the balancing act as regards the ongoing development of the EU's energy and sustainable development policy, which will be highlighted in this section. It becomes evident that there is a constant manoeuvring taking place between what are considered energy security and climate goals in the EU, requiring a trade-off between decarbonisation, energy security and competitiveness, while also considering the division of competences between the Union and the Member States.

The Union's ambitions in the field of energy and sustainable development are, at least in part, a reflection of the international sustainable development and climate commitments the EU has undertaken. In the framework of the United Nations, the EU and its Member States have committed to the 2030 Sustainable Development Goals (UN SDGs).<sup>7</sup> Several of these goals are directly relevant for energy and sustainable development (as the name itself indicates), such as Goal 7 (affordable and clean energy), Goal 11 (sustainable cities and communities) and Goal 13 (climate action).<sup>8</sup> Furthermore and more concretely, under Article 3 of the Paris Agreement, the Union has agreed to submit Nationally Determined Contributions (NDCs) on how it foresees reducing its emissions and keeping global temperature from increasing beyond 1.5 degrees as compared to pre-industrial levels.<sup>9</sup>

Apart from its climate commitments, there are other factors that determine the Union's policy in the area of energy, namely the Union's security of supply. In the context of the G20, of which the Union is part, the Leaders' Declaration following the 2017 Summit in Hamburg stated that the group is resolved to tackle common challenges to the global community, such as climate change and energy security.<sup>10</sup> In view of these international commitments, this section will briefly highlight the EU's internal policy concerning energy and sustainable development. It discusses the emphasis on each of these elements and the manner in which they are intertwined in EU law and policy in turn.

### 2.1. The Energy Union: An emphasis on security of supply

The EU shares its competences with the Member States in the area of energy. This shared competence flows from Article 4.2(i) TFEU. As this is what is known as a 'complementary' competence, both the Member States and the EU can develop national and, respectively, regional energy policy in parallel. Pursuant to Article 4(3) of the Treaty on the European Union (hereinafter TEU), the Member States and the Union have a mutual duty to *sincerely cooperate* with each other in this endeavour. This implies that although both the Member States and the EU may operate alongside one another, they should cooperate and coordinate with each other and not pursue policies that are contrary to their respective objectives.<sup>11</sup> Moreover, the primacy of EU law prescribes that in the event there is a conflict between Union law and the laws of a Member State, Union law prevails and that when the Union has taken action with regard to a particular issue Member States are prevented from taking action.

Since the Treaty of Lisbon, the EU has had in place a Union-wide energy policy: its legal basis can be found in Title XXI, Article 194 TFEU. This article, among others, sets out that in its energy policy, the EU shall aim to (a) ensure the functioning of the energy market; (b) ensure the security of supply of the Union; (c) promote energy efficiency and the development of renewables; and (d) promote the interconnection

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<sup>7</sup>Note, the definition most commonly used to describe sustainable development is the one used in the Brundtland Report: 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs' *Report of the World Commission on Environment and Development: Our Common Future* (Oxford University Press 1987).

<sup>8</sup>United Nations 2030 Sustainable Development Goals <<http://www.un.org/sustainabledevelopment/sustainable-development-goals/>> (accessed 1 March 2019).

<sup>9</sup>Article 2 of the Paris Agreement (n 1).

<sup>10</sup>See G20 Germany 2017, 'G20 Leaders' Declaration – Shaping an Interconnected World' (Hamburg, 8 July 2017) 2.

<sup>11</sup>Article 4(3) of the Consolidated Version of the Treaty on European Union, 2010 OJ C 83/01 (hereinafter TEU).

of energy networks.<sup>12</sup> In this context, Article 194 TFEU also serves as the legal foundation for the plan that the EU unveiled in 2015: the so-called Energy Union Package, dubbed a ‘Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’.<sup>13</sup> Realising that it is crucial to have a coherent and forward-looking energy strategy, the Commission heralded the Energy Union as one of its top 10 priorities.<sup>14</sup> By means of this strategy, the EU intends to go beyond the mere completion of the single Internal Energy Market (IEM) and build a resilient Energy Union to provide its consumers (households and businesses) secure, sustainable, competitive and affordable energy, while simultaneously pursuing the bloc’s climate policy targets.<sup>15</sup> The idea of the Energy Union is to attain a truly integrated energy market, beyond the national regulatory frameworks of the Member States, by ensuring a more competitive, efficient, sustainable and interconnected energy market.<sup>16</sup> The EU does not shy away from using unambiguous language in the founding document, proclaiming that Europe needs to make the right choices now, before it is too late to shift to a low-carbon economy.<sup>17</sup>

In light of the Union’s history, it is rather remarkable that the concept of an Energy Union only saw the light of day in 2015: the origins of the EU in the early 1950s can de facto be traced back to energy policy. The birth of the European Coal and Steel Community (hereinafter: ECSC) in 1952 is widely accepted to have been ‘the first step in the federation of Europe’.<sup>18</sup>

The Energy Union is arguably the biggest EU energy project since the ECSC. One of the underlying reasons given for the creation of the Energy Union at present are the deteriorating relations with Russia in the East, as well as the EU’s obligation to meet climate targets and transition to a decarbonised economy.

The Energy Union strategy is built around five interlinked dimensions: (1) energy security, solidarity and trust; (2) a fully integrated European energy market; (3) energy efficiency contributing to moderation of demand; (4) decarbonising the economy; and (5) research, innovation and competitiveness.<sup>19</sup> To some extent, we can discern the origins of a cognitive dissonance here: while one can understand that these pillars are interlinked and complement each other, it is also obvious that all five dimensions cannot be simultaneously executed to their full extent and that a trade-off between them is needed. For instance, the first two dimensions emphasise guaranteeing energy security for the Union, to be achieved through fully integrating Europe’s energy markets, while energy efficiency and decarbonisation of the economy, linked to managing energy resources in a sustainable manner, only follow later in the list of priorities (dimensions 3 and 4). An explanation for this may be that ensuring energy security for European citizens is considered a more urgent matter, while it is assumed that transitioning to a more efficient, decarbonised economy can simultaneously take place, albeit more ‘behind the scenes’. This assumption can be deceptive, however, as it could also be argued that transitioning to cleaner and more efficient energy sources will increase the EU’s energy security and create less dependency on fossil fuels from abroad.

While the term ‘energy security’ does not necessarily refer to fossil fuels, the reality is that the Union imports more than half of its energy from abroad, most of it being fossil fuels (coal, petroleum and natural gas) from Russia.<sup>20</sup> Hence, when discussing the Union’s energy security, the association with fossil fuels is unavoidable in practice. Interestingly enough, however, the concept of ‘energy security’ in and of itself

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<sup>12</sup>Article 194(1) TFEU.

<sup>13</sup>See DG Energy, ‘Energy Security Strategy’ <<https://ec.europa.eu/energy/en/topics/energy-strategy/energy-security-strategy>> (accessed 18 July 2019) and European Commission, ‘Energy Union Package – Framework Strategy for a Resilient Energy Union with a Forward-looking Climate Change Policy’ COM (2015) 080 final.

<sup>14</sup>ibid.

<sup>15</sup>Energy Union Package (n 13) 2.

<sup>16</sup>The Energy Union is a political strategy that includes but goes beyond the Energy Package legislation liberalising the EU Internal Energy Market: See EU Clean Energy Package Proposals <<https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition>> (accessed 1 March 2019).

<sup>17</sup>Energy Union Package (n 13) 3.

<sup>18</sup>Schuman Declaration of 9 May 1950 <[https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en)> (accessed 1 March 2019).

<sup>19</sup>Energy Union Package (n 13) 4.

<sup>20</sup>See Eurostat, Energy Production and Imports (n 1).

is not clear cut. No legally binding definition of ‘energy security’ exists, either on the international level, or in the context of EU law.<sup>21</sup> In the words of the EU itself:

DG Energy undertook steps to ensure that the assessment of security of supply becomes more quantifiable and transparent. *This overview shows that although there is no clear definition at the EU level of what security of supply means, there is a clear focus on measures to establish security of supply.*<sup>22</sup>

The status quo therefore is that, although a vast number of academics and policymakers discuss and try to frame the definition of ‘energy security’ and ‘energy security of supply’ legally or otherwise, no clear consensus on its meaning exists.<sup>23</sup> The most straightforward point of reference then is the International Energy Agency (hereinafter IEA), which describes the concept of ‘energy security’ in the broadest sense as ‘the uninterrupted availability of energy sources at an affordable price’.<sup>24</sup> The United Nations offers an additional description and characterises ‘energy supply security’ as ‘the continuous availability of energy in varied forms, in sufficient quantities, and at reasonable prices’.<sup>25</sup> One can further distinguish two dimensions of energy security: long-term energy security, which implies timely investments taking into account sustainable development needs, and short-term energy security, implying that the system should react adequately to sudden changes in supply and demand.<sup>26</sup>

Despite the fuzziness of the concept of energy security, it is commonly understood that energy security covers elements of (i) a reliable supply that is (ii) accessible, and (iii) affordable. In the opinion of the author, a fourth, overarching element should be added, which is that the supply should be *sustainable* for the long term. It follows that by guaranteeing energy security, energy markets should be resilient in the event of shocks (e.g. in the European context, think of the recurring gas transit disputes between Russia and Ukraine that took place in the 2000s, which affected a great number of EU Member States directly).<sup>27</sup> In essence, energy security must go hand in hand with a sustainable energy supply, one that can be guaranteed for future generations (echoing the definition of sustainable development mentioned above).<sup>28</sup> In this sense, the sustainability aspect is inseparable from the concept of energy security.

Despite the lack of a legal definition at EU level, the Union clearly must have been convinced that the concept of energy security was important enough to elaborate on a European Energy Security Strategy, preceding its Energy Union Package.<sup>29</sup> This strategy was accompanied by an in-depth study of Europe’s energy security.<sup>30</sup> Additionally, the earlier and more detailed Security of Gas Supply Regulation

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<sup>21</sup>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) 330 final, 166, accompanying document EC, ‘European Energy Security Strategy’ (n 3).

<sup>22</sup>ibid (emphasis added).

<sup>23</sup>See e.g. Energy Charter Secretariat, ‘International Energy Security – A Common Concept for Energy Producing, Consuming and Transit Countries’ (Energy Charter Secretariat, Brussels 2015) 10ff; The Council of European Energy Regulators (CEER), ‘Energy Regulation and Security of Supply – The European Regulators’ Approach’ presentation of 8 March 2010 [www.ceer.eu](http://www.ceer.eu) (accessed 18 July 2019); I Dreyer and G Stang, ‘What Energy Security for the EU’ [2013] European Union Institute for Security Studies 1; and generally J Lilliestam and A Patt, ‘Conceptualising Energy Security in the European Context’ (2012) SEFEP Working Paper 2012-4 and R Metais, ‘Ensuring Energy Security in Europe: The EU between a Market-based and a Geopolitical Approach’ (2013) College of Europe EU Diplomacy Paper 03/2013.

<sup>24</sup>See International Energy Agency, ‘What is Energy Security?’ <<https://www.iea.org/topics/energysecurity/whatisenergysecurity/>> (accessed 1 March 2019).

<sup>25</sup>Energy Charter Secretariat (n 23) 113.

<sup>26</sup>ibid; also see International Energy Agency, *World Energy Outlook 2016* (IEA 2016) 86.

<sup>27</sup>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?’ (2011) 3 Oil, Gas & Energy Law Journal (OGEL) Special issue on Cross-Border Pipelines.

<sup>28</sup>Supra note 7.

<sup>29</sup>European Commission, ‘European Energy Security Strategy’ (n 3).

<sup>30</sup>European Commission, Commission Staff Working Document, ‘In-depth study of European Energy Security’ (n 21). In brief, the European Energy Security Strategy consists of the following key elements: 1. Immediate actions aimed at increasing the EU’s capacity to overcome a major disruption; 2. Strengthening emergency/solidarity mechanisms including coordination of risk assessments and contingency plans; and protecting strategic infrastructure; 3. Moderating energy demand; 4. Building a well-functioning and fully integrated internal market; 5. Increasing energy production in the European Union; 6. Further



and Directive (2010) and the Security of Electricity Supply Directive (2006) set out more detailed rules in these specific areas.<sup>31</sup> The Security of Gas Supply Regulation, for instance, actively advocated for developing ties with third countries:

The diversification of gas routes and of sources of supply for the Union is essential for improving the security of supply of the Union as a whole and its Member States individually. Security of supply will depend in the future on the evolution of the fuel mix, the development of production in the Union and in third countries supplying the Union, investments in storage facilities and in the diversification of gas routes and of sources of supply within and outside the Union including Liquefied Natural Gas (LNG) facilities.<sup>32</sup>

The dimension of energy security as presented in the Energy Union Package builds on this 2014 European Energy Security Strategy.<sup>33</sup> The EU, in creating an Energy Union, plans to attain this energy security, solidarity and trust by the following means:

First, by diversifying supplies, meaning energy sources, suppliers and routes.<sup>34</sup> One of the key elements here is the EU's interest to explore the full potential of liquefied natural gas (hereinafter LNG).<sup>35</sup> This implies an increased amount of trade in and imports to Europe of LNG. For these reasons, the EU is developing a comprehensive strategy for LNG and its storage, including linking LNG access points to the internal market.<sup>36</sup> As part of this, the Commission is working to remove obstacles to LNG imports from the US and other LNG producers. Second, the EU envisions an ever-closer cooperation of Member States, Transmission System Operators and the energy industry on security of supply. The rationale here is that, in the event of a tight supply or a disruption, Member States can rely on their neighbours. Third, the strategy proposes a stronger role for the EU in global energy markets by contributing to the improvement of energy governance with a view to promoting competition and transparency. Here, the main tool that the EU intends to use is EU trade policy: it aims to include energy-specific provisions in trade agreements with its partners.<sup>37</sup> In the Commission's words, it 'will seek as a priority to negotiate energy specific provisions contributing to the energy security, notably access to resources, and sustainable energy goals of the Energy Union'.<sup>38</sup> Especially countries that are important from a security of supply perspective are singled out here. The strategy explicitly mentions the United States (as well as Canada). The ambition to negotiate a separate energy chapter in TTIP was a quintessential example hereof, as are the energy provisions of the already concluded EU-Ukraine DCFTA and those in the EU-Singapore FTA.<sup>39</sup> Fourth, the EU wants to strengthen its energy security by promoting more transparency over gas supply to the Union. In other words, the Commission demands more insight into intergovernmental agreements that Member States conclude with third countries which regulate the (long-term) buying of gas. The Union is of the view that if it is involved in negotiations from an early stage of the process and manages to speak with one voice, it is easier to more effectively move forward since it has proven to be more difficult to renegotiate such agreements in the past.<sup>40</sup>

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developing energy technologies; 7. Diversifying external supplies and related infrastructure; 8. Improving coordination of national energy policies and speaking with one voice in external energy policy.

<sup>31</sup>Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC Text with EEA relevance; Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment (Text with EEA relevance).

<sup>32</sup>Security of Gas Supply Regulation (n 31) point 7.

<sup>33</sup>'European Energy Security Strategy' (n 3) and Energy Union Package (n 13).

<sup>34</sup>Energy Union Package (n 13) 4.

<sup>35</sup>ibid, 5.

<sup>36</sup>ibid.

<sup>37</sup>Energy Union Package (n 13) 6.

<sup>38</sup>ibid.

<sup>39</sup>EU-Singapore Free Trade Agreement, Authentic text as of May 2015; EU-Ukraine Association Agreement (n 4) and European Commission, DG Trade (n 5) and United States Trade Representative (n 5).

<sup>40</sup>Energy Union Package (n 13) 6.

## 2.2. Europe's 2020 and 2030 climate and energy strategy: An emphasis on sustainable development

Apart from the Energy Union, with its heavy focus on energy security, the EU further has its own, Union-wide climate and energy strategy in place. This policy is based on both the energy (Article 194 TFEU) as well as on the environmental (Article 191 TFEU) competences of the EU. As is the case with energy, EU environmental policy is based on a shared competence and is set out in Article 191 TFEU. This implies that the Member States may only exercise their competences to the extent that the Union has not exercised its competences and are not allowed to adopt legislative measure that may conflict with or hinder the execution of those that are undertaken at EU level. Article 191 TFEU serves as the basis for the Union's policies in the area of sustainable development, although a connection to Article 194 TFEU on energy policy remains: there is a relationship between the two areas, sometimes leading to overlap or even potential tension between the two articles. One could think of EU climate targets, for example, including goals for shares of renewable energy in Member States' energy mix and how these may arguably be at odds with the energy mix carve-out of Member States under Article 194(2) TFEU.<sup>41</sup> Notwithstanding this fact, the emphasis of the 2020 and 2030 strategies seems to be on sustainable development rather than energy security only.

The Union's 2020 strategy is a policy that inter alia implements the objectives set out in paragraph 1 of Article 194.<sup>42</sup> By 2020, the EU aims to reduce its emissions by at least 20 per cent. In addition, the objective is to reach a 20 per cent share of renewables in the energy mix (including 10 per cent in the transport sector) and achieve energy savings of at least 20 per cent.<sup>43</sup> These objectives combined are known as the 20/20/20 targets. The Union hopes to meet its objectives by setting out five priorities: (1) accelerating investment in energy efficiency; (2) building a pan-European energy market (overlapping objective with the Energy Union); (3) protecting consumer rights in the energy sector; (4) accelerating the deployment of low-carbon technologies; and (5) pursuing good relations with the EU's external energy suppliers and transit countries.<sup>44</sup> While the stress is on sustainable development, the emphasis of the external dimension is on having good relations with third countries in the sphere of energy. This element is thus explicitly taken up in both the Energy Union strategy, as well as the EU's own energy and climate strategy.

The next target on the horizon is the 2030 strategy, where the EU plans to go beyond those goals envisaged for 2020: it includes a 40 per cent cut in greenhouse gas emissions compared to 1990 levels; a 27 per cent minimum share of renewables in the energy mix; and a 27 per cent increase in energy efficiency and savings.<sup>45</sup> To meet these objectives, the EU aims to reform its emissions trading scheme (ETS), focus further on diversifying energy supplies and increase interconnection in the Union, as well as putting in place a new governance system for sustainable energy.<sup>46</sup>

The ambitious targets set out in both the Energy Union strategy and the Climate and Energy strategy cannot be met without acknowledging the importance of the external dimension from the start. In both strategies, the diversification of energy supplies and good relations with the EU's key suppliers are mentioned as a priority. However, it must be acknowledged that both strategies have different points of gravity, which are sometimes hard to reconcile. While the Energy Union focuses on integrating markets and guaranteeing security of supply, the 2020 and 2030 strategies have a different primary goal: to increase the share of renewables and reduce harmful CO<sub>2</sub> emissions. How exactly the Energy Union and the 2020 and 2030 strategies relate to each other remains a point of discussion: although the Energy Union strategy remains a political strategy at present, the idea is that a legal framework will form its foundations in the future. It is conceivable that the two points of gravity of these two major energy and climate strategies of the EU point to the root cause of the ensuing balancing act between furthering climate

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<sup>41</sup> See on the legal interaction between EU environmental and energy policy, for instance, T Sveen, 'The Interaction between Article 192 and 194 TFEU' in *EU Renewable Energy Law: Legal Challenges and Perspectives*, Scandinavian Institute of Maritime Law Yearbook 2014 (Oslo University) 157ff.

<sup>42</sup> See DG Climate Action, 2020 Climate and Energy Package (n 1).

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> See DG Climate Action, 2030 Climate and Energy Framework (n 1).

<sup>46</sup> *ibid.*



and energy security goals. The Union must constantly decide how to reconcile two objectives: importing fossil fuels to guarantee short-term energy security or decarbonising the economy to warranty long-term energy security.

### 3. Externalising internal goals: Sustainable development and energy chapters in EU FTAs

Despite the fact that the 2020 and 2030 strategies are aimed at decreasing the EU's dependence on fossil fuels, the Union would presently not be able to function without fossil fuel imports from abroad. While the EU must live up to the climate commitments it undertook under the UN SDGs and the Paris Agreement, as well as under its own climate and energy strategies, the fact remains that more than half of the energy the EU consumes is imported from abroad.<sup>47</sup> At least 90 per cent of its crude oil is imported, as well as 60 per cent of its natural gas, making the EU one of the leading importers of these fuels. Some EU Member States rely completely on one country (e.g. on Russia for their natural gas) for their energy supply.<sup>48</sup> It is therefore understandable that strengthening and guaranteeing energy security is a top priority for the EU. Nevertheless, it is just as important to acknowledge that the key is to diversify away from fossil fuels in the long run and ensure that the Union is energy efficient and can (fully) rely on renewable energy in the future. This objective seems to be taking a backseat at present, which is reflected in the Union's external relations, for example in the energy and raw materials chapters that the EU is concluding in its FTAs.

This arguably is the cause of the cognitive dissonance with respect to the externalisation of the Union's energy and sustainable development policy: on the one hand, the Union promotes sustainable development and climate change mitigation in its FTAs with third countries, on the other it ensures that it has an abundant supply of fossil fuels. One could argue that this clashes with the objectives of sustainable development, at the very least in the long term. The following section will highlight some of the relevant chapters in EU FTAs to expose this dissonance with a view to suggesting how to proceed in a more coherent manner in the area of energy and climate policymaking in the EU.

The EU acts externally to the extent it has competence to act internally, the capacity for which is governed by the principle of conferral (Article 5 TFEU). This article states that the Union shall act within the powers conferred on it by the Member States.<sup>49</sup> Although conceived from the outset, common commercial policy became an exclusive EU competence only in the Lisbon Treaty, taken up in Articles 206 and 207, Part V, Title II TFEU. Most, if not all, 'new-generation' bilateral EU FTAs in place or under negotiation, however, go well beyond mere trade and common commercial policy. In addition to the classic provisions on the reduction of customs duties and non-tariff barriers in the field of goods and services, these agreements also contain chapters on other relevant trade-related matters, such as intellectual property protection, investment, public procurement, competition and, last but not least, sustainable development and energy. Evidently, not all of the topics covered in EU FTAs necessarily fall within the exclusive competence of the EU and may be shared. This implies that some (draft) chapters of current EU FTAs may pose challenges in the area of competences and cannot be concluded by the EU alone, requiring approval of the FTAs by EU Member States separately.<sup>50</sup>

This was clarified in CJEU Opinion 2/15 on the EU-Singapore FTA.<sup>51</sup> The Commission had submitted a request to the Court of Justice to determine whether it had the exclusive competence to

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<sup>47</sup>Paris Agreement (n 1); See DG Energy, 'Energy Security Strategy' <<https://ec.europa.eu/energy/en/topics/energy-strategy/energy-security-strategy>> (accessed 1 March 2019) and European Commission, *Energy Union Package – Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy* (European Commission 2015) 2.

<sup>48</sup>ibid.

<sup>49</sup>Article 5 TFEU. The Union is to do so in accordance with Chapter 1 of Title V TEU, Article 205 TFEU; see on the existence of EU external competence in particular, B van Vooren and R Wessel, *EU External Relations Law – Texts, Cases and Materials* (Cambridge University Press 2014) Chapter 3, 'The Existence of EU External Competence'.

<sup>50</sup>See Court of Justice of the European Union (hereinafter CJEU) (Request for an Opinion pursuant to Article 218(11) TFEU – Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore – Allocation of competences between the European Union and the Member States) Opinion Procedure 2/15, Opinion of the Court (16 May 2017); note, however, that the Singapore FTA is now split into two agreements (EU only and mixed) – this is likely to be the EU's strategy in the future.

<sup>51</sup>ibid.

sign the Agreement itself. The Court concluded that this was not the case for the EU-Singapore FTA as some of the provisions in the Agreement fell into the area of shared competences (e.g. Investment and Investor-State Dispute Settlement) and therefore the whole Agreement could only be concluded by the EU and the Member States acting together. As regards chapters in the Agreement on energy generation from non-fossil fuels and sustainable development, however, the Court decided that they were within the exclusive competence of the Union.<sup>52</sup> This can be understood from the perspective that these chapters are assumed only to cover the trade-related aspects of energy and the environment. It remains doubtful, however, whether the argumentation of the Court can by definition be extended to all chapters on energy and raw materials in future EU FTAs, as they may vary in their set-up and goals, and can cover non-trade-related aspects of energy and environmental issues.

With this in mind, the section will compare the chapters relevant for sustainable development and energy in recently concluded FTAs (Singapore and Ukraine), as well as a draft chapter in the framework of TTIP negotiations. It will examine the energy chapters in more depth as, unlike the chapters on sustainable development, they are not standardised.

### *3.1. The sustainable development dimension: Chapters on trade and sustainable development and renewable energy generation in EU FTAs*

#### *3.1.1. Trade and sustainable development chapters in EU FTAs*

The EU wishes to become a global frontrunner in the field of promoting renewable energy and sustainable development. This expresses itself, for example, through the inclusion of specific chapters on clean energy (discussed below) and the by-now standardised chapters on sustainable development in the EU's FTAs (e.g. in the EU-Singapore FTA).<sup>53</sup> As the Commission itself phrases it, the EU commits itself to a responsible trade and investment policy as an instrument to implement the UN SDGs.<sup>54</sup> For this reason, the EU has started to include by default chapters on Trade and Sustainable Development (TSD) in its 'new-generation' bilateral FTAs. The first time such a chapter was included was in the 2011 EU-South Korea FTA, which is in its eighth year of implementation in 2019.<sup>55</sup> Other TSD chapters in force are taken up in agreements with Central America and South American countries such as Colombia and Peru, in addition to those taken up in FTAs with the European Neighbourhood (Georgia, Moldova and Ukraine).<sup>56</sup> The EU-Canada Comprehensive Economic and Trade Agreement (CETA) also includes a chapter on TSD, as well as those FTAs that are currently under negotiation.

The existing TSD chapters are based on International Labour Organization (ILO) conventions and Multilateral Environmental Agreements (MEAs).<sup>57</sup> The chapters seek to promote an effective implementation of these agreements, creating a level playing field to not lower environmental standards for the purpose of improving trade and attracting investments, and ensuring the sustainable management of natural resources.<sup>58</sup> TSD chapters in EU FTAs reflect these values through the inclusion of provisions on multilateral labour standards and agreements, MEAs, trade favouring sustainable development, trade in forest products, trade in fish products, upholding levels of protection, review of sustainability impacts, civil society institutions, institutional and monitoring mechanisms, and cooperation on TSD.

The implementation period of the chapters is relatively short, and provisions in EU TSD chapters in FTAs are binding and subject to dispute settlement. The rationale is to ensure transparency and make 'real' progress in these areas and not limit them to lip service. Nevertheless, the Commission is also

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<sup>52</sup>Opinion 2/15, paras 147–63: the Court finds that the objective of sustainable development now forms an integral part of the common commercial policy of the EU and that the envisaged agreement is intended to make liberalisation of trade between the EU and Singapore subject to the condition that the parties comply with their international obligations concerning social protection of workers and environmental protection.

<sup>53</sup>EU-Singapore FTA (n 39).

<sup>54</sup>DG Trade, Non-Paper of the Commission Services, 'Trade and Sustainable Development Chapters in EU Free Trade Agreements (FTAs)' (Brussels, 11 July 2017) 1.

<sup>55</sup>EU-South Korea FTA (n 2).

<sup>56</sup>Respectively OJ L 346, 15 December 2012; OJ L 354, 21 December 2012; OJ L 354, 21 December 2012; OJ L 261, 30 August 2014; OJ L 260, 30 August 2014; OJ L 161, 29 May 2014.

<sup>57</sup>DG Trade Non-Paper (n 54) 2.

<sup>58</sup>ibid, 2–3.

studying ways in which to improve the effectiveness of TSD chapters further by exploring other options. One of the possibilities would be to have in place a more assertive partnership on TSD, involving an upgraded partnership for enhanced coordination and joint action with Member States, the European Parliament, international organisations and trade partners. It would also mean making pervasive use of the TSD dispute settlement mechanism, where leverage could be applied in a more systematic way.<sup>59</sup> Another option would be to include a sanction mechanism, as is currently partly in place in the CETA. This would essentially entail the application of sanctions in case of non-compliance impacting trade or investment between the countries.<sup>60</sup>

This practice demonstrates that the EU takes the inclusion of extensive TSD chapters very seriously in its FTAs. The basis for including these chapters is, in the Commission's own words, the UN SDGs. The chapters include provisions on recognising 'the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems' and ensuring that parties 'reaffirm their commitment to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party'.<sup>61</sup> One novel and progressive example of how the Union takes into account multilateral environmental commitments in this respect is the chapter on 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation' taken up in the EU-Singapore FTA, as illustrated below. This is a prime case where the EU has focused on the sustainable development side of energy in its international economic relations.

### 3.1.2. Trade and renewable energy: The EU-Singapore FTA (not yet in force)

The EU-Singapore FTA was concluded on 17 October 2014 and is currently pending ratification on the side of the EU and its Member States, taking into account CJEU Opinion 2/15.<sup>62</sup> Singapore is the biggest trade partner of the EU in the region of the Association of the Southeast Asian Nations (ASEAN).<sup>63</sup> Chapter 7 is entitled 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation'. The chapter is particularly innovative as it covers not only energy in general, but more specifically energy with a focus on sustainable development and climate change mitigation. Additionally, it approaches the theme of renewable energy from a comprehensive trade and investment angle, rather than considering them as completely separate issues. This implies that certain topics, such as energy, are better understood if dealt with in a more holistic and comprehensive manner. The chapter is progressive in that, among other things, it explicitly addresses the need to move away from fossil sources, as set out in the Preamble to the chapter:

In line with global efforts to reduce greenhouse gas emissions, the Parties share the objective of promoting, developing and increasing the generation of energy from renewable and *sustainable non-fossil sources*, particularly through facilitating trade and investment. To this effect, the Parties shall cooperate towards removing or reducing tariffs as well as non-tariff barriers and fostering regulatory convergence with or towards regional and international standards.<sup>64</sup>

The chapter consists of seven articles, most of which contain 'General Agreement on Tariffs and Trade (hereinafter: GATT)-plus'-type commitments on trade and investment in renewable energy. The obligations set out in the chapter apply to all measures that may affect trade and investment between the parties related to the generation of energy from renewable and sustainable non-fossil sources, such as wind, solar, aero thermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases, but not to the products from which energy is generated

<sup>59</sup>ibid, 6–7.

<sup>60</sup>ibid, 7.

<sup>61</sup>e.g. Article 292 paras 1 and 2, Chapter 13 of the EU-Ukraine DCFTA (n 4).

<sup>62</sup>See European Commission, Trade, Countries and Regions, Singapore at <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/>> (accessed 1 March 2019).

<sup>63</sup>The Association of the Southeast Asian Nations (ASEAN) <[www.asean.org](http://www.asean.org)>.

<sup>64</sup>EU-Singapore FTA (n 39) Chapter 7: 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation' (emphasis added).

(Article 7.3(1)).<sup>65</sup> To prevent potential conflict with other parts of the Agreement, the FTA sets out in Article 7.3(3) that the other provision of the Agreement prevail.

There are five main principles set out in the chapter that parties to the Agreement have to adhere to:

- (a) refraining from using local content requirements;
- (b) refraining from local partnership requirements;
- (c) ensuring that procedures concerning the authorisation, certification, etc, are applied in a non-discriminatory, objective and transparent manner;
- (d) ensuring that any administrative charges in connection with the importation of goods and provision of services are compliant with the rules of the overall Agreement; and
- (e) guaranteeing that the terms, conditions and procedures for the connection and access to electricity transmission grids are transparent and non-discriminatory.<sup>66</sup>

Article 7.5 of the FTA sets out rules on non-tariff barriers for the parties in their trade in products for the generation of energy from renewable and sustainable non-fossil sources.<sup>67</sup> It prescribes that in trading such products, the EU and Singapore have to use international standards as a basis for their technical regulations.<sup>68</sup> Moreover, parties are encouraged to include environmental performance in their technical regulations.<sup>69</sup>

Finally, Article 7.6 of the Agreement allows parties to invoke general exceptions that are present throughout the whole Agreement (e.g. Articles 2.14 and 8.62) and which cannot derogate from the exceptions provided for in the World Trade Organization (hereinafter WTO) Agreements.<sup>70</sup>

All in all, we can conclude that although the obligations are not extensive and particularly far reaching, this chapter of the EU-Singapore FTA nevertheless elevates the current standard for the regulation of renewable energy in EU FTAs. Not only does it firmly commit to the effort of eliminating greenhouse gas emissions, it also, as mentioned before, approaches (clean) energy from a more integrated trade and investment perspective. A similar chapter has been included in the FTA with Vietnam (not yet in force).<sup>71</sup>

### 3.2. *The energy security dimension: Chapters on energy and raw materials in EU FTAs*

Somewhat paradoxically, however, the very same FTAs that include chapters on TSD include (draft) chapters on removing discriminatory practices in fossil fuel trade and access to fossil energy supplies (arguably unsustainable in connection with their carbon intensity). Considering the EU's own international climate and environmental commitments and internal policies, one could assert that negotiating access to fossil fuels that should be as cheap and abundant as possible is, at minimum, in tension with fulfilling the Union's obligations under the chapters on TSD and international climate commitments. Following this assertion, the subsections below examine the chapters on energy and raw materials that emphasise the energy security aspect and which the EU has taken up or is currently negotiating in its FTAs: the energy-specific chapter in the EU-Ukraine DCFTA and a draft chapter from TTIP negotiations.

As explained in the previous section, the EU realises that it is imperative to secure energy supply for its citizens. For this reason, the EU in its FTAs, in parallel to TSD chapters, attempts to eliminate discriminatory practices in international fossil fuel trade in its bilateral agreements (e.g. in the EU-Ukraine DCFTA).<sup>72</sup> Beyond that, the EU even goes as far as attempting to include provisions that legally secure access to fossil fuel energy sources (mainly natural gas) in its FTAs with third countries (e.g. in the ongoing, yet currently dormant, EU-US TTIP negotiations). These chapters are discussed in turn below.

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<sup>65</sup>ibid, Article 7.3(1).

<sup>66</sup>ibid, Article 7.4 (Principles).

<sup>67</sup>ibid, Article 7.5(1).

<sup>68</sup>Especially the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) are considered to be relevant international standards and are particularly encouraged.

<sup>69</sup>EU-Singapore FTA (n 39) Article 7.5(2).

<sup>70</sup>ibid, Article 2.14 sets out exceptions for the trade in goods, Article 8.62 does the same for trade in services.

<sup>71</sup>EU-Vietnam FTA (signed on 30 June 2019) Chapter 14; see 'European Commission, Trade Policy in Focus, EU-Vietnam Agreement' <<http://ec.europa.eu/trade/policy/in-focus/eu-vietnam-agreement/>> (accessed 18 July 2019).

<sup>72</sup>EU-Ukraine DCFTA (n 4).

### 3.2.1. EU-Ukraine DCFTA (provisionally in force)

The EU-Ukraine DCFTA is part of the larger Association Agreement that the EU concluded with Ukraine.<sup>73</sup> It was signed on 27 June 2014 but has not yet entered into force as it is still pending ratification in some EU Member States.<sup>74</sup> Due to security, political and economic challenges faced in the region, the active implementation of the DCFTA was postponed for 2016.<sup>75</sup> Nevertheless, the Agreement is provisionally in force as of 1 January 2016.

Notwithstanding the above, Chapter 11 of the DCFTA, entitled ‘Trade-Related Energy’, is a prime example of a highly evolved FTA as far as energy is concerned. Unlike the EU-Singapore FTA, however, its focus is not on renewable energy. Rather, the chapter clarifies outstanding issues in the more traditional energy field of fossil fuels and electrical energy. We can understand this more thorough regulation of the trade-related aspects of the traditional energy sector between the EU and Ukraine also from the viewpoint of Ukraine being part of the Energy Community Treaty, by means of which the EU extends its internal energy acquis to third countries.<sup>76</sup> In addition to this, the chapter’s underlying rationale was clearly to guarantee an enhanced security of supply in the form of fossil fuels for the EU.

The chapter is comprised of 12 articles that centre around issues of dual pricing, transit, transport and quantitative restrictions. Chapter 11 provides clear definitions of previously ambiguous terms in the context of trade-related energy issues. It describes ‘energy goods’, for instance, within the context of the Agreement as natural gas, electricity and crude oil, and explicitly includes their respective Harmonised System codes.<sup>77</sup> What is more, the definition of ‘fixed infrastructures’, such as gas storage facilities and gas and electricity grids, is taken over from the 2003 EU Gas and Electricity Directives.<sup>78</sup> Last but not least, ‘transit’ and ‘transport’ of energy is implied to cover the transit and transportation of energy goods through fixed infrastructures and pipelines, including oil.<sup>79</sup>

Articles 269–271 of Chapter 11 form its centre of gravity and prohibit explicitly any forms of dual pricing and related discriminatory measures when trading energy. Article 269(1) prescribes that the price of gas and electricity supply shall be determined on the basis of supply and demand only, although parties are allowed to regulate for the purposes of ‘general economic interest’.<sup>80</sup> If parties do decide to regulate in this area, they have to ensure that price regulations and their calculations are published prior to their entry into force.<sup>81</sup>

Dual pricing (the sale on the domestic market at far below global market prices, compared to high export prices abroad) is prohibited altogether by means of Article 270.<sup>82</sup> This ‘GATT-plus’ style commitment can be seen as a very clear stance on the practice, and in line with the EU stance on dual-pricing policies of the past decades.<sup>83</sup> Although the prohibition does not link dual pricing with subsidisation directly, as is often the case in WTO debates, it does so implicitly by including all measures that may result in dual pricing: ‘... neither Party or a regulatory authority thereof, shall adopt or maintain

<sup>73</sup>EU-Ukraine Association Agreement (n 4).

<sup>74</sup>Only after all EU Member States have adopted/approved the Association Agreement will it enter into force.

<sup>75</sup>European Commission, DG Trade, ‘Ukraine’ <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/>> (accessed 1 March 2019).

<sup>76</sup>Energy Community Treaty: ‘Treaty Establishing the Energy Community Treaty’ [2006] OJ L 198, p. 18.

<sup>77</sup>EU-Ukraine DCFTA (n 4) Chapter 11: Trade-Related Energy, Article 268(1); The Harmonised System Convention: (Harmonised Commodity Description and Coding System), 14 June 1983, 1503 UNTS 167 is the system according to which all schedules are structured, See World Customs Organization, <<http://www.wcoomd.org>> (accessed 1 March 2019).

<sup>78</sup>EU-Ukraine DCFTA (n 4) Article 268(2) and the 2003 European Commission Gas and Electricity Directives: Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L 176/37; and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L 176/57.

<sup>79</sup>EU-Ukraine DCFTA (n 4) Article 268(3) and (4).

<sup>80</sup>ibid, Article 269(2).

<sup>81</sup>ibid, Article 269(3).

<sup>82</sup>ibid, Article 270 (Prohibition of Dual Pricing).

<sup>83</sup>A Marhold, *Fossil Fuel Subsidy Reform in the WTO: Options for Constraining Dual Pricing in the Multilateral Trading System* (ICTSD 2017) 6–9.



a measure resulting in a higher price for exports of energy goods to the other Party than the price charged for such goods when intended for domestic consumption'.<sup>84</sup>

The same applies with respect to customs duties and quantitative restrictions, which are prohibited unless they are justified on grounds of public policy or public security; protection of human, animal or plant life or health; or the protection of industrial and commercial property.<sup>85</sup> It goes without saying that such restrictions or measures cannot constitute a means of arbitrary discrimination or a disguised restriction on trade between the parties.

Considering the fact that Ukraine lies in a geopolitically sensitive region, especially as far as the transit of energy is concerned, Chapter 11 could not do without rules on energy transit and the transportation of energy.<sup>86</sup> To avoid any ambiguity, the drafters of Article 272 wanted to ensure as broad a coverage of transit as possible in the article. For that reason, the principle of freedom of transit, enshrined in the rules of both the GATT and the Energy Charter Treaty (hereinafter: ECT) were included.<sup>87</sup> The article reads as follows:

The Parties shall take the necessary measures to facilitate transit, consistent with the principle of freedom of transit, and in accordance with Article V.2, V.4 and V.5 of GATT 1994 and Articles 7.1 and 7.3 of the Energy Charter Treaty of 1994, which are incorporated into and made part of this Agreement.<sup>88</sup>

This article combines the relevant transit provisions of both the GATT and the ECT, including GATT Article V as covering fixed infrastructures.<sup>89</sup> It adds to that the obligations on transit set out in Article 7 of the ECT that go beyond those in the GATT, as the ECT provision was specifically tailored to deal with gas pipelines. By combining both relevant articles from both treaties, the article mitigates the uncertainty of the extent of coverage of energy transit in the EU-Ukraine DCFTA. That being said, both the EU and Ukraine are parties to the WTO and the ECT, and in that sense the article merely summarises their existing commitments.<sup>90</sup> Nevertheless, it is novel to see them combined in one and the same article.

The articles that follow were also clearly drafted with energy security considerations in mind: Article 275, for instance, obliges parties to take all measures to prevent unauthorised taking of energy goods, while Article 276 deals with the interruption of transit.<sup>91</sup> The latter article *inter alia* prohibits, under any circumstance, the interruption of existing transport or transit of energy goods.<sup>92</sup> It seems likely that these articles were taken up owing to the unreliable energy supply and transit situation following the gas disputes between Russia and Ukraine in the 2000s.

With regard to transport of energy, Article 273 focuses mainly on third-party access to the grid. Parties must ensure that tariffs, capacity allocation procedures and all other conditions are objective, reasonable and transparent and do not discriminate on the basis of origin, ownership or destination of the electricity or gas.<sup>93</sup> Here, explicit reference is made to the Energy Community Treaty.<sup>94</sup> Other articles of the chapter (namely Articles 277 and 278) emphasise this relationship once again, also with respect to setting up regulatory authorities for electricity and gas, something that falls into the 'unbundling' legislation of the Energy Community.<sup>95</sup>

When compared to the EU-Singapore FTA, Chapter 11 of the EU-Ukraine FTA is clearly more focused on energy security and fossil fuels, rather than renewable energy. The EU aspired to be as

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<sup>84</sup>EU-Ukraine DCFTA (n 4) Article 270(1).

<sup>85</sup>*ibid*, Article 270(2).

<sup>86</sup>As is well known, Ukraine was subject of many gas transit issues in the 2000s, see on this in particular Marhold (n 27).

<sup>87</sup>Article V (Freedom of Transit) of the GATT 1994: General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) and Article 7 (Transit) of the Energy Charter Treaty, 18 April 1998, 2080 UNTS 100.

<sup>88</sup>EU-Ukraine DCFTA (n 4) Article 272 (Transit).

<sup>89</sup>GATT Article V (Freedom of Transit).

<sup>90</sup>*ibid*.

<sup>91</sup>EU-Ukraine DCFTA (n 4) Article 275 (Unauthorised takings of energy goods) and Article 276 (Interruption).

<sup>92</sup>*ibid*, Article 276(2).

<sup>93</sup>*ibid*, Article 273 (Transport).

<sup>94</sup>*ibid*.

<sup>95</sup>*ibid*, Article 277 (Regulatory authority for electricity and gas) and Article 278 (Relationship with the Energy Community).

comprehensive as possible with regard to trade-related energy in its relations with Ukraine. In this respect it managed to address and clarify several outstanding issues, albeit not necessarily with sustainable development in mind. The chapter does, after all, promote the lowering of trade barriers for fossil fuels with the goal of providing the Union with cheap and accessible natural gas. It is questionable to what extent this goal is reconcilable with the Union's 2020 and 2030 energy and climate strategies, as well as with the content of the TSD chapters in its FTAs. However, one should bear in mind that both the Singapore and Ukraine FTAs were negotiated prior to the conclusion of the Paris Agreement (albeit after the UN SDGs). For that reason, it may not be surprising that they do not incorporate the level of commitment undertaken in the framework of the Paris Agreement.

### 3.2.2. EU-US TTIP negotiations

Similar questions can be raised with respect to the – now dormant – negotiations for the TTIP.<sup>96</sup> These have been anything but controversy free, not least because of the proposed Investor-State Dispute Settlement (ISDS) mechanism.<sup>97</sup> However, from the viewpoint of the EU's energy security ambitions, TTIP is a fascinating example. The reason for this is that in TTIP negotiations, the EU is explicitly seeking access to US energy supplies (mostly shale gas) and aims to include solidified legal commitments on these issues in the Agreement. In recent years, the Union has felt increasingly pressured to diversify its energy supplies, moving away from capricious suppliers in the European neighbourhood and its reliance on countries in the Gulf. It is for that reason that the EU was advocating for the inclusion of an energy chapter during TTIP negotiations. More specifically, the EU was making the case for an 'access to supplies' approach in the chapter (emphasising the export side of trade), rather than the 'access to markets' rationale of WTO rules, a rather novel development.<sup>98</sup>

The US has so far not been willing to accommodate the EU's wishes in this respect and does not seem to be eager to include an energy chapter in the Agreement.<sup>99</sup> One explanation for this is that the position of the US as an energy importing/exporting country has changed significantly over the years: the US was a net importer until relatively recently and even had an oil export ban in place following the 1970s' oil crises to guarantee its energy security.<sup>100</sup> However, large discoveries of shale gas in the early 2010s turned the situation around completely. This resulted in a substantial decrease of US imports of its total crude oil requirement.<sup>101</sup> Moreover, the US has now become the biggest producer of liquid fuels globally and the largest gross exporter of refined products.<sup>102</sup> The EU does not import US crude oil or natural gas at present but hopes to start importing LNG from the US in the near future.<sup>103</sup> The strategy pursued in TTIP fits squarely into the EU's Energy Union ambitions, more specifically in the dimension of energy security discussed above: the EU aims to diversify its energy supplies and move away from capricious suppliers in the European neighbourhood and the reliance on countries in the Gulf.

Apart from increasing its energy security, the EU's ambitions also seem to be to set a new global energy regulation standard for energy governance, using TTIP as a pioneer example. Illustrative thereof is a leaked EU Commission non-paper from May 2014, stating among other things that

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<sup>96</sup>TTIP (n 5).

<sup>97</sup>See on this issue e.g. M Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements' (2015) 18 *Journal of International Economic Law* 1.

<sup>98</sup>WTO disciplines were mainly designed with an emphasis on imports and providing market access, rather than facilitating access to countries' supplies of natural resources, see generally A Marhold, 'WTO Law and Economics and Restrictive Practices in Energy Trade: The Case of the OPEC Cartel' (2016) 9 *Journal of World Energy Law and Business* 475.

<sup>99</sup>KJ Benes, *Considerations for the Treatment of Energy in the US-EU Transatlantic Trade and Investment Partnership* (Columbia | SIPA Center on Global Energy Policy, New York, September 2015) 15.

<sup>100</sup>See Borderlex, Interview: End of US Crude Oil Export Ban – Consequences for TTIP and the Climate, 15 January 2016; and J Bordoff and T Houser, *Navigating the US Oil Export Debate* (Columbia | SIPA Center on Global Energy Policy, New York, January 2015).

<sup>101</sup>From 67 per cent in 2008, to 27 per cent in 2014, Benes (n 99) 7.

<sup>102</sup>*ibid.*

<sup>103</sup>*ibid.* 8; also see generally on this topic I Espa and K Holzer, 'Negotiating an Energy Deal under TTIP: Drivers and Impediments to U.S. Shale Gas Exports to Europe' (2015) 43 *Denver Journal of International Law and Policy* 357.

[t]he EU and the US have been at the forefront of challenging export restrictions for the last decade, as illustrated by their successful common effort to lift China's export restrictions on raw materials including rare earths.

Combatting resource nationalism, together vis-à-vis third countries while at the same time allowing for export restrictions to exist between us sends the wrong message to our partners and offers some of these resource-rich countries a great opportunity to interpret trade rules in a way which is detrimental to our economies.<sup>104</sup>

It transpires from this that the EU is a strong proponent of stronger rules regarding energy access, distribution, trade and sale. The EU's position sends a strong message about what it is aspiring to with respect to TTIP, energy regulation and access to fossil fuels. The 2016 leaked draft chapter, for example, entitled 'EU's proposal for a Chapter on Energy and Raw materials in TTIP', followed up on this, with the EU advocating inclusion of the following:

In addition to the provisions on Energy and Raw Materials laid down in this document, the Parties must agree on a legally binding commitment to eliminate all existing restrictions on the export of natural gas in trade between them as of the date of entry into force of the Agreement. The language of such commitment is still to be discussed.<sup>105</sup>

While the terms 'energy security' or 'security of supply' are not mentioned directly in the leaked draft, the proposed language strongly implies that strengthening the Union's energy security is the underlying motive. This comes to fruition in the EU's proposal to include an 'Energy Consultation Mechanism', which is to apply in situations of 'emergency or threats thereof in the area of energy'.<sup>106</sup> By means of the draft chapter, including its suggested Energy Consultations Mechanism, the EU is sending a strong message on how it expects to strengthen its energy security. First, it wants to guarantee access to US shale gas supplies, and, second, it wants to set up a mechanism whereby the contracting parties can help each other in energy emergency situations. In this draft chapter, the EU exposes itself as a strong proponent of more solid rules regarding energy access, distribution, trade and sale, with a strong focus on energy security and fossil fuels.

#### **4. Sustainable development and energy security in EU FTAs: A cognitive dissonance**

The examples above allow us to draw a comparison between chapters in EU FTAs that focus on sustainable development and clean means of energy generation and those whose primary aim it is to guarantee access to fossil fuels with a view to the Union's energy security. It becomes clear that the EU's internal cognitive dissonance in these areas is externalised in its trade relations with third countries: on the one side, the EU now by default incorporates TSD chapters in its FTAs and the EU-Singapore FTA even contains a progressive chapter on the removal of trade barriers concerning renewable energy. Chapters focusing primarily on energy security with strategic energy partners, on the other hand, are Chapter 11 on 'Trade-Related Energy' in the EU-Ukraine DCFTA, as well as the draft chapters on energy and raw materials negotiated in the context of TTIP. Based on the two types of chapters on energy we have observed in these 'new-generation' FTAs, we can conclude the following: while the chapters on TSD and the promotion of trade and investment in renewable energy (Singapore) are clearly in line with the EU's international climate commitments and notions of sustainable development, this cannot straightforwardly be claimed of the chapters on trade-related energy (Ukraine, TTIP), whose emphasis is on energy security, with sustainable development taking a back seat. These chapters are clearly tailored towards access to fossil fuels and eliminating discriminatory practices in their trade.

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<sup>104</sup>European Commission, EU-US Transatlantic Trade and Investment Partnership, 'Raw Materials and Energy – Initial EU Position Paper' (2015) and Non-paper on a Chapter on Energy and Raw Materials in TTIP (leaked) 27 May 2014.

<sup>105</sup>European Commission, DG Trade, Note for the Attention of the Trade Policy Committee, 'TTIP: EU's Proposal for a Chapter on Energy and Raw Materials in TTIP' (Brussels, 20 June 2016).

<sup>106</sup>EU's Proposal for a Chapter on Energy and Raw Materials (n 105) Annex II, Energy Consultation Mechanism, under 1.

In comparing both types of chapters, the reader is therefore confronted with a rather stark contrast. The EU's negotiating agenda with regard to the desired energy and raw materials chapter in the framework of TTIP seems, for instance, to be 'fuelled by a true thirst for fossil fuels'. This presents the EU in a radically different light from that of the global frontrunner in sustainable development it aspires to be.

One way to overcome this cognitive dissonance is for the EU to stress the promotion of renewable energy and sustainable targets in both its internal and external dealings as this will automatically contribute to the Union's ability to become increasingly energy efficient and, more importantly, self-sufficient and less dependent on fossil fuel imports from abroad. A crucial element that would contribute to becoming less dependent on fossil fuels would be for the EU to take a stronger stance against fossil fuel subsidies. EU Member States still subsidise their fossil fuel sector heavily, both directly and indirectly.<sup>107</sup> Such subsidies keep the fossil fuel industry afloat artificially, including from outside the EU, and displace cleaner energies in the energy mix.

It may be argued, however, in the EU's defence, that although different in their objectives, the Singapore and Ukraine FTAs, reflecting both ends of the spectrum, offer interesting examples of modern-day FTAs that include progressive energy regulation. While non-tariff barriers for renewable energy were at the heart of negotiations with Singapore, with Ukraine the objective clearly seems to have been to enhance energy security for the EU, resulting in detailed rules regulating non-discrimination and dual-pricing policies. The result is that the EU-Singapore FTA incorporates a ground-breaking chapter on non-tariff barriers in renewable energy generation. The Ukraine DCFTA chapter on energy focuses rather on transit and pricing policies in a specialised and technical manner.

The question then is to what extent the notions of energy security and sustainable development are contradictory. In the opinion of the author, in theory they are not: long-term energy security implies that this energy security is sustainable in nature as well, as this is the only way forward if we take our climate commitments seriously. However, the reality is that in the short term, there seems to be a tension between the strategic and commercial interests of the Union and its Member States on the one hand, and the non-trade value of sustainable development on the other. This tension is reflected to some degree internally (the Energy Union versus the 2020/2030 strategies) and comes to expression externally in the conclusion of TSD chapters, as well as energy and raw materials chapters, externally in its FTAs.

Apart from balancing sustainable development with energy security, the EU must, moreover, move carefully in these areas as energy and environmental policy remain competences that the EU shares with its Member States (a significant part of which are fully dependent on fossil fuel imports). For matters of coherence and attaining a truly decarbonised economy, both the EU and its Member States must therefore critically assess their stance towards fossil fuels, and to what extent they really need to be dependent on them, or whether cleaner alternatives may be easier to attain than they may seem.

## 5. Conclusion

The cognitive dissonance in the EU's external energy and sustainable relations described in this paper reflects the tightrope the Union must walk internally: it has set ambitious 2020 and 2030 climate targets, in addition to its international commitments under the Paris Agreement and the UN SDGs. At the same time, however, it continues to be heavily dependent on fossil fuels and realises it is unable to kick this 'addiction' anytime soon, aspiring to establish an Energy Union to integrate the IEM, a large part of which is still fossil fuel based. While it is understandable that the Union needs to guarantee the flow of available and affordable energy for its citizens and that therefore negotiating access to fossil fuels with non-EU countries is unavoidable in the short term, long term this approach will conflict with ensuring a sustainable, decarbonised, fossil fuel-free future for the Union. One may ask how the EU plans to reconcile and bridge these objectives internally, as well as abroad, for example in its Energy Union strategy, in the future.

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<sup>107</sup>See generally European Parliament, DG for Internal Policies, *Fossil Fuel Subsidies – In-depth Analysis for the ENVI Committee* (Brussels, 2017).

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### **Declarations and conflict of interests**

The author declares no conflicts of interest with this work.