

The EU as a Global Normative Energy Actor in its External Energy Relations with its Neighbourhood: a Case-Study of EU-Russia Energy Relations

PhD in Law (Full-Time)

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Declaration of Original Authorship

I confirm that this is my own work and use of all material from other sources has been properly and fully acknowledged.

Natasha A. Georgiou

To the remarkable
women in my life
that have inspired me

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Completing a doctoral thesis is by no means an easy task which requires patience, stamina, perseverance and dare I say courage. Some fundamentals are necessary: besides an inherent interest in scientific research and a deep desire to answer a single question profoundly pertinent to legal scholarship, a solid social infrastructure is mandatory. Having received more than the ample support required, I feel compelled to thank the following institutions and people that have been instrumental in this incredible journey that has facilitated my research. First and foremost, I am appreciative to the University of Reading and the School of Law for my Studentship which enabled me to embark on this academic path. I am also grateful to the following institutions which have provided a platform for academic debate and research, namely: (i) the Energy Charter Secretariat in Brussels and my mentor Dr. Ernesto Bonafé for my time spent at the Secretariat whilst undertaking my Internship and Research Fellowship; the European University Institute (EUI) in Florence and Professor Marise Cremona for my time at the Law Department as a Visiting Scholar; (iii) the Oxford Institute of Energy Studies (OIES) and Dr. Katja Yafimava, Dr. James Henderson and Howard Rogers for the opportunity to undertake research and publish under the auspices of the OIES as a Doctoral Research Fellow; and (v) the University of the Witwatersrand (WITS) in South Africa and Vice-Chancellor Adam Habib and Professor David Everatt for the Visting Fellowship at the WITS School of Governance. A special thanks to my supervisors Dr. Anne Thies and Dr. Lawrence Hill-Cawthorne for their patient guidance and advice over the years. I would also like to mention Dr. Ioannis Glinavos, Dr. Jorge Guira and Dr. Deni Mantzari for their support, supervision and comments at different junctures in my academic career. In addition I would like to thank my examiners, Professor Marise Cremona and Professor Chris Hilson who made my viva an enjoyable experience. A special thanks in particular to Proffessor Marise Cremona for her invaluable comments and feedback regarding supplemental edits to the research which has enhanced my thesis. An infinite amount of gratitude is also due to the European Society of International Law (ESIL), the Society of International Economic Law (SIEL) and the many academics and experts I have met over the years at conferences and seminars who have engaged in academic debate and discussion providing a sounding board for my research. Finally, I am thankful to my family and friends, in particular my partner, for the encouragement and support over the years and for enduring lengthy discussions about my research despite not sharing my fascination for EU-Russia relations and energy trade policy.

List of Abbreviations

AA	Association Agreements
ALTENER	Programme of technical assistance adopted in September 1993 to encourage the promotion of renewable energy sources and reduce CO2 emissions
BCM	Billion Cubic Metres
BIT	Bilateral Investment Treaty
BRIC	Brazil, Russia, India, China
CCP	Common Commercial Policy
CEEC	Central and Eastern European Countries
CEPA	Comprehensive and Enhanced Partnership Agreement
CFSP	Common Foreign and Security policy
CIS	Commonwealth of Independent States
CSDP	Common Security and Defence Policy
CO2	Carbon Dioxide
DCFTA	Deep and Comprehensive Free Trade Agreements
EaP	Eastern Partnership
EC	European Community
EC	European Commission
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECSC	European Coal and Steel Community
ED	Energy Dialogue
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Energy Charter
EFP	European Union Foreign Policy
EFTA	European Free Trade Association
ENP	European Neighbourhood Policy
ENTSO-E	European Network of Transmission System Operators for Electricity
ENTSO-G	European Network of Transmission System Operators for Gas
EP	European Parliament
ERTA	Agreement concerning the labour of crews of vehicles engaged in international road transport
EU	European Union

EUR	euro
EURATOM	European Atomic Energy Community
FDI	Foreign Direct Investment
FTA	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICA	International Court of Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IEA	International Energy Agency
IEC	International Energy Charter
IGA	Intergovernmental Agreements
INOGATE	The Interstate Oil to Gas Programme of technical assistance which is part of TACIS, the European Community's technical assistance programme for the New Independent States of the former USSR
IR	International Relations
ITO	Independent Transmission System Operator
LNG	Liquefied Natural gas
MIT	Multilateral Investment Treaty
MS	Member States
MFN	Most Favoured Nation
MoU	Memorandum of Understanding
NAFTA	North America Free Trade Agreement
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental Organisation
NIC	New Independent States
OPEC	Organisation of Petroleum Exporting Countries
PA	Partnership Agreement
PCA	Partnership and Cooperation Agreement
PCIA	Permanent Court of International Arbitration
PHARE	Programme of technical assistance for Central and Eastern Europe
PSA	Production Sharing Agreement
RUB	Russian Ruble
SAVE	Energy efficiency programme launched in 1991 to stabilise CO2 emissions

SYNERGY	Programme of technical assistance for international co-operation in the energy sector
TACIS	Technical assistance to the Commonwealth of Independent States
TCM	Trillion Cubic Metres
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TEP	Third Energy Package
TFEU	Treaty on the Functioning of the European Union
TPA	Third Party Access
TSO	Transmission System Operator
UfM	the Union for the Mediterranean
UN	United Nations
UNCITRAL	UN Commission on International Trade Law
US	United States
USA	United States of America
USD	United States Dollar
USSR	Union of Soviet Socialist Republics
VP	Vice President
WTO	World Trade Organization

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Abstract

This thesis has focused on the EU's external legal relations with Russia in the energy sphere as a case study of the normative power framework. The thesis has drawn from Manners 'Normative Power Europe' theory, where the central component to the Union's normative power is that of a value-driven foreign policy actor based on the core norms that form its underlying identity (namely, peace, liberty, democracy, rule of law, respect for human rights and fundamental freedoms) which it seeks to promote in its external relations through multilateral legal frameworks. By using the normative power theoretical framework as a reflective device, the thesis has analysed the Union's manoeuvres in the energy sphere with respect to its neighbourhood and Russia to establish whether the Union can be said to be a global normative energy actor. The examination has focused on the EU's approach towards Russia in its energy relations through the normative power lens; which has then been gauged against the EU's approach towards third countries, in particular the Eastern Neighbourhood. In so doing, the perception of the EU as a normative power driven by values has been benchmarked against other underlying factors underpinning external relations with Russia, such as economic and security interests. In undertaking the analysis, this thesis has endeavoured to make a valuable contribution to existing scholarship regarding the EU's role as a global actor and the extent to which the Union is a normative power in its external energy relations with its neighbourhood and Russia. For the purpose of this novel contribution, the study has committed to fulfilling the following: (i) it has introduced the normative power framework focusing on Manners' theory whilst differentiating between different strands and claims of the 'EU as a Power' debates thereby undertaking a more nuanced view; (ii) it has linked the normative actor conceptualisations to the field of energy; (iii) it has tested the normative power framework and normative actor claims by analysing the Union's external relations with its neighbourhood (in particular the Eastern neighbourhood); (iv) it has evaluated the normative power framework and normative actor claims by analysing the Union's external relations with Russia using the ENP analysis as a benchmark comparator; (v) it has revealed additional dimensions to the Union's role as a global actor that includes a strategic element to the Union's usual normative agenda; and (vi) it has provided a more refined understanding and perception of the EU as a global normative energy actor in strategic sectors of the economy where the Union's security interests are at stake.

Chapter 1: Introduction

The conceptualisation of the EU as a normative power serves as a point of departure of this thesis as the prevailing description of the Union's role and identity in global affairs. While the Union's global role and putative normative dimension is presented differently by various observers, there is a prevalent and undisputed claim that the Union is a different kind of global power in the international arena (than a traditional power) and that this novelty manifests itself in the EU's diffusion of norms and values which is characteristic of the type of polity it is.¹ The conceptualisation of the EU as a normative power therefore reflects an understanding that the Union most consequentially affects the international system by promoting its values and norms in its external relations. This thesis will test the above-mentioned claim and perception of the EU as a normative power within the context of EU-Russia energy relations following recent events such as the Ukrainian crisis² and the annexation of Crimea.³ The Union's conduct in the context of its external relations with Russia arguably requires a reassessment of the normative power claim given the Union's manoeuvres following Crimea and a series of trade disputes which has resulted in the subsequent fracture in EU-Russia relations.

More specifically, this thesis examines the Union's external legal relations with Russia in the energy sphere as a case study of the normative power framework. By using the normative power theoretical framework as a reflective device, the thesis analyses the EU's manoeuvres vis-à-vis Russia and ascertains the extent to which the Union can be said to be a global normative energy actor. The research scrutinises: (i) the EU's approach towards its neighbourhood (in particular the Eastern Neighbourhood/Eastern Partnership⁴) in its energy relations through the normative power lens; which is then benchmarked against (ii) the EU's approach towards Russia, its strategic energy partner. In so doing, the notion of the EU as a normative power driven by values is gauged against other likely factors underpinning its external relations with Russia, such as economic and security interests that

¹ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 242

² A prolonged crisis in Ukraine began on 21 November 2013 when then-president Viktor Yanukovich suspended preparations for the implementation of an association agreement with the European Union. The decision sparked and precipitated a revolution that led to Yanukovich's ousting. After the ousting, unrest ensued in eastern and southern regions of Ukraine, from where Yanukovich had drawn most of his support. Subsequently, a rapid political crisis developed after Russian military intervened in the said regions and annexed the then-autonomous Ukrainian region of Crimea. See also Christian Nitoiu 'Is Meaningful Cooperation Between the EU and Russia Still Possible?' in Christian Nitoiu, *Avoiding a 'Cold War': The Future of EU-Russia Relations in the Context of the Ukraine Crisis* (LSE IDEAS 2016) 94

³ The Ukrainian territory of Crimea was annexed by the Russian Federation on 18 March 2014. Since then, the peninsula has been administered as two Russian federal subjects—the Republic of Crimea and the city of Sevastopol, which, until 2016, were grouped in the Crimean Federal District. See also Christian Nitoiu, 'Is Meaningful Cooperation Between the EU and Russia Still Possible?' in Christian Nitoiu, *Avoiding a 'Cold War': The Future of EU-Russia Relations in the Context of the Ukraine Crisis* (LSE IDEAS 2016) 94

⁴ This thesis will refer to the Eastern Neighbourhood and Eastern Partnership interchangeably as a regional dimension to the ENP which was initiated to foster political association and economic integration between the Union and its East European Neighbours which include Ukraine, Moldova, Belarus, Georgia, Armenia and Azerbaijan.

may be underlying factors in the Union's multilateral approach imbedded in values. In undertaking this analysis, the thesis endeavours to ascertain whether there is discourse between the Union's rhetoric and action and whether this disparity is as a result of a normative agenda or strategic, geopolitical considerations.

Whilst the thesis does not purport to suggest that the EU is exclusively normative, it reveals to what extent the EU pursues a normative agenda for non-normative and strategic objectives. The normative power theory is relevant to the EU's external relations with Russia and its neighbourhood where (as the thesis will show) the notion of the EU as a trade and regulatory actor have gained traction given the normative aspects of EU trade agreements with values, principles and legislation included.⁵ However, emphasis on the normative aspects of the EU's actorness has generally lead to an underestimation of the geopolitical and strategic considerations that come into play, especially with respect to Russia and the ENP (in particular the Eastern Neighbourhood), which are also interest-oriented external policies which have emanated from the normative heritage of the EU.⁶ The case study specifically focuses on the Union's external relations with Russia in the energy sphere using the analysis undertaken in the preceding chapters of the thesis, as benchmarks for the Union's conduct in its external relations. In applying the broader analysis to the Union's external energy relations with Russia, the thesis sheds light on the nature of the EU as a normative energy actor and the extent to which the Union pivots between a value-based agenda and geopolitical approach in its energy relations with Russia, where its strategic objectives and interests are at stake.

1.1. The EU as a Global Actor

The way in which the EU exercises its power in the global arena has been the topic of much academic debate with several International Relations theories endeavouring to define the nature of the EU based on its conduct in the world. In many ways, the EU can be said to be playing different roles on the global stage in the kind of power it exerts in its international relations, whether it be a civilian power⁷, soft power⁸ or normative power.⁹ Whilst the forms of 'power' are different, they are often used interchangeably and are synonymous in describing an entity that lacks (or refrains from using) military capabilities to exert its influence. Rather, the role of the EU as a power on the global stage is unique and distinguishable by its conduct which is reminiscent of the Union's integration process after World War II which focused on diminishing inter-state conflict through cooperation founded

⁵ e.g. human rights clauses and approximation clauses (i.e. *acquis*)

⁶ Serena Giusti, 'The EU's Transformative Power Challenged in Ukraine' (2016) 21(2) *European Foreign Affairs Review*, 165-183, 166

⁷ Hedley Bull, 'Civilian Power Europe: A Contradiction in Terms?' (1982) 21(2) *Journal of Common Market Studies*, 149-164

⁸ Joseph S. Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs Press, 2004)

⁹ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235 – 258

in legally binding multilateral instruments.¹⁰ Whilst the use of norms and multilateral legal frameworks alludes to normative behaviour, many academic scholars have opted to acknowledge the EU as a *sui generis* actor in abstract terms which exists in a league of its own and thereby cannot be classified with pre-existing terminology.¹¹ Here, reference to the EU as a 'power' is a case in point. The perception of the EU as a power has led to conceptual ambiguity given the many strands of power and interpretation of the meaning attached to it. As alluded above, power is generally associated with the use of military action and/or military clout in global politics. Whereas with respect to the Union and specifically in relation to this thesis, power refers to the EU's ability to influence and affect change without military action through the use of legal frameworks and European market access which is conditional on conforming to EU rules and regulation. Notwithstanding the ambiguity in terminology, contributions to the 'EU as a Power' debates have helped cement the idea that the Union is a significant international actor that should be taken seriously.¹² Whilst the debates may be fragmented and often used interchangeably,¹³ they provide valuable insight into the Union's existence on the global stage in their efforts to provide acceptable platforms from which the Union's role in international affairs can be understood.

The Union's lack of military action has broadened the theoretical debate on EU foreign policy. In the absence of military instruments, the Union is alleged to use norms and values to assert itself on the global stage thereby enhancing its role as a normative power. Again, the perception of the EU as 'normative' power leads to conceptual ambiguity given the linguistic fluidity of what normative constitutes. Conceptually, there are several potential meanings of the term 'normative'. Starting with the word 'norm', this is usually defined as a principle of right action derived from an ethical perspective.¹⁴ However, 'norm' can also refer to what is construed as 'normal'. If we concede that the *norm* is questionable in a world of politics where *realpolitik* prevails then the secondary meaning of 'norm' and 'normative as indicative of what is construed as normal, would appear inappropriate. Here it is important to note that the 'EU as a power' debates have emanated from International Relations theories which suggest an analytical concept based in the study of politics that cannot be easily transported across into the field of law and legal scholarship. As an IR derived notion, there are bound to be inconsistencies with any legally defined term or understanding of what 'normative' and 'power' entail. A degree of conceptual pluralism is therefore inevitable

¹⁰ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 2

¹¹ *Ibid*

¹² Chad Damro, 'Market Power Europe: Exploring a Dynamic Conceptual Framework' (2015) 22(9) *Journal of European Public Policy* 1336-1354

¹³ Civilian power, soft power and normative power are often used interchangeably as 'powers' that are unrelated to traditional military power however there are subtleties and nuances in their meaning which will be explored further below.

¹⁴ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies (JCMS)* 1183-1204, 1193

as imposing a universal understanding and definition of a politically derived concept is relatively impossible. As a novel contribution to legal scholarship, a reconstruction of the notion of a 'normative power' is therefore required to explicate the meanings of contested concepts as consistent as possible when using them within legal research and analysis.

For the purpose of this research, the perception of the EU as a normative power therefore entails an endogenous belief¹⁵ in cooperation, based on rules and shared norms.¹⁶ It suggests a commitment to export internal structures of multilateral governance to relations with external partners whilst striving for convergence of third parties to EU norms and values. The civilian power argument claims that the Union has a preference for 'soft' civilian means of engagement rather than military force. Civilian power and soft power are therefore often used interchangeably given the similar means that the said actor uses. Soft power includes means such as cultural exchanges and public diplomacy which is applied consistently over the long term for the purpose of fostering cooperation and accommodation.¹⁷ Civilian means is non-military and includes economic, diplomatic and cultural policy instruments.¹⁸ Civilian power finds its roots in François Duchêne's conception of the EU that is distinctive of a normative power.¹⁹ The premise of Duchêne's conception lies in the claim that traditional military power²⁰ has given way to progressive civilian power as the means to exert influence in international relations.²¹

Duchêne's perception of the Union as a civilian power together with Ian Manners' conception of the Union that coined the phrase 'Normative Power Europe', have become a core reference in the literature. According to Manners 'the central component of normative power Europe is that the EU exists as being different to pre-existing political forms and that this particular difference predisposes it to act in a normative way'.²² More specifically, that the Union as a normative power is a value-driven foreign policy actor based on the core norms that form its underlying identity (peace, liberty, democracy, rule of law, respect for human rights and fundamental freedoms) which it seeks to instil in its external relations with third countries through multilateral legal frameworks.

¹⁵ The notion of the EU as a union of values, found its inception in the Laeken Declaration which launched the Convention on the Future of Europe (officially the European Convention) specifically in relation to the EU's external policy.

¹⁶ Laeken Declaration on the Future of the Union, European Council, 14-15 December 2001
<http://www.internationaldemocracywatch.org/attachments/311_Laeken%20Declaration%202001.pdf>
accessed 20 October 2016

¹⁷ Joseph S. Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs Press, 2004)

¹⁸ Hanns Maull, 'Germany and Japan: The New Civilian Powers', (1990) 69(5) *Foreign Affairs*, 92-3

¹⁹ François Duchêne, 'Europe's Role in World Peace', in Richard J. Mayne (ed.) *Europe Tomorrow: Sixteen Europeans Look Ahead* (Fontana, 1972) 32-47

²⁰ Military power includes the use of military force and economic measures often in response to short and intermediate crises with its policies generally more coercive.

²¹ François Duchêne, 'Europe's Role in World Peace', in Richard J. Mayne (ed.) *Europe Tomorrow: Sixteen Europeans Look Ahead* (Fontana, 1972) 32-47

²² Ian Manners, 'Normative Power Europe: A Contradiction in Terms? (2002) 40(2) *Journal of Common Market Studies* 242

1.2. The EU as a 'Normative' Actor Rather Than 'Normative Power'

A common perception as suggested above and expressed by the former Advocate General Francis Jacobs, is that the 'EU is based exclusively on law, not power...' and 'that over the past sixty years or so law has made a unique contribution to the European story'.²³ Whilst this expressed view does hold bearing in that the EU is based on law and not power, it is arguable, as advocated by Marise Cremona and Joanne Scott, that in its external relations, the Union's use of the law can be seen as power.²⁴ This stems from the fact that law is at the foundation of the Union's external power in its capacity to engage on the global stage as an international actor. Similarly, Anu Bradford argues that the EU yields global power through its influence in the world which it successfully exports through the spreading of regulations and norms thereby 'Europeanizing' legal frameworks and markets alike.²⁵ Therefore, whilst the impact of the EU's law beyond its borders and the 'global reach' of EU law may be classified as forms of power, this thesis will examine the ways in which the law is used as powerful instruments of EU external action to assess the extent to which the Union is normative as an 'actor' (rather than a 'power') in its external engagement with its neighbourhood and Russia. Reference to 'power' within the thesis should therefore not be construed as power in the traditional sense of the word but rather as an extension of the Union's 'normativity' and ability to use the law in its external relations as a means of projecting its presence on the global stage. An assessment of the Union's role as a power in global politics, therefore falls beyond the ambit of this thesis. Despite the thesis occasionally alluding and referring to the idea that in the EU's international relations, we can see the law operating or being used as a form of power, the analysis of this thesis will specifically focus on the Union's role as a normative actor rather than a normative power.

1.3. Background: EU External Energy Relations with Russia

The following section provides background to the Union's external energy relations with Russia. The section highlights the challenges that this strategic partnership faces given the political impasse between both powers which has become the new paradigm of engagement following Crimea, against which the Union pursues its normative agenda and tries to institutionalise its energy relations within reliable comprehensive legal frameworks. It is against this backdrop that the Union's normativity is assessed. For this purpose, it is important to note that EU-Russia relations do not exist in a vacuum – it has evolved against a wider geopolitical backdrop of strained relations between Russia and the West and an

²³ Francis Jacobs, Foreword Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: Volume 1: The European Union Legal Order* (Oxford University Press, 2018)

²⁴ Marise Cremona and Joanne Scott, 'EU Law Beyond EU Borders' in Marise Cremona and Joanne Scott (eds), 'EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law' (Oxford University Press, 2019) 1

²⁵ Anu Bradford, 'The Brussels Effect' (2013) 107 *Northwestern University Law Review* 1

ever-growing concern about energy security.²⁶ Energy security is therefore an issue of bilateral tension and remains to be the ultimate test of the EU-Russia relationship. The matter was brought to the fore following the January 2009 Ukraine-Russia gas crisis (hereinafter, 2009 Gas Crisis) when gas supplies to Europe were brought to a halt following a transit dispute between Russia and the Ukraine.²⁷ The 2009 Gas Crisis revealed the EU's vulnerability in its energy dependence on Russia, which subsequently pushed energy security to the top of the EU foreign policy agenda. As a result, energy security has emerged as a contentious issue in EU-Russia relations which has contributed to the steady deterioration of mutual relations.²⁸

Bilateral relations, in particular, have come under increasing pressure in recent years, following a series of trade disputes and supply disruptions, bringing Russia's reliability as a trade partner into question. Tensions have been further exacerbated by Russia's withdrawal from the Energy Charter Treaty (ECT) (a legally binding multilateral framework for the energy sector) which has effectively rendered energy cooperation between the EU and Russia based on political dialogues and commitments that lack legally binding norms regarding investment protection, transit and dispute resolution (which will be further examined in Chapter 5²⁹). With the likelihood of a revised bilateral framework unlikely following the EU's suspension of all talks in response to Russia's annexation of Crimea, the basis of legal ties between these two powers has been brought into question.

As a result, EU-Russia relations appear to have entered a period of stalemate that has eroded the integrity of the supposed 'strategic partnership' and raised concerns as to whether meaningful cooperation between the EU and Russia is still likely or even possible. The fact that Russia has gone from being described as a 'strategic partner' to a 'strategic challenge', as unveiled by Federica Mogherini in the 2016 EU Global Strategy on Foreign and Security Policy, gives credence to this assertion.³⁰

1.4. Objectives of the Thesis

The purpose of this thesis is not to provide a definitive statement as to which conceptualisation of the Union as a power is best or most accurate when considering EU external relations. Rather, the thesis examines to what extent the most pronounced

²⁶ Fraser Cameron, 'The Politics of EU-Russia Energy Relations' (2009) 9 *The EU-Russia Centre Review*, EU-Russia Energy Relations OGEL Collection 18, 20 <http://www.eu-russiacentre.org/wp-content/uploads/2008/10/review_ix.pdf> accessed 8 March 2015

²⁷ Simon Pirani, Jonathan P. Stern and Katja Yafimava, 'The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment' (*Oxford Institute for Energy Studies*, 2009) 4

²⁸ Jeronim Petrovic, Robert W. Ortung and Andreas Wenger (eds), *Russian Energy Power and Foreign Relations. Implications for Conflict and Cooperation*, (Routledge, 2009) 91

²⁹ See Chapter 5 Section 5.2.3.1 (*Limitations of International Legal Frameworks Regulating EU-Russia Energy Relations*)

³⁰ European Commission, 'A Global Strategy for the European Union's Foreign and Security Policy', June 2016 <https://europa.eu/globalstrategy/sites/globalstrategy/files/about/eugs_review_web_4.pdf> accessed 10 August 2016.

perception of the EU in the literature - Normative Power Europe - explains the EU's external energy relations, focusing on the Union's energy relations with Russia and the Eastern Neighbourhood. In the alternative, the thesis proposes a more nuanced understanding of the EU as a global actor which is 'normative' in its use of the law (as a form of power) to project itself on the international stage. The EU's external energy relations with Russia will serve as the touchstone for the bulk of the analysis which will be undertaken against the backdrop of the Union's external relations with its neighbours, in particular the Union's Eastern Neighbourhood.

The overall aim of the thesis is to supplement Manners' perception of the EU as a power driven by values with a more refined conceptualisation of the Union as a 'normative' actor in its use of legal frameworks as tools to pursue its objectives which are not exclusively value-based. For this purpose, the thesis will examine the EU's role as a global actor in the energy sector by examining the Union's approach to its external relations and its involvement in the shaping of an international legal order in the energy realm. The EU's general strategy in its external relations can best be described as promoting a rule-based market approach and an international multilateral legal order, which are inspired by the EU's own values and objectives. We see this approach predominantly used in the legal instruments the EU uses in its external relations with third countries to export the *acquis*.³¹ Third countries eager to obtain access to the European market willingly agree to conform to an EU model based on EU norms and values. However, the EU model does not provide a one-size-fits-all approach with some countries (in particular Russia) reluctant to concede on a rule-based market approach. By examining the legal challenges surrounding the implementation of this approach, specific attention will be devoted to the application of EU law principles in the Union's external energy relations with Russia. Finally, the thesis will scrutinise the governance of the EU's external energy policy vis-à-vis Russia by examining the legal instruments and mechanisms the EU employs and the rationale for implementing same.

In many ways, the EU's policy towards Russia can be seen as a test case for the effectiveness of the Union as a normative power in its external relations.³² The relationship with Russia sheds light on the Union's ability, or inability, to form a coherent external policy and implement it.³³ It has been argued that the EU has a clear normative agenda as far as its external relations are concerned,³⁴ while others have claimed that, in its relations with

³¹ The *Acquis Communautaire* is the accumulated body of European Union (EU) law and obligations from 1958 to the present day. It comprises all the EU's treaties and laws (directives, regulations, and decisions), declarations and resolutions, international agreements and the judgments of the Court of Justice.

³² Hiski Haukkala, *The EU-Russia Strategic Partnership: the Limits of Post-Sovereignty in International Relations*, (Routledge 2010)

³³ Hiski Haukkala, 'Lost in Translation? Why the EU has failed to Influence Russia's Development' (2009) 61(10) *Europe-Asia Studies* 1757-1775

³⁴ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies (JCMS)* 1183-1204, 1193

Russia, the EU appears to give more weight to its economic interests than its normative objectives.³⁵ Whilst the Union's normative agenda includes a rule-based market approach to trade which inevitably encompasses economic interests, the distinction lies in the pursuit of values (normative agenda) over interests (economic or security agenda) which is the recurring dilemma the Union grapples with in its external relations with Russia.

The thesis tests these arguably incompatible claims to ascertain the extent to which the EU is a global normative energy actor in its external relations with Russia. Despite the Union's desire to entrench its energy relations with Russia within legally binding frameworks, Europe's heavy reliance on Russian energy supplies inevitably means that there is a constant struggle to find balance between its values and interests. If the EU's interests are inevitably likely to tip the balance given the economic / strategic significance of the energy sector and the security nexus of energy in relation to Europe's gas supply, then this alludes to an actor that is not only normative but also strategic at heart. It is within this context that the thesis makes a novel contribution to the field using the EU's external energy relations with Russia as the main indicator for assessing whether the Union can be considered a normative actor in global energy relations.

The normative power framework, as mentioned above, offers an explanation as to why the EU attempts to frame energy relations with Russia within EU principles. In so doing, the EU is seen to have an impact internationally through the values it embodies, thereby shaping what it perceives as 'normal' in the international sphere, which ultimately qualify it as a normative power. It also alludes to the Union's self-perception and self-projection as a different hybrid of international actor that shuns away from traditional models of power politics that seeks to promote a rule-based international order.³⁶ However, whilst the perception of the Union as a normative power has become mainstream in recent years, there is conceptual ambiguity surrounding what a normative power constitutes which requires further dissection (which will be undertaken in the chapter to follow). In particular, whether the concept itself relates to the Union's identity as a 'normative power' or aspects of its identity that are 'normative'.

For the purpose of ascertaining the extent to which the Union is purely normative or whether it entails normative traits, the thesis demonstrates (as will be shown in Chapter 2) how the Union pursues a market-based approach in its external relations with third countries and more specifically, the EU energy *acquis* which the Union promotes in its external energy relations with Russia and the Eastern Neighbourhood (as will be shown in Chapter 4 and Chapter 5). The Union's approach, which is deeply imbedded in market principles, reveals

³⁵ Tuomas Forsberg and Graeme P. Herd. 'The EU, Human Rights, and the Russo—Chechen Conflict' (2005) 120 (3) *Political Science Quarterly* 455-478

³⁶ Marise Cremona, 'Values in EU Foreign Policy' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing 2011), 276

ways in which the Union's conduct in its external relations may contribute to the 'EU as a Power' debates.³⁷ The Union's market-based approach is such a strong trait, that it has led to the notion of the EU as a Market Power.³⁸ So profound are these advances in scholarly attention to the Union's external relations that they have helped inspire the notion of the EU as a Global Regulator.³⁹ The perception of the EU as a Global Regulator, which is in-line with the findings of this thesis, is that the Union is capable of 'externalising' its internal market-related policies and regulatory measures, which has extra-territorial effects on its neighbours.⁴⁰ Various terms in the literature have been employed to capture what is meant by 'externalisation' which is best understood as efforts on the part of the Union to get other actors to adhere to a level of regulation similar in effect to that of the European single market or to conform to the Union's market-related and regulatory model.⁴¹

In this respect, we see differentiated forms of engagement in the EU's external relations (in particular, the European Neighbourhood) based on the norms the EU projects which are increasingly both economic and geopolitical. This suggests a pivot in the Union's integration with its periphery based on the different facets of the Union's identity and its role as a global actor. On the one hand we see the EU behaving as a large market with regulatory capacity and competing interests and on the other hand we see the Union behaving as a community of values pursuing a normative objective. The dual nature of the Union is captured by the two predominant theoretical frameworks of the EU, namely: the Union as a 'normative power'⁴² which has been described above; and the Union as a 'market power'⁴³ which exercises its powers through the externalisation of economic and social, market-related policies and regulatory measures. As an extension to the market power framework, it also alludes to the perception of the Union as a potential global regulator⁴⁴ given the external impact of its internal market regulations, which contribute to the notion of the EU as an international actor.

Whilst the two theories are often considered different strands of the 'EU as a Power' debate, the thesis will treat the conceptualisation of the EU as a Market Power and in turn the EU as a Global Regulator as fundamentally part of the normative power framework, given that a normative power contains within it the more specific notion of a market-based actor and

³⁷ Chad Damro, 'Market Power Europe: Exploring a Dynamic Conceptual Framework' (2015) 22(9) *Journal of European Public Policy* 1336-1354

³⁸ *Ibid*

³⁹ Alasdair R. Young, 'The European Union as a Global Regulator? Context and Comparison' (2015) 22(9) *Journal of European Public Policy* 1233

⁴⁰ *Ibid*

⁴¹ Alasdair R. Young, 'Europe as a Global Regulator? The Limits of EU Influence in International Food Safety Standards' (2014) 21(6) *Journal of European Public Policy* 904-922

⁴² Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 242

⁴³ Chad Damro, 'Market Power Europe' (2012) 19(5) *Journal of European Public Policy* 682

⁴⁴ Alasdair R. Young, 'The European Union as a Global Regulator? Context and Comparison' (2015) 22(9) *Journal of European Public Policy* 1233

regulator. In so doing, the thesis will reconcile these different perspectives of the EU as a power making a novel contribution to existing scholarship by undertaking a more nuanced approach to the conceptualisation of the Union as a normative power which includes a strategic dimension to the normative debate (including economic considerations and security interests). As the thesis will show, a market-based approach is intrinsically part of the Union's rule-based agenda for which it uses multilateral frameworks and legal instruments in its quest for *acquis* export and global governance. This also affirms the view that these economic and geopolitical strands of EU external relations cannot be seen as separable given that pursuing a market-based approach to regulation is an inherently geopolitical and value-based decision which inevitably means that economics and strategic interests are intrinsically connected. It comes as no surprise that the Union's market-based approach is as much a value to be upheld as the rule of law and democracy. Such values have very specific definitions in the liberal democracies reflected within the Union, which inadvertently includes market-based allocation of particular resources. Consequently, the thesis does not consider the Union's trade and market actorness as economic and therefore strategic. Rather, the thesis treats the Union's trade, market and economic clout as synonymous to the Union's normative influence, given these are internal and external motivations that stem from the Union's values. Article 3(5) TEU states that in its relations with wider world, the Union shall uphold and promote its values and interests which include peace, security, sustainable development, solidarity, *free and fair trade*, the eradication of poverty and protection of human rights. Furthermore, the fact that the EU makes access to its market conditional on signing up to human rights clauses or human rights treaties, means that the Union's 'normativity' has universal appeal with third countries adopting EU norms and standards voluntarily.⁴⁵

With these conceptual frameworks in mind, the following chapters take stock of the different ways in which EU law is externalised in the Union's foreign policy, with a particular focus on the Union's norm export in its Eastern neighbourhood and Russia, the objectives they may serve for the Union, and the policy implications these may entail for the EU and its external actors. Whilst the Union has the ability to influence law and policy beyond its periphery, its techniques vary based on its neighbours and the foreign policy tools it engages in its respective external relations. Whilst the Union uses the law as its main instrument of choice and as a mechanism to forward its agenda, more often than not, the shape and form of these instruments vary based on the respective country's willingness to conform to an EU model driven by European values. Therefore whilst the law functions as a system of action or a foreign policy tool in the Union's agenda, which is necessary to ensure that norms are applied consistently, there is often inconsistency in the application and pursuit of norms with

⁴⁵ Anu Bradford, 'The Brussels Effect' (2013) 107 Northwestern University Law Review 58

the Union potentially using norms to justify particular interests. Against this backdrop, the thesis tests the extent to which normative power theory explains (or fails to explain) the EU's external energy governance and relations with its strategic partner, Russia. The significance lies in the fact that there may be additional dimensions to the Union's role as a global actor that are not exclusively normative when it comes to strategic partners (such as Russia) and strategic sectors of the economy (such as energy) where the Union's interests lie. This presents a unique idea in terms of looking at the true character of the EU, which may entail additional facets to this hegemon, which includes a strategic or geopolitical dimension.

1.5. Legal Contribution of the Thesis: Assessing the Global Reach of EU Law and the Extraterritorial Impact of EU Legislation

By examining the Union's normativity within the 'normative power' framework, this thesis will explore the ways in which the Union promotes the 'global reach' of EU law through its external relations and wide range of legal instruments which the Union uses to extend EU law beyond its borders. Here, reference to the 'global reach' of EU law⁴⁶ includes phenomena such as the extraterritorial application of EU law (or extraterritoriality)⁴⁷, territorial extension⁴⁸ and the so-called 'Brussels Effect'⁴⁹. 'Global reach' also includes the impact of the EU's external relations and engagement with third countries through international legal instruments as mechanisms promoting the EU's values under the external mandate of Article 3(5) TEU and Article 21 TEU. The legal instruments include both

⁴⁶ Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87; see also Elaine Fahey, *The Global Reach of EU Law* (Routledge, 2016)

⁴⁷ Scott draws a distinction between the concept of extraterritoriality and territorial extension whereby a measure that is extraterritorial does not require a territorial connection between a regulated activity and EU Member State, whereas territorial extension is triggered by a territorial connection with the EU (either by way of conduct or legal presence within the EU). It follows that territorial extension (and extraterritoriality) serve as an important tool to extend the global reach of EU law. However, it is important to note that whilst territorial extension has an external dimension (i.e. that it makes compliance with EU law conditional upon conduct abroad) it does not operate exclusively in pursuit of external objectives but rather internal objectives as will be shown by the thesis with respect to the Union's internal market and energy security. Here the Union's measures, that give rise to territorial extension, pursue internal objectives that are projected externally, namely protecting the internal market and competition in the energy markets to ensure stability and security of European energy supply. In so doing, we can see the EU extending the global reach of its internal market rules and competition law to protect its open and competitive markets from risks that originate abroad. Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87; see also Elaine Fahey, *The Global Reach of EU Law* (Routledge, 2016); Joanne Scott, 'The Global Reach of EU Law' in Marise Cremona and Joanne Scott (eds), 'EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law' (Oxford University Press, 2019) 31

⁴⁸ Joanne Scott has explored the concept of 'territorial extension' in EU law and has shown how this phenomenon has enabled the Union to exploit a territorial connection for the purpose of exerting influence over foreign law and conduct.⁴⁸ By way of example, the EU uses the territorial connection with Member States to gain leverage over third country laws by making access to the EU market conditional on conformity to EU rules and values. Joanne Scott, 'The New Extraterritoriality' (2014) 51 *Common Market Law Review* 1343

⁴⁹ Anu Bradford's 'Brussels Effect' is said to occur when a third country adopts EU standards into its domestic legislation. Scott argues that territorial extension may fuel the Brussels Effect where EU market access is conditional on the content of the said third country's law. Here territorial extension will typically operate to generate legal non-divisibility of standards, which is a key element of the Brussels Effect, thereby promoting the emergence of the Brussels Effect. Anu Bradford, 'The Brussels Effect' (2013) 107 *Northwestern University Law Review* 1; Joanne Scott, 'The Global Reach of EU Law' in Marise Cremona and Joanne Scott (eds), 'EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law' (Oxford University Press, 2019) 38

'hard' law instruments (legislation and international agreements) and 'soft' law instruments (dialogues, action plans, agendas for action and guidelines). The modes of EU engagement include action and interaction at a unilateral, bilateral and multilateral level. However these different forms of 'global reach' are not limited to the export of the EU's *acquis*, it also includes instruments to support the adoption of international law which will be explored in the chapters to follow. Within the framework of the Union's external policies, the thesis will reveal how the EU uses its external relations powers to develop international legal relations through a plethora of unilateral, bilateral and multilateral agreements which serve to affirm the Union's preferred normative interactions which extend beyond norm export or promotion.

The EU uses several techniques to extend the global reach of its laws through jurisdictional triggers that reveal the distinction and interplay between 'extraterritoriality', 'territorial extension' and the 'Brussels Effect'. Whilst the Union's efforts to extend the global reach of EU law through these mechanisms have often proved to be controversial, the thesis will specifically focus on the Union's energy regulation and competition rules to evaluate the external dimension of internal market rules and extraterritorial impact of EU law vis-à-vis Russia in the energy domain.

The EU's 'actorness' is bolstered by the 'global reach' of EU law which is facilitated by the interchange between law and external action. The Union's 'normativity' is evident in the way in which the law shapes EU external action and the centrality of law to the Union's actorness.⁵⁰ Whilst Manners' notion of the EU as a normative power entails a conceptualisation of the Union as a value-driven foreign policy actor, this thesis will seek to assess the Union's normativity by exploring the role EU law plays in the Union's projection of itself as a Union of values. The distinction lies in the shift in focus from the universal values in EU foreign policy to the use of the law to promote EU values externally and the extent to which the Union upholds these values in its external relations where its strategic interests and security is concerned.

Against this backdrop, the thesis will try to show how the EU uses the law to conduct its foreign policy by promoting its values and interests through integration. With specific reference to the ENP and Eastern Neighbourhood, the thesis will explore how the law is used to integrate third countries into EU structures (through legal agreements, frameworks and initiatives) and the way in which the EU integrates itself into internal and external legal regimes (through the *acquis*), blurring the lines between what is internal and external in the legal order the Union seeks to establish. Whilst the law largely constrains the integration of third countries into EU structures as well as the EU's integration into international and

⁵⁰ Marise Cremona and Joanne Scott, 'EU Law Beyond EU Borders' in Marise Cremona and Joanne Scott (eds), 'EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law' (Oxford University Press, 2019) 4

external legal regimes, the Union's treaty-based commitment to 'good global governance' and 'multilateral solutions to common problems' means that the EU is largely a regulatory actor engaged in importing, shaping and promoting legal norms.⁵¹

In so doing, the EU extends the global reach EU law through unilateral, bilateral and multilateral relations and agreements which the EU has entered into pursuant to these relations which serve as examples of the global reach of EU law. The Union's efforts to export its *acquis* to the neighbourhood stands as case-in-point and an illustration of the phenomenon of the extraterritorial impact of EU legislation. As Cremona notes, the central importance in EU external relations is the development of relationships based on political, economic and legal integration with these relationships fundamentally driven by and based on the law.⁵² The EU's Association Agreements in the Eastern Neighbourhood have been considered effective mechanisms of the Union's external law of integration and promotion of EU regulatory approaches across a wide range of economic fields (including the energy sector) which facilitate Union objectives such as legal, political and economic reform and stability.⁵³

In the Eastern Neighbourhood we can see the law acting as a catalyst for cooperation with the extraterritorial application of EU law through the Association Agreements which advance cooperation in enforcement.⁵⁴ Although public international law precludes states from enforcing their laws extraterritorially, the EU has developed strategies which ensure enforcement of law in third countries and its neighbourhood without breaching the norm prohibiting extraterritorial enforcement. A prime example is the mutual recognition of EU law which extends the application of EU law to the third country's substantive rules and aims to ensure compliance with EU law. As will be explored further in the thesis,⁵⁵ the EU achieves this mutual recognition of EU law and extraterritorial application of EU law in the neighbourhood by making market access conditional upon a third country's conformity with EU legislation. Another example includes cooperation agreements with third countries which advance enforcement of EU law extraterritorially, which will be examined further in the thesis.⁵⁶

Whilst there are several techniques that serve to extend the global reach of EU law including extraterritoriality, territorial extension and the Brussels Effect, this thesis will focus on the external dimension of the Union's internal market rules as a regulatory tool to extend the EU's energy regulation and competition rules to Russia and its neighbourhood. In

⁵¹ *Ibid*

⁵² *Ibid* 12

⁵³ Marise Cremona and Joanne Scott, 'EU Law Beyond EU Borders' in Marise Cremona and Joanne Scott (eds), 'EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law' (Oxford University Press, 2019) 13

⁵⁴ *Ibid*

⁵⁵ See Chapter 4 (*The EU as A Normative Power in the Neighbourhood*)

⁵⁶ See Chapter 4 Section 4.1.4.1. (*Bilateral Frameworks*)

undertaking the analysis and assessing to what extent there is indeed an extraterritorial impact or 'global reach' of EU law vis-à-vis Russia and the ENP, the thesis will explore whether this phenomenon and exercise of global power arguably constitutes a form of normative power, given the cross-border characteristics of the Union's legislation and its implications for Russia. This thesis will therefore assess whether the EU's use of extraterritoriality is in a manner that is self-serving and thereby strategic which extends beyond the normative agenda.

As the thesis focuses on the external reach and impact of EU law, reference to 'externalisation' of EU law and 'extraterritoriality' of EU law should not be construed in the strict sense of the term or within the confines of the individual concepts examined by Scott ('territorial extension') and Bradford ('the Brussels Effect') but rather in the broader context of the 'global reach' of EU law through the Union's unilateral legislative instruments and regulatory action beyond its borders. This thesis therefore does not discuss whether concepts such as territorial extension or the Brussels Effect are efficient or desirable in the EU's efforts to externalise its regulation in the neighbourhood and Russia. Instead, it provides an account for why and how the EU exports its trade and liberalisation model to Russia and why this has evolved into a process of unilateral regulatory promulgation which is fundamentally normative but also strategic in the way the Union yields its influence in the world.

1.6. Structure of the Study

From the preceding section it is clear that the thesis endeavours to ascertain the extent to which the normative power theory applies in the realm of the Union's external energy relations or whether other theories might explain the EU's foreign relations and engagement in this strategic sector with its strategic partner. Therefore, the primary research question which the thesis endeavours to answer is: *to what extent does the normative power theory explain the EU's external energy relations with Russia?* For this purpose, the thesis consists of six chapters that all contribute to the findings of this study, which endeavour to answer the research question. In **Chapter 2**, the thesis builds and elaborates on Manners' theory that the EU is a normative power. The chapter provides an introduction to the normative power framework and undertakes a review of the prevailing literature on the EU as a normative power. In undertaking this analysis the chapter considers the criteria Manners has identified as central to the conceptualisation and the mechanisms of normative power that is used as a framework in the chapters to follow. The chapter then engages with the literature and extracts from existing scholarship what has been claimed with the intention of using this as a benchmark in the case study to follow. The chapter also considers the Lisbon Treaty and the extent to which it has bolstered the normative power framework, which is further explored in a more substantive analysis thereafter.

Chapter 3 examines the scope of the Union's external energy competence by analysing the cross-over between the EU's internal market and external energy relations. The chapter thereafter assesses the EU's energy policy and the extent to which the Lisbon Treaty has bolstered the Union's energy actorness in the international arena.

Chapter 4 builds on the preceding chapter, which analysed the scope of the Union's external energy competence and the interplay between the Union's internal market and external energy relations. The main objective of this chapter is to decipher the extent to which the Union can be said to be a normative power in its neighbourhood. For this purpose, the chapter examines the instruments of the Union's external energy policy and assesses to what extent the Union displays characteristics of a normative actor in the energy sector. This also entails a deeper analysis regarding the extent to which the Union can be said to be 'invoking norms' through the export of its energy *acquis* using a market-based approach and 'leading by example' through regional integration and multilateral cooperation. In undertaking this analysis the chapter assesses the extent to which the normative power theory offers a viable explanation for the Union's conduct in the energy sector with its neighbouring partners and to what extent the Union can indeed be said to qualify as a global normative energy actor based on the normative power criteria established by Manners.

Chapter 5 examines to what extent Manners' normative power theory explains the Union's conduct in its external energy relations with Russia as a departure from the Union's usual value and rule-based normative approach to its relations with its neighbourhood. By using the previous chapter on the Union's external energy relations with its neighbourhood (in particular its Eastern Neighbourhood) as a comparator to determine the level of deviation in the Union's conduct in its relations with Russia, the case study sheds light on the extent to which the Union can be said to be normative in its external energy relations with Russia and more specifically, whether in the absence of an effective international legal architecture, the EU has evolved into a normative power given its constant efforts at regulatory convergence which it tries to impose on Russia, a non-participant of the ENP. In this respect, the case study considers whether the Union can be said to be a global normative energy power or whether there are other potential elements to the Union's actorness in the global energy sphere. The case study concludes that there are additional dimensions to the Union's actorness which fall beyond the Union's usual normative agenda where its strategic interests are concerned.

Reflecting on the preceding chapters and having ascertained that there is a call for energy governance in EU-Russia energy relations, **Chapter 6** provides some conclusions as to whether the Union has become more active in the energy sphere and assertive in its external energy relations with Russia and the Eastern Neighbourhood through the export of norms and values (including the Union's liberalisation model and energy *acquis*) thereby

strengthening the normative power argument. Whilst the role of the EU as a normative power in its external relations cannot be questioned, the chapter argues that the aims of the Union's initiatives vis-à-vis Russia are not driven by values alone, but rather geopolitical interests in the energy sphere. The chapter suggests that the normative power theory is insufficiently nuanced to fully explain the EU's external energy relations with Russia given that Russia is a strategic partner and that EU-Russia relations have a strong security dimension on account of the Union's heavy dependence on Russian energy supply. With this in mind, the chapter provides concluding remarks as to whether, the Union's growing role in global energy governance and its efforts at promoting a rule-based market agenda imbedded in values, is a goal unto itself or rather a strategic attempt to bolster the Union's energy security. By using the EU's values and its objectives as measures, the findings assert that supplemental to the Union's normative agenda in its external relations, the EU pursues strategic interests in its external energy relations with Russia given the strong security dimension of its energy supply. The findings also consider and demonstrate (as an ancillary question to the Union's normative agenda) to what extent the Union has become a normative energy security actor, setting the stage for additional research to be conducted in the future as an offspring of the normative power theory.

1.7. Research Methodology

The research methodology chosen for this thesis is theoretical and doctrinal. The aim of this section is two-fold: firstly to explain why a theoretical and doctrinal approach has been chosen for the purpose of the analysis; and secondly to illustrate how these respective approaches serve to guide and support the research project. A theoretical approach has been chosen for two reasons: firstly, it connects the research to existing knowledge thereby creating a basis for the hypothesis; and secondly, it facilitates the choice of research methods undertaken which are guided by the relevant theoretical framework. Applying this rationale of the theoretical framework to the normative power theory and the methodology undertaken by this thesis, the normative power criteria (and traits as advocated in the literature) provide benchmarks⁵⁷ for the analysis against which the case study will be tested. The case study is based on a very specific area of external relations, namely energy relations, both with the Eastern Neighbourhood and with Russia. As already mentioned above, Manners advocates that the EU has a clear normative interest as far as the social dimension of its energy policies are concerned however dissidents of Manners have argued that in its relations with Russia the Union throws more weight behind its economic or security interests⁵⁸. Manners' theory facilitates the research by providing a platform of existing knowledge as a basis to answer the research question. By using Manners' normative power

⁵⁷ See Chapter 4 Section 4.1 (*Theoretical Framework – Manners' Normative Power Criteria*)

⁵⁸ See Chapter 5 Section 5.2 (*Theoretical Framework – Manners' Normative Power Criteria*)

theory as a starting point, the research is able to use the established criteria to determine the extent to which the Union constitutes a normative power in its external energy relations with its neighbourhood which is then used as a benchmark comparator to ascertain the extent to which the Union is normative in its external energy relations with Russia.

Examining the theoretical claims of a normative power, forces the research study to address questions of *why* and *how*. More specifically, *why* the Union behaves in a certain way in its external energy relations with Russia and *how* this behaviour digresses from its usual engagement with its neighbourhood? Furthermore, the theoretical assumptions compel the research to ask *what* justifies the inconsistency in behaviour and *what* does this reveal about the nature of the EU and its role on the global stage? On consideration of the above, it can be confirmed that the theoretical framework of Normative Power Europe provides structure that supports the objectives of the research project, to assess the extent to which the Union is normative. If we concede that theory creates the conceptual basis for understanding, analysing and designing ways to investigate the research question within a developed framework, then the normative power theory provides a good springboard against which the analysis can be undertaken and the research question tested.

The thesis also pursues a doctrinal approach to the methodology as it is the most efficient research methodology for the purpose of answering the research questions to hand. Doctrinal research methods are often characterised by the study of legal texts and for this reason a doctrinal approach is often described as 'black-letter law'. Although the research project falls squarely at the intersection of law and foreign policy with a strong international relations component which would be synonymous with a non-traditional interdisciplinary approach, a traditional doctrinal approach has been pursued as the research question ultimately requires the legal analysis of texts (or the equivalent thereof). As a contribution to legal scholarship, the research undertaken focuses on legal questions and does not engage in any political science or international relations research. The thesis therefore relies extensively on textual analysis to explain the law, such as treaty provisions, case law, legislation, regulation and other materials. More specifically, the aim of this doctrinal research is to examine, scrutinise and clarify the law of the Union's external energy relations by way of a distinctive mode of analysis focused on authoritative texts that consist of primary and secondary sources, focusing on what is relevant to assess the extent to which the EU's role as normative actor can be confirmed. The assumption being that 'black letter' research is legal scholarship derived from itself given the analysis of legal texts from which the contribution will be made.⁵⁹

For the purpose of the doctrinal methodology of this thesis, the legal sources relied on vary from chapter to chapter based on the different fields and strands of law relevant to the

⁵⁹ Edward L. Rubin, 'Law and the Methodology of Law' (1997) 521 Wisconsin Law Review 525

research project. The methodology for the EU law related aspects include matters pertinent to answering the research question. In this respect, assessing whether the Union is a normative energy actor in its external energy relations with Russia and the Eastern Neighbourhood, entails the following: (i) an examination of the Union's competence under the Treaties and its constitutional framework which defines what kind of actor the Union is - this includes: (a) an examination of the Union's objectives in the Treaties including in the external dimension (Article 3(5) TEU) and general principles and goals of EU external action (Article 21 TEU) and the constitutional basis for the Union's relations with its neighbours (Article 8 TEU); (b) an assessment of the Union's external power - this includes explicit external powers such as the CFSP (Articles 18 and 27 TEU) and the CCP (Article 207(1) TFEU) and express competence in the energy sector (Article 194 TFEU) - here the constitutional framework of the EU and its competence is of significance as there appears to be a clear crossover between the Union's explicit external power (i.e. in trade and the CFSP) and the external dimension of the Union's sectoral power (i.e. energy); (ii) the internal dimension of the Union's energy policy and the extent to which the Union's internal market regulation has been externalised and imposed on its external energy relations with Russia - this includes a detailed analysis of: (a) the liberalisation model and the internal market (Article 114 TFEU); (b) the energy liberalisation packages, in particular the TEP; (c) the TEP's Third Party Access regime and unbundling rules; (d) ownership unbundling and the Third Country Clause; and (e) Competition law (Article 101 TFEU and Article 102 TFEU); (iii) the security nexus to the energy sector and the Commission's subsequent growing competence to determine whether a geopolitical approach is being undertaken in the Union's external energy relations – this will entail an analysis of the (a) Energy Union initiative that was launched in 2014; (b) the Energy Security Package that was released in 2016 and the proposed amendments to legislation; and (iii) the implications for Russia, specifically with regard to Gazprom and its position within the European market; and finally (iv) the review of the written products and communication of the EU institutions (predominantly that of the European Commission) which relate to trade, energy, foreign policy vis-à-vis Russia, the ENP, the Eastern Neighbourhood and the Union's Security Strategy which would be relevant and necessary for answering the research question.

With respect to the international law instruments, the doctrinal dimension of the research covers the analysis of relevant multilateral fora, treaties, treaty provisions and bilateral negotiations and frameworks relevant to the Union's external relations with the ENP (in particular the Eastern Neighbourhood) and Russia. In relation to the Eastern Neighbourhood, this includes: (i) bilateral frameworks such as the Association and Economic Cooperation Agreements and PCAs; and (ii) multilateral frameworks such as the Energy Charter Treaty; Eastern Partnership and Energy Community Treaty. With respect to Russia, this includes: (i) at a bilateral level, the PCA; Energy Dialogue; and the

suspended Partnership Agreement; and (ii) at a multilateral level, the ECT and the WTO. The thesis brings together the different dimensions of the normative power framework and EU external relations law through the theoretical and doctrinal approaches to ascertain what 'normative' constitutes in the context of the EU's external relations with Russia and its neighbourhood. This entails a more in-depth examination of the role of norms and values (Article 2 TEU) in the Union's external relations (Article 3(5) TEU and Article 21 TEU) and to what extent such norms and values are imposed on third countries in an effort to export the *acquis* (Article 8 TEU). Herein lies the novelty of the research which builds on an existing theory which is used as a reflective device to reveal additional dimensions to the Union's role as a global actor. Whilst the normative power theory serves as an appropriate starting point to examine the Union's external energy relations with Russia and its periphery, by testing the normative actor claims in the literature against the Union's actions with its neighbourhood and Russia, the thesis unveils nuances to the existing normative power framework which are pertinent to the EU as a global actor debate.

Chapter 2: The Role of EU as a Normative Power in its External Relations

Following the end of the Cold War, there was a general impetus on the part of political science and international relations scholars to conceptualise the EU as an international actor. Following decades of Europe at the epicentre of a bi-polar superpower dominated world, the EU (then European Community) was suddenly inundated by a plethora of challenges that needed to be tackled that would inevitably serve to escalate the Union's states to that of a power within the international political arena. The dissolution of the Soviet Union brought unprecedented opportunities for states striving for national sovereignty from the confines of the iron curtain. The signing of the TEU in 1992 signalled a more coherent path for an EU CFSP with Member States bound by policies of common interest over issues including trade and cooperation with the Union evolving to what is arguably the only true supranational power in present world politics.⁶⁰

Former EU High Representative Javier Solana remarked in the Autumn of 2007 that the EU has a responsibility to work for the 'global common good' which has become the adopted view and general conception of the Union's global role and ambition in the international system.⁶¹ This perception appears to correlate with the Union's sense of collective purpose and legitimacy which it seeks to find in its foreign and security relations.⁶² This role in its external relations and on the global stage as a player with a broad spectrum of civilian capabilities, goes hand-in-hand with the emphasis of the EU as a 'force for good' and 'peacebuilder' in the world underpinning the notion of an 'ethical power'.⁶³ This suggests a conceptual shift in the Union's role and aspirations from what it 'is' to what it 'does' which extends beyond the power of example and attraction to active engagement in an effort to change the world in conformity to what the Union perceives to be an appropriate model of the 'global common good'.⁶⁴ Ian Manners has long argued that the EU is a normative power which he has defined as the way in which the Union 'changes the norms and standards of global politics away from the bounded expectations of state-centricity which are generally acknowledged within the United Nations system to be universally applicable'.⁶⁵ This then sets the platform for any analysis to be undertaken to determine to what extent the Union is a normative power and if so, whether it acts in a manner befitting of its title.

The purpose of this chapter is to provide an introduction to the normative power theory and its respective adherents and critics. The chapter provides a review of the prevailing

⁶⁰ Michael E. Smith, 'Implementation: Making the EU's International Relations Work, in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (Oxford University Press, 2005) 154-175, 170

⁶¹ Friends of Europe, 'Countering Globalisation's Dark Side', Europe's World, policy dossier <<https://www.friendsofeurope.org/index.php/cap-renegotienhuis/countering-globalisations-dark-side>> accessed 20 October 2016

⁶² Lisbeth Aggestam, 'Introduction: Ethical Power Europe?' (2008) 84(1) *International Affairs*, 1-11

⁶³ *Ibid*

⁶⁴ *Ibid*

⁶⁵ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84(1) *International Affairs*, 46-60

scholarship on the EU as a normative power, drawing from the literature what observers have alleged to be the established criteria for examining the Union's role as an international actor within this conceptual framework. For this purpose, the chapter begins by identifying the key aspects to a normative power that Manners has identified as central to the argument. The chapter then considers other voices in the literature which either agree or disagree with Manners' conception and/or the criteria Manners claims is indicative thereof. In undertaking this analysis, the chapter highlights the assessment standards that the literature has established as reflective of a normative actor which either serve to validate or contest Manners' conceptualisation of the Union as a normative power. Whilst the normative argument has been portrayed differently by various scholars with the claim often difficult to unpack, the prevailing gist of the theoretical framework is that the EU is a unique and novel kind of power in the international system with its novelty embedded in the pursuit of values and diffusion of norms which is characteristic of the Union's polity from whence it has obtained its predisposition to act in a normative way.⁶⁶ The final section briefly considers to what extent the Lisbon Treaty has facilitated the normative argument and the context within which these developments have been made. By presenting the secondary literature on the EU as a normative power and by highlighting the different ideas of what a normative power constitutes, the chapter establishes a framework that is used in later chapters against which the EU's external relations are gauged. The thesis thereafter applies Manners' argument of a normative power to examples of EU engagement with proximate third countries (namely Russia and the Eastern Neighbourhood) to deduce to what extent the Union can be considered a normative power within the context of its energy relations. In the alternative to a normative power, the thesis considers whether a more appropriate and pertinent conceptualisation of the EU as an international actor exists which sets the platform for a more detailed discussion of the true nature of the EU and whether the existence as a normative power is even achievable in modern-day global politics.

2.1. Manners' Normative Power Europe

Ever since Ian Manners coined the term 'Normative Power Europe'⁶⁷ the concept of the EU as a normative power became a popular framework for analysing foreign policy and EU external relations. It also became mainstream with the view that it captured the true essence of the EU as an international actor rather than the perception of the EU as a military or civilian power.⁶⁸ Nevertheless, ambiguity surrounding the concept and what it actually entails has fuelled the on-going debate whether the EU does indeed qualify as a normative

⁶⁶Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 242

⁶⁷ *Ibid* 235-258

⁶⁸ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies (JCMS)* 1183-1204, 1184

power or not.⁶⁹ In many ways, the term serves as an ideal type and a description of the EU's self-image, which is in contrast to traditional power identities with military clout. In this respect, the nature of the EU as a foreign policy actor is not that of a geopolitical power trying to expand its boundaries through military force but rather a trade power whose role in world politics is driven by its economic might. The distinction lies in the emphasis being on trade, rather than military strength, as the driving force in international affairs. It also stands as justification for the EU's behaviour vis-à-vis third countries, in particular its near neighbours, with trade relations being at the core of these strategic partnerships. There are indeed aspects of the EU's conduct which are indicative of a geopolitical power, trade power or normative power, but more often than not this describes the behaviour of the Union, rather than explains the rationale for its conduct and whether this reveals a fundamental aspect of its nature.⁷⁰ For Manners however the 'most important factor shaping the international role of the EU is not what it does or what it says but what it is' which suggests that the EU emanates power simply by existing as a model for others to emulate.⁷¹ This then sets the bar for what constitutes 'normal' in the world of politics which the EU projects based on its own norms and values.⁷²

Manners asserts that in order to establish whether the Union is a normative power, it is important to consider why the Union's historical context, political-legal constitution and hybrid polity make it unique or sui generis. The EU constitutes a separate legal personality as an international organisation that is legally distinct from its Member States.⁷³ The perception of the EU as a global legal actor stems from the EU's ability to interact with both third countries and international organisations in a manner which is legally and politically distinguishable from its Member States.⁷⁴ This express legal personality and distinct legal status then indicates a capacity to act in the international legal order thereby confirming the EU's status as an international actor.⁷⁵ From a global perspective, the EU can therefore be

⁶⁹ The idea of 'Normative Power Europe' is popular yet frequently criticised as an analytically poor and politically loaded concept. This stems mostly from the multiple meanings that key concepts such as 'normative' and 'power' constitute which often leads to ambiguity and conceptual confusion. This has resulted in many scholars arguing that normative power can be comprehended as an ideal-type which the EU approximates more closely than other great powers. The concept of 'normative power' therefore serves as a shorthand description of what the EU is and as an explanation for what the EU does, without necessarily implying that the Union qualifies as the same. See Hanns W. Maull, 'Europe and the New Balance of Global Order' 81(4) *International Affairs* 775-99; Max Weber *The Methodology of the Social Sciences* (Free Press, 1949) 90; Karen E. Smith, 'Beyond the Civilian Power Debate' *LSE Research* (London School of Economics and Political Science, 2007); Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1200

⁷⁰ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1184

⁷¹ Ian Manners, 'Normative Power Europe: a Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235-258, 244.

⁷² Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 42 *Common Market Law Review* 553-573

⁷³ Article 47 TEU

⁷⁴ *Ibid* 553-573

⁷⁵ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 7

said to uphold an independent identity constituting its own values, interests and policies, which it seeks to promote internationally as an extension of itself, which alludes to a normative power given the Union's role as a promoter of values and exporter of norms.⁷⁶ It follows that the EU is perceived as a peculiar animal, the nature of which is hard to define.⁷⁷ Whilst many academic contributions offer seemingly competing conceptualisations of the Union as a power, these debates tend to implicitly portray the Union as a unique power. Although few would advocate that the EU is a state, it is best understood as a hybrid of an international organisation best classified under international law - i.e. an international entity *sui generis*.⁷⁸ According to Manners, this unique political legal constitution predisposes the Union to act in a normative way, the rationale of which is explored further below.⁷⁹

Manners advocates that fundamental to the Union's normative identity, is the fact that it has evolved from a treaty-based legal order. The EU is based on the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The TEU is considered the framework treaty that sets out the fundamental legal properties of the EU. This includes how to become a member, how to leave the EU, the aims and objectives of the Union, the role of its organs and principles of conduct within the organisation. The TFEU on the other hand elaborates on the functioning of the EU and fleshes out the areas in which the institutions can adopt measures for the purpose of fulfilling the objectives set out in the TEU. Mandatory to the analysis of the normative power framework are the key provisions of the TEU which relate to the Union's external relations. These include the legal principles governing EU action in its international realm, the values and objectives of the EU in conducting its international relations, the EU institutions' roles in pursuing EU foreign policy and the interaction between the TEU and TFEU. Noteworthy is the article in the TEU on the ENP, a foreign relations instrument of the Union which seeks to tie those countries neighbouring the European territory, both to the east and south, to the EU.⁸⁰ The ENP (in particular the Eastern neighbourhood) is significant for the purpose of this analysis as it is a policy domain where the Union is notorious for its rhetoric as a promoter of values and norm diffusion. The EU seeks to transfer its values within the ENP, not only through conditionality but through functional cooperation.⁸¹ Existing scholarship has paid

⁷⁶ Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 42 *Common Market Law Review* 553-573

⁷⁷ Charlotte Bretherton and John Vogler, *The European Union as a Global Actor* (Routledge, 2006) 2

⁷⁸ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 3

⁷⁹ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies*, 235-58, 240

⁸⁰ The inception of the ENP was founded on the idea of a 'Wider Europe' shortly before the 2004 Eastern enlargement as initial response to the changing geopolitical landscape. As presented in the letter (requested by GAERC) by Chris Patten and Javier Solana at an informal meeting of the Foreign Ministers in September 2002. See Dimitry Kochenov and Elena Basheska. 'ENP's Values Conditionality from Enlargements to Post-Crimea' (CLEER Papers, 2015/1) 7

⁸¹ It has been argued that functional cooperation is regarded as a compromise which serves conflicting goals. If we consider the example of modes of cooperation between the EU and non-democratic states, democracy promotion and maintaining stability /security are often considered conflicting goals when dealing with

considerable attention to conditionality when assessing the effectiveness of the ENP.⁸² Whilst the literature on conditionality has focused on the democracy promotion by the EU, the effectiveness of conditionality⁸³ as a mechanism for the promotion of values within the ENP has generally been portrayed as limited.⁸⁴

Following this brief review of the Union's constitutional framework, the question to Manners' assertion that ultimately remains is why the EU is predisposed to act in a normative way based on its derivation and extraction from its norms?⁸⁵ Furthermore, how is the Union's genealogy of its norms upheld against other states and actor's perceptions of norms?⁸⁶ Manners argues that the fact that the EU's core norms are enshrined in its constitution to which it adheres to, inevitably make the Union a normative power.⁸⁷ The norms are manifest in the *acquis communautaire* which is the EU's body of law.⁸⁸ The *acquis* includes fundamental norms and principles such as peace, liberty, democracy, the rule of law and human rights with additional norms such as social solidarity, anti-discrimination, sustainable development and good governance identified as ancillary thereto.⁸⁹ Manners asserts that these norms distinguish the Union from other states and entities which is the rationale for

authoritarian regimes. In this respect, it has been argued in the literature that utilizing functional cooperation within a state's administrative governance, can bring social and economic well-being to the population of a partner country while helping the regime retain political stability against social unrest. See Tina Freyburg, Sandra Lavenex, Frank Schimmelfennig, Tatiana Skripka and Anne Wetzel, 'Democracy promotion through functional cooperation? The case of the European Neighbourhood Policy (2011) 18 (4) Democratization, 1026-1054

⁸² Michele Comelli, *Potential and Limits of EU Policies in the Neighbourhood* (Notre Europe, 2013); Sandra Lavenex and Frank Schimmelfennig, 'EU Democracy Promotion in the Neighbourhood: From Leverage to Governance?' (2011) 18(4) Democratization, 885-909; Raffaella A. Del Sarto and Tobias Schumacher, 'From Brussels with Love: Leverage, Benchmarking, and the Action Plans with Jordan and Tunisia in the EU's Democratization Policy', (2011) 18(4) Democratization, 932-955; Charles Thépaut, 'Can the EU Pressure Dictators? Reforming ENP Conditionality after the Arab Spring' (2011) EU Diplomacy Paper No. 6, College of Europe; Pol Morillas, 'From Policies to Politics: The European Union as an International Mediator in the Mediterranean' (2015) IEMed Euromesco series No. 23, European Institute of the Mediterranean; Tania A. Börzel and Vera Van Hüllen, 'One Voice, One Message, But Conflicting Goals: Cohesiveness and Consistency in the European Neighbourhood Policy' (2014) 21(7) Journal of European Public Policy, 1033-1049; Rossa Balfour, 'EU Conditionality After the Arab Spring' (2012) IEMed Euromesco series No. 16, European Institute of the Mediterranean; Alexander Duleba, Vladimír Benč, and Vladimír Bilčík, 'Policy Impact of the Eastern Partnership on Ukraine: Trade, Energy, and Visa Dialogue' (Research Center of the Slovak Foreign Policy Association, 2012); Erwoan Lannon, 'More for More or Less for Less: From the Rhetoric to the Implementation of European Neighbourhood Instrument in the Context of the 2015 ENP review' (2015) IEMed Overview, European Institute of the Mediterranean, 220-224; Hiski Haukkala, 'The EU's Regional Normative Hegemony Encounters Hard Realities: The Revised European Neighbourhood Policy and the Ring of Fire' in Dimitris Bouris and Tobias Schumacher (eds) *The Revised European Neighbourhood Policy: Continuity and Change in EU Foreign Policy* (Palgrave Macmillan, 2017)

⁸³ The EU's conditionality has primarily been directed at the democratisation of the neighbourhood as democracy is viewed as a necessary component for greater security, stability and prosperity. The ENP literature is critical of the effectiveness of the conditionality in the framework of the ENP. See Hrant Kostanyan, *Assessing European Neighbourhood Policy: Perspectives from the Literature* (Rowman & Littlefield, 2017) 1

⁸⁴ The ENP literature has focused on the EU's capacity to achieve its policy objectives in the neighbourhood which include democracy, respect for human rights and fundamental freedoms such as freedom of the press and assembly. See Hrant Kostanyan, *Assessing European Neighbourhood Policy: Perspectives from the Literature* (Rowman & Littlefield, 2017) 1

⁸⁵ Helene Sjørnsen, 'The EU as a 'Normative Power': How Can This Be?' (2006) 13(2) Journal of European Public Policy, 235-251

⁸⁶ *Ibid*

⁸⁷ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) Journal of Common Market Studies, 235-58, 240

⁸⁸ Amichai Magen, 'Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of EU External Influence' (2007) 9(3) European Journal of Law Reform 361-92

⁸⁹ *Ibid*

the Union's propensity to act in a normative manner with a particular emphasis paid to the EU's constitutional framework which determines what kind of actor it is.⁹⁰

At the core of Manners' conceptualisation is the claim that the notion of normative power Europe is central to 'power over opinion'⁹¹ and an understanding of the EU's identity which is essentially based on a series of principles and shared beliefs that Member States adhere to and with which the Union ultimately sets an example.⁹² With EU Member States agreeing to these principles, as enshrined in the *acquis*, the principles become legally binding commitments.⁹³ With this in mind, Manners maintains that the EU will continue to be a normative power for the foreseeable future on account of its 'norm diffusion' which it enacts through 'contagion', or by setting an example, as opposed to a coercive manner like that of a traditional power.⁹⁴ This trait is most prominent with the Union's export of norms pertaining to human rights. By way of example, when dealing with third countries, the EU uses conditionality clauses to bind such states to practicing ethical standards, as per the European Convention on Human Rights.⁹⁵ In addition, the Union includes human rights clauses in its trade agreements which are linked to technical assistance and access to the internal market.⁹⁶ Manners upholds that the way in which the EU exports its norms is as significant as the norms that it is promoting.⁹⁷ The fact that the methods undertaken are non-military and that the EU uses codifications of its norms as binding agreements, bolsters the view that the Union is a normative power.

Drawing from Manners' normative power theory and referring to the Laeken Declaration, it has been implied that the EU's self-perception and conceptualisation as a 'Union of values' from which it draws its identity and projects itself onto the world, matches the theoretical framework developed by Manners.⁹⁸ The Union's self-perception and self-projection as an international actor with the wider world is through the promotion of its values which finds

⁹⁰ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies*, 235-58, 240

⁹¹ Carr made the distinction between economic power, military power and power over opinion. See Edward Hallett Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (Palgrave, 2001). According to Manners, the notion of a normative power Europe is located in the discussion of the 'power over opinion' or 'ideological power' and the desire to move beyond the debate over state-like features through an understanding of the EU's international identity. See Ian Manners and Richard Whitman, 'Towards Identifying the International Identity of the European Union: A Framework for Analysis of the EU's Network of Relationships' (1998) 21(3) *Journal of European Integration* 231-249

⁹² Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies*, 235-58, 239

⁹³ Tim Dunne, 'Good Citizen Europe', (2008) 84(1) *International Affairs*, 13-28

⁹⁴ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84(1) *International Affairs*, 46-60, 45

⁹⁵ Ian Manners, *Normative Power Europe Reconsidered: Beyond the Crossroads*, (2006) 13(2) *Journal of European Public Policy*, 182-199

⁹⁶ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies*, 235-58, 245

⁹⁷ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84(1) *International Affairs*, 46-60, 55

⁹⁸ Laeken Declaration on the Future of the Union, European Council, 14-15 December 2001 <http://www.internationaldemocracywatch.org/attachments/311_Laeken%20Declaration%202001.pdf> accessed 20 October 2016. See also Marise Cremona, 'Values in EU Foreign Policy' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing 2011), 275

practical expression through legal norms.⁹⁹ The Union then develops these norms at an international level which it thereafter promotes in its relations with third countries.¹⁰⁰ It follows, as has been advocated in the literature, that the examination of values in the EU's external relations inevitably includes the interplay between the EU legal order and international norms, given the Union's commitment to a rule-based international order founded on effective multilateralism.¹⁰¹ This strategic objective is not only expressed in its relations with the wider world under Art. 3(5) TEU ('the strict observance and development of international law') and its action on the international scene under Art. 21(1) TEU ('promote multilateral solutions to common problems'), it is also explicitly articulated in its policy documents, in particular the European Security Strategy ('a rule-based international order is our objective...we are committed to upholding and developing International Law...')¹⁰² with the High Representative's Report giving credence to this assertion ('At a global level, Europe must lead a renewal of the multilateral order.').¹⁰³ Therefore, it has been argued that the EU's commitment to international law and in turn multilateralism, is in itself a value which the Union endeavours to uphold and promote in its external relations.¹⁰⁴

It follows, as has been claimed in the literature, that the Union's efforts to export its own values and norms exist and occur in tandem with its commitment to multilateralism.¹⁰⁵ It therefore comes as no surprise that the Union's export of values and norms are often through legal instruments of both a bilateral and multilateral nature.¹⁰⁶ Against this backdrop, academic scholarship asserts that the Union's rule-based multilateral approach towards trade relations with 'Wider Europe'¹⁰⁷ and Russia specifically, serves as a case in point which further serves to bolster the 'normative power' argument if 'normative' is understood to mean the defence of values, international law and the ability to promote

⁹⁹ Marise Cremona, 'Values in EU Foreign Policy' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing 2011), 275

¹⁰⁰ *Ibid*

¹⁰¹ *Ibid*

¹⁰² European Security Strategy, adopted by the European Council in December 2003 and reviewed in 2008, 9-10

¹⁰³ Secretary General/High Representative Report on the Implementation of the European Security Strategy – Providing Security in a Changing World, 10 December 2008, Doc 17104/08, 4

¹⁰⁴ Marise Cremona, 'Values in EU Foreign Policy' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing 2011), 275

¹⁰⁵ *Ibid*

¹⁰⁶ Whilst it would seem natural for foreign relations to be politics-driven and for law to play a minor role in external relations, Cremona argues that the law does in fact play an important role in EU external relations. See Marise Cremona, 'Structural Principles and their Role in EU External Relations Law' in Marise Cremona (ed.) *Structural Principles and their Role in EU External Relations Law* (Bloomsbury, 2018) 3

¹⁰⁷ Recognition that the EU's neighbouring countries constitute the EU's essential partners, the EU initiated the concept of a 'Wider Europe' which promotes mutual production, economic growth and external trade with neighbouring countries to create an enlarged area of political stability and the rule of law. As an extension of its foreign policy the Union's Wider Europe policy, which later became known as the ENP, promotes security, stability and mutual gain through the sharing of a set of values and joint initiatives in pursuit of common political goals. See Commission of the European Communities, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' <http://eeas.europa.eu/enp/pdf/pdf/com03_104_en.pdf> accessed 20 October 2016

universal norms.¹⁰⁸ It is posited that the EU perceives respect for international law as an inherent part of the rule of law and thereby one of its founding values.¹⁰⁹ At the same time, the Union sees the development of a rule-based international order as fundamental to the promotion of its values including democracy and human rights. It is for this reason, as asserted in the literature, that we see the Union more actively engaged in the development of new international norms at a bilateral, regional and multilateral level through which it seeks to promote its own rule-based approach in order to promote its normative agenda.¹¹⁰ More specifically, the Union contributes to the development of international norms by integrating those norms into its own legal order which it thereafter projects as EU norms in its legal relations with third countries, thereby giving substance to its values.¹¹¹ The example of human rights clauses included in the Union's trade agreements mentioned above, serve as a case-in-point. With this in mind, academic scholarship maintains that the Union's commitment to international law and strengthening of the international legal order through effective multilateralism, provides the normative platform from which the Union has launched its foreign policy agenda. In this respect, it has been argued (and as will be shown by the analysis undertaken in this thesis) that the EU's overall preference for institutionalising its external relations with third countries (in particular Russia and the Eastern neighbourhood countries) within a shared multilateral legal framework can therefore be seen as the ideal conceptualization of a normative power.¹¹²

2.2. Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents

Whilst the idea of a normative power is inevitable when describing the EU in its external relations, multiple meanings of 'normative' and 'power' have led to conceptual ambiguity. In this respect, further clarification is required to determine in what context the concept is being used and consideration to what extent the EU does indeed constitute a 'normative power' in terms of identity or whether the EU rather has normative aspects to its identity.¹¹³ In order to remove the obscurity surrounding the concept, Forsberg has advocated that a distinction is required between the different facets of a normative power, and in what context it is being used when describing the EU. In particular whether 'normative' refers to: (i) 'normative identity'; (ii) 'normative interests'; (iii) 'normative behaviour'; (iv) 'normative means of power'; or (v) 'normative outcomes'; which are all fundamental criteria of Manners' 'normative

¹⁰⁸ Tuomas Forsberg and Hiski Haukkala, *The European Union and Russia*. (Palgrave Macmillan 2016) 229

¹⁰⁹ Marise Cremona, 'Values in EU Foreign Policy' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing 2011), 315

¹¹⁰ *Ibid*

¹¹¹ *Ibid* 314

¹¹² Tuomas Forsberg and Hiski Haukkala, *The European Union and Russia*. (Palgrave Macmillan 2016) 229

¹¹³ Hanns W. Maull, 'Europe and the New Balance of Global Order' (2015) 81(4) *International Affairs*, 775-799, 779; Max Weber, *On the Methodology of the Social Sciences*, (Lulu Press Inc, 2015)

power'.¹¹⁴ However, Manners asserts that the criteria can exist in isolation and do not presuppose each other or necessitate the fulfilment of all facets of a normative power.¹¹⁵ Therefore, whilst a normative identity would explain normative interests and normative behaviour, material interests can exist irrespective of a normative identity; and normative interests can be fostered in a normative manner.¹¹⁶ Whilst Manners argues that merely adopting a normative basis does not make the EU a normative power, it is not clear in the literature whether all five criteria need to be fulfilled,¹¹⁷ in this respect some authors argue that normative power can be seen as an ideal type rather than what the EU actually is.¹¹⁸

Nevertheless, the academic scholarship argues that the EU does appear to satisfy some of the criteria that would ultimately strengthen its normative power status. As far as **normative identity** is concerned, as already mentioned above, the fundamental claim that Manners makes is that the EU is a normative power by virtue of its normative identity that is derived from its treaty-based legal order, which bestows on the EU a predisposition to act in a normative way.¹¹⁹ Furthermore, in terms of **normative interests**, the notion of a normative power, possessing normative interests which vary from the strategic interests of a traditional power, suggest that as a normative power the EU undertakes foreign policy initiatives that are not means/end orientated but rather a pursuit of values that ultimately distinguish the EU from other foreign policy actors.¹²⁰ In this respect it has been noted that the Treaties set broadly-defined policy objectives for EU external action that do not establish a *telos* or end point to which they seek to drive the Union.¹²¹ In the absence of foreign policy initiatives that are purposive and set a clear objective, the normative interests of the EU can be defined as a statement of values that represent the wider goal of establishing a common good, as advocated by Solana, which extends beyond self-regarding interests.¹²²

The equally popular view of the EU as a trade power,¹²³ to a certain degree, undermines the view that the EU is a 'normative power', if 'normative' is understood as endeavouring to

¹¹⁴ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1184

¹¹⁵ Ian Manners, 'Normative Power Europe: a Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235-258; Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1191

¹¹⁶ *Ibid*

¹¹⁷ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84(1) *International Affairs*, 45-60; Ian Manners, 'The Social Dimension of EU Trade Policies: Reflections From a Normative Power Perspective' (2009) 14(5). *European Foreign Affairs Review*, 785-803

¹¹⁸ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1191

¹¹⁹ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235 – 258

¹²⁰ Asle Toje, 'The Consensus—Expectations Gap: Explaining Europe's Ineffective Foreign Policy' (2008) 39(1) *Security Dialogue* 121-141

¹²¹ Marise Cremona, 'Structural Principles and their Role in EU External Relations Law' in Marise Cremona (ed), *Structural Principles and their Role in EU External Relations Law* (Bloomsbury, 2018) 4

¹²² Wolfers Arnold, *Discord and Collaboration: Essays on International Politics* (Hopkins University Press 1962)

¹²³ Sophie Meunier and Kalypso Nicolaidis, 'The European Union as a Conflicted Trade Power' (2006) 13(6) *Journal of European Public Policy* 906-925; Chad Damro, 'Market Power Europe: Exploring a Dynamic Conceptual Framework' (2015) 22(9) *Journal of European Public Policy* 1336-1354

promote human rights and democracy in the political realm alone.¹²⁴ Whereas, if ‘normative’ is defined as the defence of values, international law and the ability to promote universal norms (which transcend beyond human rights), then the Union’s rule-based multilateral approach towards trade relations with its neighbours, in particular Russia, bolster, rather than dilute, the ‘normative power’ argument.¹²⁵ This assertion is evident in the neighbourhood, with respect to the human rights clauses that are integrated into the Union’s trade agreements as a condition to access to the European market; and in relation to Russia with respect to the Ukraine crisis, given the EU’s imposed sanctions (in its endeavours to uphold international law) that have ultimately hindered trade relations with Russia.¹²⁶

Here it is significant to note that it is increasingly difficult to exert influence through traditional models of power such as economic sanctions which have waned in importance in recent years – this is true for the EU’s sanctions against Russia which have arguably crystallised the deadlock and increased the rift between these two powers. Whilst the EU’s sanctions against Russia may strengthen any normative argument given the Union’s efforts to uphold the rule of law over self-regarding economic interests, the sanctions have been largely unsuccessful in its efforts to create a conciliatory stance regarding the conflict in Ukraine. It goes without saying that the EU could not impose full-blown sanctions towards Russia in the energy sector given its heavy dependence and reliance on Russian energy resources. We can therefore see that the sanctions include some form restriction in investing in Russia’s energy companies and exports of energy equipment and technology (crucial for the Russian oil industry) but not on imports of Russian energy resources which would suggest a somewhat strategic normative agenda.¹²⁷ For this purpose, the thesis will not

¹²⁴ Meunier and Nicolaidis, sees trade relevant to both ‘civilian power’ and ‘normative power’ perspectives. See Sophie Meunier and Kalypso Nicolaidis, ‘The European Union as a Conflicted Trade Power’ (2006) 13(6) *Journal of European Public Policy* 906-925

¹²⁵ Tuomas Forsberg and Hiski Haukkala, *The European Union and Russia* (Palgrave Macmillan 2016) 229

¹²⁶ However, the conflict in Ukraine and sanctions are not a definitive example of normative goals prevailing in EU foreign policy, as the targeted sanctions were strategically imposed on segments of industry and sectors of the economy which were more detrimental to Russian interests, than Union interests and therefore the EU can be seen to be acting in a manner that is arguably not exclusively normative. A similar argument can be raised in relation to the controversial EU-Turkey refugee deal which came into force on 20 March 2016. The EU-Turkey refugee deal relates to an agreement whereby every person arriving irregularly on a Greek island, including asylum seekers, should be returned to Turkey. The controversy lies in the premise on which the deal was constructed, namely that Turkey is a safe place for refugees which is allegedly flawed. Amnesty International, ‘The EU-Turkey Deal: Europe’s Year of Shame, 20 March 2017. See also Tuomas Forsberg and Hiski Haukkala, *The European Union and Russia* (Palgrave Macmillan 2016) 229

<https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/> accessed 20 October 2016

¹²⁷ It is important to note that as far as the energy sector is concerned, the restrictive measures targeting sectoral cooperation and exchanges included: (i) restrictions on EU national and companies buying or selling bonds, equity or similar financial instruments with a maturity exceeding 30 days issued by the three major Russian energy companies; and (ii) exports of certain energy-related equipment and technology to Russia are subject to prior authorisation by competent authorities of Member States. This would include export licenses denied for oil exploration and production in waters deeper than 150 meters or in the offshore area north of the Arctic Circle and projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing. EU Sanctions against Russia over Ukraine Crisis. https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en

focus on the EU's sanctions against Russia as a means of assessing the Union's normativity in its manoeuvres in the energy sphere as sanctions can arguably erode any normative argument if we consider that it has been strategically imposed and that it constitutes a traditional tool of power which has yielded limited results since the military intervention in Ukraine.¹²⁸

Nevertheless, the EU's overall preference for institutionalising relations in its near neighbourhood within a shared multilateral normative framework has been seen as the ideal conceptualization of a normative power.¹²⁹ Furthermore, in terms of **normative behaviour**, one of the accepted definitions of normative power include upholding international law and universal norms, rules and principles such as multilateralism.¹³⁰ As a normative power, the EU invokes norms, shapes discourse and leads by example.¹³¹ By upholding international law, behaving in accordance with international norms, promoting universal rules and projecting its values on third countries, the Union yields power in its foreign relations through its influence.

However, a commitment to international law does not mean to suggest that the EU automatically qualifies as a normative power in its ability to uphold norms with due respect paid to international laws. A normative power, according to Manners, also includes the ability to use **normative means of power**.¹³² This however is not at the exclusion of economic means of power given that the EU is an economic power and therefore unlikely to rely exclusively on normative means. Nevertheless, normative means of influence prevail in the EU's foreign policy instruments, which is evident in its external relations with its neighbourhood and Russia.¹³³ This will be illustrated in the chapters to follow, in particular in relation to the analysis undertaken on the legal architecture in place, which suggests that the Union has a preference for keeping its relations with Russia and its Eastern Neighbourhood entrenched in legally binding frameworks. Here the EU predominantly uses normative power as a vehicle of influence by promoting general rules and practices and the subsequent mutual gains to be achieved through cooperation.¹³⁴ Normative power can also

¹²⁸ This illustrates that despite the EU's normative agenda in imposing sanctions against Russia which would suggest *mileu* goals overriding self-regarding possession goals, the sanctions are, as far as the energy sector is concerned, strategically imposed in a manner detrimental to Russia with limited consequences to the EU's security of energy supply.

EU Sanctions against Russia over Ukraine Crisis. https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en

¹²⁹ Tuomas Forsberg and Hiski Haukkala, *The European Union and Russia*. (Palgrave Macmillan 2016) 229

¹³⁰ Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 42 *Common Market Law Review* 553 -573

¹³¹ Ian Manners, 'Normative Power Europe: a Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235-258

¹³² *Ibid*

¹³³ Petr Kratochvíl, 'The Discursive Resistance to EU-Enticement: The Russian Elite and (the lack of) Europeanisation' (2008) 60(3) *Europe-Asia Studies* 397-422; Tuomas Forsberg and Antti Seppo, 'Power without Influence? The EU and Trade Disputes with Russia' (2009) 61(10) *Europe-Asia Studies* 1805-1823

¹³⁴ *Ibid*

be defined as the ability to achieve **normative outcomes**.¹³⁵ With the concept of power implying the ability to achieve results, the EU's success in normative ends (with the exception of abolition of capital punishment) leaves much to be desired.¹³⁶ In particular with regard to its relations with its neighbourhood, the EU's normative goals often play second fiddle to economic or strategic interests.¹³⁷

On the basis of Manners' seminal article and the related normative power debate, there appear to be four distinguishable mechanisms of a normative power through which the EU exercises its normative power as a means of influence namely: (i) through persuasion; (ii) by invoking norms; (iii) by shaping discourse; and (iv) by setting an example. However a distinction between these mechanisms have not been fully explored in the theoretical scholarship as the EU is often seen to use all four mechanisms as a means of exerting its influence.¹³⁸ As far as the EU's external relations with its neighbourhood is concerned, it has been argued that the most significant mechanisms deployed are that of **invoking norms** and the **power of example**.¹³⁹ The act of **invoking norms** refers to the activation of norms to which third parties have already committed themselves which can be seen as another mechanism of power typically associated with normative power.¹⁴⁰ Here the activation of commitments refer to the normative clauses which exist within agreements between the EU and third countries, which can be invoked by one party when they are violated by another. The fact that these normative elements exist in agreements between the EU and third powers, point to the normative interests of the EU rather than a mechanism of power.¹⁴¹ In terms of the **power of example** mechanism, 'model power' is in all probability the most normative of the various forms of normative power but likely the least understood.¹⁴²

Manners labelled the mechanism of spreading norms by example as 'contagion' as alluded to above, that refers to the process of transmittance through contact of which there are many forms.¹⁴³ 'Contagion' can refer to 'emulation' or imitation of best practices though

¹³⁵ Ian Manners, 'Normative Power Europe: a Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235-258.

¹³⁶ Sibylle Scheipers and Daniela Sicurelli, 'Normative Power Europe: a Credible Utopia?' (2007) 45(2) *Journal of Common Market Studies (JCMS)* 435-457

¹³⁷ Petr Kratochvíl, 'The Discursive Resistance to EU-Enticement: The Russian Elite and (the Lack Of) Europeanisation' (2008) 60(3) *Europe-Asia Studies* 397-422

¹³⁸ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1196

¹³⁹ *Ibid*

¹⁴⁰ Talcott Parsons, 'On the Concept of Political Power' (1963) 107(3) *Proceedings of the American Philosophical Society* 232-262.

¹⁴¹ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1197.

¹⁴² Jan Zielonka, 'Europe as a Global Actor: Empire by Example?' (2008) 84(3) *International Affairs* 471-484

¹⁴³ Ian Manners, 'Normative Power Europe: a Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235-258, 244.

group pressure;¹⁴⁴ or it can refer to influence through structural interdependence;¹⁴⁵ or example through learning.¹⁴⁶ Whilst there are different forms of norm promotion through example, typically these norms appeal most to states who already share them.¹⁴⁷ Regional integration is the most prominent form of power of example, with the EU using its economic might to set the standard and define the terms of regional cooperation. Here the EU is portrayed as a model for upholding universal norms with access to its markets being the ultimate reward for following its lead, which we see predominantly in the Union's external relations with its neighbourhood. Arguably, the EU's ability to influence or bring about certain effects by setting an example can be interpreted as constituting power.¹⁴⁸

Whilst this thesis endeavours to analyse the different mechanisms in their application towards the neighbourhood and Russia, there is substantial overlap between Manners' criteria and the normative mechanisms which potentially leads to conceptual ambiguity thereby clouding the normative analysis rather than demystifying it. By way of example, the most pronounced normative mechanisms in the neighbourhood mentioned above, namely *invocation of norms* and *setting of an example*, overlap with the criteria of *normative behaviour* and *normative means of power* respectively - the Union's normative behaviour (preference for institutionalising relations within shared legal frameworks) is synonymous with *invoking norms* (the use of conditionality clauses and activation of norms and commitments under the PCAs and *acquis* export), if we consider that the Union invokes norms through the *acquis* and the legal frameworks it promotes in its external relations. Similarly, *normative means of power* (promoting general rules and practices for subsequent gains through cooperation) is synonymous with *setting an example* (norm promotion through example), if we concede that the Union promotes general rules and cooperation by way of its regional integration through instruments such as the ENP and Eastern Partnership where it sets itself up as an example. As a result of these convergences and intersections, the thesis focuses its analysis more predominantly on the criteria of a normative power, which are more clearly defined in Manners' conceptualisation of a 'normative power' rather than the mechanisms of a normative power which are arguably ambiguous and less pronounced in Manners' theoretical framework.

¹⁴⁴ Tanja Börzel and Thomas Risse, 'Diffusing (Inter-) Regionalism: The EU as a Model of Regional Integration', Annual Convention of the American Political Science Association, Toronto, Canada, 2-6 September

¹⁴⁵ Allan Drazen, 'Political Contagion in Currency Crisis' in Paul Krugman (ed), *Currency Crisis* (University of Chicago Press 2000) 47-67

¹⁴⁶ Laura C. Ferreira-Pereira, 'Human Rights, Peace, and Democracy: Is "Model Power Europe" a Contradiction in Terms?' in Federiga Bindi (ed), *The Foreign Policy of the European Union: Assessing Europe's Role in the World* (Brookings Institution Press 2010)

¹⁴⁷ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1198

¹⁴⁸ *Ibid*

In many ways 'normative power' provides an appropriate description of what the EU does without implying that that is what it actually is.¹⁴⁹ Where the EU displays traits of a normative power but does not qualify as such, perhaps the notion of a normative power can be seen as an ideal type.¹⁵⁰ Namely, something that the Union aspires to as an actor on the political stage.¹⁵¹ However conceiving the notion of a normative power as an ideal type can lead to dogmatism, if the concept in which the normative ideal applies is not defined.¹⁵² Sjurgen argues that it is only by presenting clear definitions of what a normative power is (or conversely, what a normative power is not) that one can realistically expect to say anything empirical about the argument.¹⁵³ However, the concept itself can lead to ambiguity which is why Forsberg advocates that a distinction is required between the different mechanisms of normative power, namely: persuasion, invoking norms, shaping discourse, and providing an example. It is only by scrutinising these different mechanisms that one can determine whether the Union is indeed normative or not or whether it acts in a normative way which implies that the Union is not exclusively normative by nature with additional dimensions to its role as an international actor.

Reflecting on the conceptualisations of the Union as a normative power mentioned above, for the purpose of this thesis, the analysis undertaken focuses on the mechanisms of normative power most pertinent to the Union's external relations with Russia and its Eastern Neighbourhood, namely that of the invocation of norms and the power of example. As alluded to above, the invocation of norms is most pronounced in the conditionality clauses of bilateral and multilateral agreements in the 'near abroad' where ex-Soviet states and Eastern European countries have signed-up to frameworks facilitating enlargement or access to the internal market.¹⁵⁴ Here the Union's power of example is prominent as the Union uses regional integration to spread its norms and its economic might to facilitate states conforming to an EU model.¹⁵⁵ Whilst these mechanisms may be effective in the Eastern Neighbourhood where the Union can trigger obligations through conditionality clauses under bilateral and regional frameworks using its economic power and access to the internal market as a carrot on a stick, these methods are less successful with Russia which is not party to any regional framework nor willing to conform to an EU model or the

¹⁴⁹ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* (JCMS) 1183-1204, 1200

¹⁵⁰ Hanns W. Maull, 'Europe and the New Balance of Global Order' (2015) 81(4) *International Affairs*, 775-799, 779; Max Weber, *On the Methodology of the Social Sciences*, (Lulu Press Inc, 2015)

¹⁵¹ *Ibid*

¹⁵² Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* (JCMS) 1183-1204, 1200

¹⁵³ Helene Sjurgen, 'The EU as a 'Normative Power': How Can This Be? (2006) 13(2) *Journal of European Public Policy*, 235-251, 242

¹⁵⁴ Adrian Hyde-Price, 'A "Tragic Actor"? A Realist Perspective of "Ethical Power Europe"', (2008) 84(1) *International Affairs*, 29-44, 31

¹⁵⁵ *Ibid*

acquis. Here we see the Union engaging in different forms of norm export in an effort to engage with its strategic, yet reluctant partner.

Against this backdrop, the thesis examines whether the Union's diffusion of norms and its efforts to export its energy *acquis* to Russia are driven by values or other factors, such as interests or strategic objectives. Where the EU's diffusion of norms are in the pursuit of values or 'the greater good' this is indicative of a normative power. However, where such norms are in the pursuit of other factors, such as geopolitics or strategic interests including security, the normativity of the Union's conduct and identity is potentially eroded. This then sets the bar for what constitutes normative behaviour, namely an interests versus values objective in the Unions norm export in its external energy relations with Russia, which will be benchmarked against its conduct in the Eastern Neighbourhood. This is the framework against which the Union's normativity in its external energy relations with Russia is tested in the chapters to follow. The dichotomy between values and interests is gauged against the Union's external relations with the Eastern Neighbourhood and the values, interests or objectives it strives for in its external energy relations with Russia.

2.3. The Treaty of Lisbon and its Relevance to the Normative Power Framework

The Union's external action is based on the notion that the export of EU values and norms are fundamental to upholding security, stability and prosperity in Europe and the world at large.¹⁵⁶ This belief is articulated in Articles 3(5) TEU¹⁵⁷ and 21(1) TEU¹⁵⁸ with the constitutional basis for EU norm export to the neighbourhood stipulated in Article 8 TEU.¹⁵⁹ The concept of the EU's norm export has evolved with the Union's active engagement as a 'rule generator'¹⁶⁰ which has subsequently gained pace in the Union's external relations in

¹⁵⁶ Peter Van Elsuwege and Roman Petrov, 'Setting the Scene: Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 1

¹⁵⁷ Article 3(5) TEU - In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

¹⁵⁸ Article 21(1) TEU - The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

¹⁵⁹ Article 8(1) TEU - [t]he Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation

¹⁶⁰ Marise Cremona, 'The Union as Global Actor: Roles, Models and Identity' in Alison McDonnell (ed), *A Review of Forty Years of Community Law: Legal Developments in the European Communities and the European Union* (Kluwer Law International, 2005) 278

general, and policy towards its neighbourhood in particular.¹⁶¹ The Treaty of Lisbon has contributed greatly to this evolution with an explicit ‘transformative mandate’ in relation to the Union’s neighbourhood, namely to establish an area of prosperity based on its own values.¹⁶² The EU’s transformative engagement is predominantly based on the export of the *acquis*¹⁶³ which is most prominent in its external relations with its East European neighbours.¹⁶⁴ Against this backdrop, it is important to consider the context within which the Lisbon Treaty was prepared and adopted. The following section serves to illustrate how the Lisbon Treaty provisions have complemented and paved the way for the developments mentioned above.

Prior to Lisbon, the EU had developed a toolbox of instruments, including international agreements with the aim of facilitating the political and economic transition of the former soviet states following the disintegration of the Soviet Union. The transition would be expedited through the legislative approximation as a prerequisite to good political and economic relations. The PCAs with the former socialist countries therefore included a ‘best endeavours’ clause with soft-law obligations to ensure domestic legislation is made compatible with that of the Union. With this undertaking, the former Soviet republics engaged in a process of ‘voluntary harmonisation’.¹⁶⁵ However whilst legislative approximation became a core objective on the domestic political agenda of candidate countries undertaking a commitment of legislative reform under an obligation to incorporate the entire *acquis*,¹⁶⁶ for the former Soviet states, legislative approximation remained a moot point.¹⁶⁷

In contrast to the Union’s pre-accession strategy, the EU’s norm export to non-candidate states did not go beyond declaratory statements that lacked substance. The Union’s Wider Europe strategy which later became known as the ENP, endeavoured to move beyond mere cooperation to economic integration with legislative approximation as a core objective. By offering partner countries a stake in the Union’s internal market, it was hoped that the East

¹⁶¹ Roman Petrov, *Exporting the Acquis Communautaire Through European Union External Agreements* (Nomos Verlagsgesellschaft mbH & Co. KG, 2011)

¹⁶² Christophe Hillion, ‘Anatomy of EU Norm Export Towards the Neighbourhood: the Impact of Article 8 TEU’ in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 19

¹⁶³ Amichai Magen, ‘Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of EU External Influence’ (2007) 9(3) *European Journal of Law Reform* 361-92

¹⁶⁴ Rilka Dragneva and Kataryna Wolczuk, ‘EU Law Export to the Eastern Neighbourhood’ in Paul James Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (TMC Asser Press, 2011) 217

¹⁶⁵ Andrew Evans, ‘Voluntary Harmonisation in Integration between the European Community and Eastern Europe’ (1997) 22 *European Law Review* 201-220

¹⁶⁶ Eugeniusz Piontek, ‘Central and Eastern European Countries in Preparation for Membership in the European Union’, (1997) 1 *Yearbook of Polish European Studies* 73

¹⁶⁷ Peter Van Elsuwege and Roman Petrov, ‘Setting the Scene: Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union’ in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 2

European neighbours would gravitate towards further integration.¹⁶⁸ However, closer economic integration was subject to 'concrete progress demonstrating shared values and effective implementation of political, economic and institutional reforms, including aligning legislation with the EU *acquis*'.¹⁶⁹ In contrast to the weak approximation clauses of the PCAs, conforming domestic legislation to the *acquis* now became a clearly defined objective under the ENP and a condition to further integration.

As a regional dimension to the ENP, the launch of the Eastern Partnership provided a new framework 'to accelerate political association and further economic integration' between the Union and its East European Neighbours.¹⁷⁰ Within this framework, participating countries such as Ukraine, Moldova, Belarus, Georgia, Armenia, Azerbaijan are provided with a new bilateral platform by way of Association Agreements which includes the goal of establishing Deep and Comprehensive Free Trade Areas (DCFTAs). This new contractual framework also serves to bolster any legislative approximation with 'regulatory approximation leading to convergence with EU laws and standards'¹⁷¹ noting that 'legislative and regulatory approximation is crucial to those partner countries willing to make progress in coming closer to the EU.'¹⁷² The ultimate objective of *acquis* export with the Eastern Partnership countries is economic integration and political association through legislative and regulatory approximation facilitating convergence to an EU model of legal standard and norms.¹⁷³ Ultimately the level of integration depends on the level of institutional and regulatory convergence achieved based on the unilateral alignment of laws, norms and standards to that of the EU.¹⁷⁴

On consideration of the above, it can be confirmed that the Lisbon Treaty has contributed greatly to the normative power framework with Article 8 TEU providing the explicit legal basis for the Union developing its external relations with its neighbouring countries. It is argued that Article 8 TEU codifies the conditionality approach of the ENP and introduces the prospect of association agreements with the Union's eastern partners and other neighbouring countries not interested in formal association with the EU.¹⁷⁵ In this respect, the EU's diffusion of norms by way of exporting its *acquis* to its near neighbourhood (either

¹⁶⁸ European Commission, 'Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM (2003) 104 final, 11 March 2003, 5

¹⁶⁹ European Commission, 'Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM (2003) 104 final, 11 March 2003, 10

¹⁷⁰ Council of the EU, 'Joint Declaration of the Prague Eastern Partnership Summit', 7 May 2009, doc. 8435/09. See also Erwan Lannon and Peter Van Elsuwege, 'The Eastern Partnership: Prospects of a New Regional Dimension within the European Neighbourhood Policy' in Erwan Lannon (ed), *The European Neighbourhood Policy's Challenges*, (Peter Lang, 2012) 285-322

¹⁷¹ Council of the EU, 'Joint Declaration of the Prague Eastern Partnership Summit', 7 May 2009, doc. 8435/09, para. 5

¹⁷² Council of the EU, 'Joint Declaration of the Prague Eastern Partnership Summit', 7 May 2009, doc. 8435/09, para. 9

¹⁷³ Council of the EU, Joint Declaration of the Prague Eastern Partnership Summit, 7 May 2009, doc. 8435/09

¹⁷⁴ COM (2011) 303, 8

¹⁷⁵ Petrov, Roman and Van Elsuwege, Peter, 'Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?' (2011) 36 European Law Review 688-703

through a conditionality approach or association agreements) marks the EU out as a normative power. The Union's insistence that trade partners conform to its constitutional values and norms under the 'transformative mandate' vested in Article 8 TEU, give credence to Manners' assertion that the Union is changing world politics by deviating from state-centricity and leading by example. By setting itself up as an ideal model of values, standards and norms for third country states to gravitate towards, the Union can arguably be said to be acting in a manner which is quintessentially normative.

2.4. Criticism to the Normative Power Framework

If the export of norms and values can be said to be acting as a normative power, then the use of conditionality clauses to ensure approximation to EU laws, can be considered coercive. By placing conditionality clauses on Eastern European countries (through the process of enlargement) and other third countries (as a means of obtaining access to the European market), the Union can be considered to be imposing its own norms and values on third countries through non-normative means. This conduct amounts to 'milieu shaping'¹⁷⁶ where the Union uses its economic power as a means to coax third countries into conforming to an EU model.¹⁷⁷ Bull argues that by using non-normative means to diffuse norms whilst retaining a state self-interest in its manoeuvres within its periphery, the EU has arguably regressed from being a normative power as Manners strongly advocates.¹⁷⁸ In this respect, Hyde-Price argues that the EU is not normative and that it displays elements of hypocrisy in its conduct by resorting to coercion to impose its perception of the norm on third countries.¹⁷⁹ The Union's actions in its neighbouring periphery can therefore be seen as an area where the Union is acting in a realist rather than normative manner.¹⁸⁰ The neo-realist theory offers an alternative framework to the Union as an international actor. Neo-realism asserts that in a global system riddled with anarchy, cooperation between states is limited given that states are unitary actors driven by maximising gains and security.¹⁸¹ The EU can therefore be said to be acting as vehicle for its member states to further their own

¹⁷⁶ The Union's objectives are broadly formulated to reflect interests such as security, economic development and multilateral cooperation which creates legal space for the EU to pursue both 'possession goals' and 'milieu goals' which scholars have identified as the two types of foreign policy objectives. Milieu goals deal with the transformation of an actor's environments whilst trying to pursue both altruism and self-interest, the ENP being a prime example. See Kristian L. Nielsen and Maili Vilson, 'The Eastern Partnership: Soft Power Strategy or Policy Failure?' (2014) *European Foreign Affairs Review* 19(2) 235; Nariné Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Bloomsbury Publishing, 2014) 13; Nariné Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Bloomsbury Publishing, 2014) 13

¹⁷⁷ Adrian Hyde-Price, 'A "Tragic Actor"? A realist Perspective of "Ethical Power Europe"', *International Affairs* (2008) 84 (1), 29-44. 31

¹⁷⁸ Hedley Bull, 'Civilian Power Europe: A Contradiction in Terms?' (1982) 21(2) *Journal of Common Market Studies* 21, 149-170

¹⁷⁹ Adrian Hyde-Price, 'A "Tragic Actor"? A realist Perspective of "Ethical Power Europe"' (2008) , *International Affairs* 84(1), 29-44.

¹⁸⁰ *Ibid* 31

¹⁸¹ Adrian Hyde-Price, 'Normative' Power Europe: A Realist Critique, *Journal of European Public Policy* (2006) 13(2), 218-234, 220

interests.¹⁸² Returning to High Representative Javier Solana's claim of the EU working towards a 'common good', neorealism asserts that the diffusion of EU norms and values do not necessarily establish the Union as a normative power but rather a realist power leveraging its economic might against weaker states to maximise its interests. Neorealism therefore dilutes the normative power argument by suggesting that strategic interests and geopolitics are significant factors in the Union's conduct rather than the quest for a 'global common good'.

Whilst the perception of the Union as a normative power may appear overly idealistic, it would be inaccurate to suggest that EU foreign policy is deeply imbedded in structural realism.¹⁸³ By imposing conditionality clauses on third countries wanting to trade with the EU or aspire to EU accession, the inclusion of human rights clauses would suggest ethical concerns which are arguably incongruous with a realist power.¹⁸⁴ As Aggestam suggests, ethics is intrinsically a normative undertaking which would strengthen the normative framework where conditionality clauses are linked to human rights and values fundamental to a universal global order.¹⁸⁵ However, if the EU is to live up to Solana's view of the EU as an engine for the 'common good' then, as advocated by Dunne, the EU needs to be more proactive and able to deploy 'forces for good'¹⁸⁶ in an effort to eradicate any imminent crises in the region.¹⁸⁷ If we concede that one of the fundamental aspects of EU normative power is the promotion of human rights which is intrinsically linked to the Union's policy of conflict prevention, then the EU appears to have taken a more prominent role in diffusing its norms than the role of a great power that deploys 'forces for good'. By way of example, although the EU places high value on human rights, it is still willing to trade with autocratic states with dubious human rights records. This is illustrated by the EU's willingness to trade with China despite its insistence on human rights conditionality clauses¹⁸⁸ which contradicts its norms and values, prompting an argument in-line with realist thought that the Union is simply

¹⁸² *Ibid*

¹⁸³ Lisbeth Aggestam, 'Introduction: Ethical Power Europe?' (2008) 84(1) International Affairs, 1-11, 5

¹⁸⁴ There is a caveat to this statement – this depends on the category of rights protected. Certainly civil and political rights, grounded as they are in political liberalism, are often considered necessary elements for economic liberalism. Lisbeth Aggestam, 'Introduction: Ethical Power Europe?' (2008) 84(1) International Affairs, 1-11, 5

¹⁸⁵ Lisbeth Aggestam, 'Introduction: Ethical Power Europe?' (2008) 84(1) International Affairs, 1-11, 5

¹⁸⁶ Dunne asserts that 'becoming a regional engine for the world common good requires both greater self-reliance in the provision of its own security as well as the capacity to deploy 'forces for good' rapidly to prevent or eradicate crises out of area'. Sjursen asserts that 'values or conceptions of what is good may vary according to cultural or social contexts' and that 'normative' power cannot be anything other than the EU promoting its own norms in a similar manner to historical empires and contemporary powers'. It can therefore be argued that ideas of a 'global common good' are tied up in unachievable cosmopolitanism and fall foul to accusations of cultural imperialism, an issue that discredits the EU as a normative power. With this in mind, Sjursen claims it is possible to discount the EU as a normative power as it contradicts itself. See Tim Dunne, 'Good Citizen Europe', (2008) 84(1) International Affairs, 13-28; and Helene Sjursen, 'The EU as a 'Normative Power': How Can This Be?' (2006) 13(2) Journal of European Public Policy, 235-251

¹⁸⁷ Tim Dunne, 'Good Citizen Europe', (2008) 84(1) International Affairs, 13-28

¹⁸⁸ In its dealings with third countries the EU stipulates conditionality clauses that bind the recipients to practice ethical human rights, as stipulated in the European Convention on Human Rights.

promoting its own self-interests.¹⁸⁹ Although Manners has highlighted that the EU attempts to diffuse human rights to China through discourse, the ambiguity of the situation leaves notions of normative power open to criticism.¹⁹⁰ Aggestam's conceptualisation of the Union as an 'ethical power' reaffirms the view that the Union needs to be proactive by actively engaging in its norm promotion rather than simply setting an example, a trait which Manners deems sufficient to qualify as a normative power.¹⁹¹

As an alternative to the normative or realist framework, Dunne espouses a more refined approach with the notion of 'good citizen Europe' which alludes to the Union's ability to 'export an expression of individual rights and duties from a bounded polity to a global order'.¹⁹² This is illustrated by the use of conditionality in the 'near abroad' where the *acquis* is imposed on Eastern European candidate states and not enforced against Mediterranean countries.¹⁹³ This validates the view that the EU acts as a good citizen given its recognition of context, sensitivity to cultural differences and various courses of action based on social constructs and diversity.¹⁹⁴ Notwithstanding, it is alleged that this behaviour cannot be construed as normative as the Union uses economic coercion as a mechanism by threatening the removal of concessions to trade.¹⁹⁵ In this respect it can be argued that it is hard to conceptualise the Union as a normative power that leads by example if it uses coercion as a means to diffuse its norms. Dunne maintains that whilst 'the EU is a solidarist international society in so far as its members are states that share high levels of common interests and values', the Union suffers from a capabilities-expectations gap beyond its borders.¹⁹⁶ Although solidarist principles would be construed as more normative in approach, the pluralist view suggests that where EU Member States are involved, individual interests and concerns come into play. In this respect, Dunne argues that the Union's ability to pivot between a solidarist and pluralist approach in its policy and course of action, suggest that the EU is not a normative power which would otherwise be confined to a predetermined mode of norm diffusion.¹⁹⁷

¹⁸⁹ Helene Sjursen, 'The EU as a 'Normative Power': How Can This Be?' (2006) 13(2) Journal of European Public Policy, 235-251, 245

¹⁹⁰ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) Journal of Common Market Studies, 235 – 258, 248

¹⁹¹ Lisbeth Aggestam, 'Introduction: Ethical Power Europe?' (2008) 84(1) International Affairs, 1-11, 2

¹⁹² Tim Dunne, 'Good Citizen Europe', (2008) 84(1) International Affairs, 13-28, 16

¹⁹³ Frédéric Charillon, 'Security and Intervention: EU's Interventionism in its 'Near Abroad', in Walter Carlsnaes, Helene Sjursen and Brian White (eds), Contemporary European Foreign Policy (Sage, 2004) 252-264, 258

¹⁹⁴ *Ibid*

¹⁹⁵ Here the context of the situation is significant. Whilst it would be irrational to suggest that normative principles can be implemented in any given situation without regard to the Union's self-serving interests, Manners claims that consistency between internal policies and external action needs to be maintained. Ian Manners, 'The Normative Ethics of the European Union' (2008) 84(1) International Affairs 182 – 199, 56. Where a situation requires normative action and action with distinct non-normative methods is implemented instead, then the prioritising of strategic interests over normative objectives undermines the notion of the EU as a normative actor. Ian Manners, 'Normative Power Europe Reconsidered: Beyond the Crossroads' (2006) 13(2) 182-199, 191. See also Tim Dunne, 'Good Citizen Europe', (2008) 84(1) International Affairs, 13-28, 16

¹⁹⁶ Tim Dunne, 'Good Citizen Europe', (2008) 84(1) International Affairs, 13-28, 22

¹⁹⁷ This was evident in the EU's dealings with Iran and its uranium enrichment programme, whereby the EU followed pluralist principles by undertaking a non-intervention approach in contrast to solidarist principles which

2.5. A Nuanced Conceptualisation of Manners' Normative Power Theory

As already mentioned in Chapter 1, the EU uses its external relations powers to extend the reach of EU law which in turn shapes the EU's external action. The global reach of EU law therefore requires further scrutiny of the interaction between the law and EU external policy. The external reach of EU law serves as a natural expression of the EU's international actorness which is reflected in the Union's external action.¹⁹⁸ Cremona identifies three dimensions to the EU's 'actorness' which reveal three distinct yet overlapping dynamics to the relationship between law and action.¹⁹⁹ Whilst these dimensions are not exhaustive of the EU's actorness and the role that law plays in defining the EU as an international actor, they are characteristic of the law and external action dynamic. The dimensions include: (i) the use of the law to promote EU values externally; (ii) the use of the law as a means of conducting foreign policy and promoting EU interests; and (iii) a commitment to multilateralism and global governance structures which enable the Union to import, shape and promote international legal norms. The thesis will explore these mechanisms in the analysis undertaken²⁰⁰ to show to what extent the law defines the EU as an international actor and how the law is used in its external action on the global stage. The fact that the EU derives its external power from the law and operates through the law, has validated the notion of the EU as a normative power as coined by Manners. Whilst there is theoretical ambiguity in the normative power framework and whether the EU does indeed fulfil Manners' assertion that the EU is a foreign policy actor predominantly driven by ethical values,²⁰¹ this thesis will not examine the EU's normativity exclusively in this sense. Rather, the thesis will undertake a more nuanced approach to Manners' normative power theory by undertaking an assessment of the Union's 'normativity' based on a refined 'legal friendly' understanding of what the term constitutes and whether there are additional facets which warrant attention in this conceptualisation of the Union.

More specifically, this thesis will examine the extent to which the Union is a normative actor, in the context of its *use of the law as a tool to pursue its objectives in its external relations*, namely the promotion of EU norms, EU values and EU interests through normative means such as legal instruments, international law and international organisations. Therefore whilst the thesis will apply Manners' normative criteria and mechanisms to assess the extent to which Manners' normative power theory explains the EU's actions in its neighbourhood and

would entail a more normative approach. Dunne argues that this ability to decide between a solidarist and a pluralist policy shows that the EU is not normative given its ability to decide on different courses of action rather than being predisposed to act in a 'normative' way. Tim Dunne, 'Good citizen Europe', (2008) 84(1) *International Affairs*, 13-28, 24

¹⁹⁸ Marise Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in Marise Cremona and Joanne Scott (eds), 'EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law' (Oxford University Press, 2019) 65

¹⁹⁹ *Ibid*

²⁰⁰ See Chapter 3 Section 3.1.2.1. (*Objectives in External Action*)

²⁰¹ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84 *International Affairs* 65

external relations with Russia, the research will offer a more nuanced observation by supplementing the analysis undertaken with other perspectives in the literature which either serve to affirm or contest Manners' normative power claim, namely that the EU is a foreign policy actor driven by ethical values which define what is 'normal' in the Union's influence on the global stage.

Against this backdrop, the thesis will draw a distinction from Manners normative power claim by examining the use of the law and other normative means in the assessment of the Union's normativity, shifting the focus from the *pursuit of ethical values* to the *use of legal frameworks* to pursue EU objectives which include both values and interests. The thesis will posit that the Union's normativity is vested in the use of the law as mechanism to forward its agenda through which the Union derives its external power (i.e. influence / impact) rather than the objective itself and whether it is value-based. The analysis will show that even where the EU pursues objectives which are based on self-regarding interests which suggest a geopolitical (rather than normative) foreign policy actor, where these interests are pursued through the use of legal instruments and frameworks, the EU can still be said to be engaging as a normative actor despite the *telos* of its objective being strategic in nature.

Article 3(5) TEU establishes the EU's external mission which includes upholding and promoting the EU's values and interests. Whilst the promotion of values may involve the external reach of EU legal norms and international norms, interests are seen as largely non-normative in competition with values as a driver of EU foreign policy. However, depicting values and interests; and law and power as complete opposites on a scale is overly simplistic. Whilst values and interests appear to be inherently conflicting, they are not stark opposites. As has been mentioned earlier, law is indeed an expression of power and as will be shown in the chapters to follow, there is an overlap of interests and values. By way of indication, Tocci argues that an actor shapes its values according to its interests, while an actor's values shapes its interests.²⁰² Therefore interests influence the values to be promoted in the Union's external relations and foreign policy which in turn help define the interests to be pursued in its external action. By way of example, the EU's interests of stability in the neighbourhood serve to influence the values promoted there, such as the rule of law and human rights which help construct the Union's interests in the region, namely peace and security.

The overlap of values and interests is acknowledged by the EU Global Strategy in which Mogherini declared that EU interests and values go hand in hand.²⁰³ The Global Strategy presents values as interests by suggesting that it is in the EU's interests to pursue its

²⁰² Natalie Tocci, *Profiling Normative Foreign Policy: The European Union and its Global Partners* (CEPS Working Document No. 279, December 2007) 3

²⁰³ European Union, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (June 2016), 13

values.²⁰⁴ However, the EU's interests and values may indeed conflict, the 2016 Turkish agreement on settlement of refugees being a case in point. In this respect Kuner argues that the EU should not masquerade its political interests under the guise of fundamental legal values.²⁰⁵ Rather Kuner asserts that there is a degree of integrity in the law resistant to political pressures which needs to be acknowledged.²⁰⁶ The overlap between the EU's values and interests has led to a shift in the Union's rhetoric in the ENP and Eastern Neighbourhood from a focus on 'shared values' to 'mutual interests'.²⁰⁷ Similarly, the Union's most recent Trade Strategy aligns the EU's values with its interests which is a declared priority for the Union.²⁰⁸

Whilst the external mandate requires the EU to promote its values, it also requires the EU to safeguard its interests. The tension in the relationship between values and interests is implicit in the fact that the EU's interest and values overlap. It is in the Union's interest that its values are rigorously promoted and more widely accepted. The Union's desire to promote its own fundamental values as global is linked to its interest in promoting EU law norms based on those values.²⁰⁹ However, it would be unreasonable to expect third countries to adopt European values as universal if they are being pushed by a European political agenda and pursuant to EU strategic interests. The blurred lines between the EU's values and interests calls for a reassessment of the normative power theory if the claim is founded on a conceptualisation of the Union predominantly driven by ethical values. With Union interests high up on the agenda, what ultimately defines a 'normative power' and what that conceptually entails, inevitably requires rethinking if the notion is to accurately reflect the Union as a global actor.

2.6. The ENP (Eastern Neighbourhood) as an Appropriate Benchmark for Assessing the Union's Normativity vis-à-vis Russia

As already mentioned in Chapter 1, this thesis will examine the Union's normativity within the normative power thesis (whilst bracketing the idea of power as a more contextual starting point) by examining the cross-border characteristics of the EU's energy policy and assessing to what extent EU law in this policy domain has extraterritorial impact. For this purpose, the thesis will explore the interaction between EU law and the EU's external relations (with the ENP/Eastern Neighbourhood and Russia) in the energy field where the Union has been relatively active. As will be shown in the chapters to follow, the EU seeks

²⁰⁴ *Ibid*

²⁰⁵ Christopher Kuner, 'The Internet and the Global Reach of EU Law' in Marise Cremona and Joanne Scott (eds), 'EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law' (Oxford University Press, 2019) 135

²⁰⁶ *Ibid*

²⁰⁷ Joint Communication by the Commission and the High Representative, Review of the European Neighbourhood Policy, JOIN (2015) 50, 18 November 2015

²⁰⁸ European Commission, 'Trade for All – Towards a More Responsible Trade and Investment Policy', 14 October 2015, 20

²⁰⁹ European Union, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (June 2016), 13

to influence conduct and governance regimes beyond its borders through the extraterritorial impact of its internal market legislation, transnational governance structures, and bilateral / multilateral agreements. Although the EU's impact is derived from its quest to influence external conduct, this quest is driven by internal concerns, namely protecting the integrity of the Union's internal regulatory regime and bolstering the European legal architecture by promoting the development of regulation in-line with the EU's values and interests. Whilst there are normative justifications for EU law's global reach, these are by no means restricted to self-proclaimed values. As the thesis will show, where the Union's neighbourhood and Russia are concerned, interests have been tipped in the balance given the strong security dimension with respect to stability in the neighbouring region and energy security with Russia.

Against this backdrop, it is important to note that the EU derives its external power from the law which is reflected in its external action. Reflecting on Cremona's dimensions of the EU's 'actorness' mentioned above,²¹⁰ the second dimension reveals how the EU uses the law as a way of conducting its foreign policy and promoting its interests.²¹¹ More specifically, the EU uses the law to pursue integration-based relationships. It follows, that the EU's integration is through the law by way of extending the reach of the EU *acquis* through international agreements.²¹² This 'integration through the law' is one of the most powerful tools in the Union's external relations which is most pronounced in its neighbourhood.²¹³ In particular, the Association Agreements and DCFTAs with Georgia,²¹⁴ Moldova²¹⁵ and Ukraine²¹⁶ which entail a substantial degree of alignment to the EU *acquis*, including sectoral alignment to the EU's energy sector.²¹⁷ Here, legal integration is evident in the closer gravitation of these countries towards the EU and the internal market through an extension of the *acquis*, with approximation to the EU legal order the choice of methodology. In contrast, despite the Union's efforts, there is no integration (or prospect of integration) with Russia which reveals a deficiency in the Union's integration project or integration

²¹⁰ See Chapter 2 Section 2.5 (*A Nuanced Conceptualisation of Manners Normative Power Theory*)

²¹¹ Marise Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in Marise Cremona and Joanne Scott (eds), 'EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law' (Oxford University Press, 2019) 66

²¹² By way of example, Georgia, Moldova and Ukraine have Association Agreements and DCFTAs in place. Alternative legal frameworks currently exist and/or are being pursued with Armenia (Comprehensive and Enhanced Partnership Agreement (CEPA); Azerbaijan (PCA and New Framework agreement) and Belarus (Partnership Priorities).

²¹³ Marise Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in Marise Cremona and Joanne Scott (eds), 'EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law' (Oxford University Press, 2019) 87

²¹⁴ Association Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part, OJ [2014] L 261/5, 30 August 2014

²¹⁵ Association Agreement between the European Union and its Member States, of the one part, and Moldova, of the other part, 29 May 2014

²¹⁶ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ [2014] L 161/3, 26 November 2013

²¹⁷ See Chapter 4 Section 4.1.3.3 (*Energy Acquis Export in the Neighbourhood*) and Section 4.1.4.1.2 (*The Association Agreements and Deep and Comprehensive Free Trade Agreements (DCFTAs)*)

through the law as an external enterprise where the partner involved is reluctant to develop relations based on EU principles.²¹⁸ The ENP (in particular the Eastern Partnership) therefore serves as an appropriate backdrop against which the Union's external relations with Russia can be assessed where the Union's mode of integration is waning and other manoeuvres therefore actively pursued in the alternative.

2.7. Chapter Conclusion

The chapter has endeavoured to examine the scholarship on the Union's role as a global actor in particular the EU's role as a normative power in its external relations with third countries. In so doing the chapter has provided a review of the prevailing scholarship on the EU as a normative power framework and the criteria which Manners' asserts are indicative thereof. In undertaking this analysis, the chapter identified the mechanisms of normative power most pertinent to the Union's external relations with its periphery, namely the invocation of norms and the power of example, which is used as a framework in the chapters to follow. The chapter also considered the other voices in the literature which either agree or disagree with Manners' conceptualisation of the EU as a normative power. Inevitably Manners' assertion that the EU is a normative power is contested in the literature due to discrepancies between what the Union says and does in its external relations. Whilst the chapter has endeavoured to reflect some of the adherents and critics towards the normative power framework, this does not purport to be an exhaustive list of all the voices in the field. It goes without saying that if the EU is not a normative power, then it must be something else. It is not the intention of this chapter to answer what kind of a power the Union is but rather to set the platform to assess to what extent the Union is normative in its external energy relations with Russia and its Eastern Neighbourhood, the subject matter of this thesis, by reviewing the prevailing scholarship and assessment standards established in the literature. In considering the Union's unique polity from whence it has obtained its predisposition to act in a normative way, the chapter has considered to what extent the Lisbon Treaty has contributed to the normative power framework given its pursuit of values and diffusion of norms, which will be examined in greater detail in the chapter to follow.

²¹⁸ Article 21(1) TEU

Chapter 3: The Role of the EU as a Global Normative Energy Actor

In the previous Chapter, the thesis introduced the scholarly claims that have been made with regard to the EU's role as normative actor. This chapter turns to the particularities regarding the EU's actorness in the field of energy, which brings together questions of competence, the EU's internal energy objectives and its external action to pursue those objectives. The chapter will analyse the scope of the Union's external energy competence by examining the interplay between the Union's internal market and its external energy relations. This will entail analysing the extent to which the internal energy objectives of the Union have been pursued and achieved through its foreign energy relations and external action, thereby creating an external dimension to an internal sectoral competence. Second, the chapter will examine EU energy policy and the extent to which the Union's energy competence has bolstered the Union's actorness in the energy domain. For the purpose of this analysis, the chapter will examine the further novelties introduced by Lisbon in addition to the Union's explicit energy competence under Article 194 TFEU and assess whether these new facets (i.e. the solidarity provision; new actors in external relations and objectives in external action) have set the Union's actorness in motion and facilitated the Union becoming a global normative energy actor. The chapter thereby provides the energy specific background needed for the subsequent case study, given the predominant role energy plays for the EU's action in the context of its neighbourhood and its relations with Russia.

3.1. The External Dimension of the EU Internal Market

The development of the EU's energy policy can essentially be scrutinised from two different yet interrelated angles, namely the functioning of the internal market and the forming of the Union's external energy policy. The manner and pace at which these two policy domains have evolved are quite different from one another, however the development of the internal market long preceded the evolution of the EU's external relations and as such insight on the internal dimension can shed light on the external realm.²¹⁹ Therefore, by examining the key objectives of the EU internal market and the challenges the EU has encountered in this policy domain, a better understanding of EU external relations will be ascertained based on the manner in which these internal challenges are or have been 'externalized'.

3.1.1. The Internal Energy Market and External Relations – the CCP Analogy

As the title of this section suggests, the analysis to follow will draw an analogy between the internal energy market and the EU's external relations using the CCP. The inception of the CCP can be found in the liberalisation of trade in goods. Article 207(1) TFEU provides for a

comprehensive set of competences of the EU in the area of trade. The development of the CCP can only be properly understood when viewed against the backdrop of the development of the international trade regime and the economic integration within Europe towards the internal market.²²⁰ Therefore the CCP serves as a vital tool for the EU in the international trading order and the internal market²²¹ which validates the assertion that the CCP is a policy area where internal and external policies are inherently connected. Whilst the competences to conclude agreements in the CCP are expressly stipulated in Article 207 TFEU, it is the interplay between the internal and external measures that has turned the CCP into a key policy area for the Union.²²²

In this respect, the extension of the Union's internal market beyond its borders serves as a case in point. By way of enlargement, and even where accession has not been possible (e.g. for geographical reasons, etc), the EU has incentivised the adoption of Union internal market rules in exchange for a stake in the EU's internal market.²²³ By using the attractive EU market as an incentive for states, the Union has managed to inspire wide-ranging reforms²²⁴ in the legal systems of third country partners to facilitate regional cooperation²²⁵ and compliance with the *acquis*. In so doing, the Union *leads by example* and *invokes norms* which are mechanisms of a normative power as already claimed in the literature discussed in Chapter 2.²²⁶ These mechanisms are most pronounced in the Union's neighbourhood and as indicated in Chapter 2,²²⁷ serve to bolster the normative power argument given the change the Union solicits in its periphery based on European norms and values. With regard to the post-enlargement neighbourhood, where accession has not been possible, non-

²²⁰ Joris Larik, 'Much More Than Trade: The Common Commercial Policy in a Global Context' (2010) in Evans, Malcolm, and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 16

²²¹ *Ibid*

²²² Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 307

²²³ European Commission, 'European Neighbourhood Policy Strategy Paper', COM (2004) 373 final, Brussels, 12 May 2004, 3

²²⁴ The Chapters of the Acquis for which wide ranging reforms are undertaken include: free movement of goods; freedom of movement of workers; right of establishment and freedom to provide services; free movement of capital; public procurement; company law; intellectual property law; competition policy; financial services; information society and media; agriculture and rural development; food safety, veterinary and phytosanitary policy; fisheries; transport policy; energy; taxation; economic and monetary policy; statistics; social policy and employment; enterprise and industrial policy; trans-European networks; regional policy and coordination of structural instruments; judiciary and fundamental rights; justice, freedom and security; science and research; education and culture; environment; consumer and health protection; customs union; external relation; foreign, security and defence policy; financial control; financial and budgetary provisions; institutions; other issues. See European Commission, , 'European Neighborhood Policy and Enlargement Negotiations' <https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en> accessed 20 October 2016

²²⁵ Regional cooperation addresses challenges common to all members of the Eastern Neighbourhood. Democracy, good governance and stability, sustainable economic development, improving energy and transport cooperation, protecting the environment and resolving conflicts are challenges where regional cooperation can make a difference. See European Commission, 'European Neighborhood Policy and Enlargement Negotiations' <https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/eastern-partnership/regional-cooperation_en> accessed 20 October 2016

²²⁶ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

²²⁷ *Ibid*

candidate states were offered access to the internal market by 'sharing everything with the Union but institutions'.²²⁸ This extension of the internal market beyond the confines of the EU's borders, shows that the Union exercises its influence through trade, not only as a power in trade but as a power through trade.²²⁹ Through the *acquis* the Union is able to export norms and values in an effort to Europeanise the Eastern and Southern fringes of its periphery. In so doing the Union uses integration (a means of norm diffusion) to promote a market-based approach and multilateral legal order with its external trading partners, which is a normative trait as indicated in academic scholarship and already mentioned in Chapter 2.²³⁰

As an important corollary to the internal market, the CCP has an important role to play in the Union's external relations based on the premise that internal market issues are closely connected to external trade issues. Trade remains a key area in the Union's external relations and as such *energy* trade as a strategic policy area as a consequence shares the same level of significance in the Union's external relations.²³¹ Here the constitutional framework and in particular the Union's competence is of significance as there appears to be a clear crossover between the Union's explicit external power (in trade and the CFSP) and the external dimension of sectoral power (energy).²³² The Lisbon Treaty in particular has facilitated a more coherent external action with trade related issues often extending into other policy areas. In many respects, Lisbon has enabled this crossover through Article 21 TEU, an article containing general principles and objectives which are tied to the Union's values which it seeks to advance in the wider world.²³³ In this respect, the Union's values are tied to the EU's objectives in its external action which strengthens the Union's role as a normative power. Here the Union's internal market values such as open economy and competitive markets inadvertently extend to the Union's external relations with these principles fundamentally linked to the EU's trade.

Similarly, in areas of the internal market, the internal energy market is closely related to external relations given the significant political, economic, security and environmental concerns. It is important to note that retaining sovereignty in the field of energy goes back to the very inception of European integration. The political evolution of Western Europe has

²²⁸ Romano Prodi, 'A Wider Europe – A Proximity Policy as the Key to Stability', Sixth ECSA World Conference, Speech/02/619 (2002), Brussels, 5-6 December 2002, 6

²²⁹ Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Trade Power', in Christopher Hill and Michael Smith (eds), *International Relations and the European Union*, Second edition (Oxford University Press, 2011) 275-298

²³⁰ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

²³¹ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 439

²³² Joris Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality', in Bart Van Vooren, Steven Blockmans, Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford: Oxford University Press, 2013) 7-21

²³³ *Ibid*

predominantly been driven by integration. With the Coal and Steel Union established shortly after the Second World War, initiating integration between France and Germany, Europe has been converging ever since with closer economic and political ties. By using economic cooperation, the EU has strived to uphold security on the continent, which reflects the approach the EU has undertaken in its foreign policy. In this respect, energy has been at the heart of European integration since the inception of the Treaty establishing the European Coal and Steel Community (ECSC)²³⁴ and the Treaty establishing the European Atomic Energy Community (EURATOM).²³⁵ Following the expiration of the ECSC Treaty in 2002, energy and European integration continued to operate under the Treaty establishing the European Community (TEC),²³⁶ which was thereafter amended by Lisbon and renamed the Treaty on the Functioning of the European Union (TFEU).²³⁷ Under the TEC, energy integration continued to prevail in the context of the completion of the internal market.²³⁸ It follows that the EU's internal energy market, which is predominantly focused on electricity and gas within the striving towards a fully liberalised and integrated energy market, has been ongoing since the end of the 1980s. As noted above,²³⁹ the momentum towards a common external energy policy within the Union had been lagging behind with calls for coherence and effectiveness only gaining traction after a series of trade disputes and supply disruptions, which pushed the matter higher up on the Union's political agenda.

Here it is important to note that throughout the EU's efforts to liberalise the energy sector, there has been ongoing tension between the regulatory frameworks required to create a competitive internal energy market and Member State manoeuvres in pursuit of national interests rather than Union interests. Member State actions in defence of vertically

²³⁴ Treaty establishing the European Coal and Steel Community and Annexes I-III, Paris, 18 April 1951 <<http://www.bumko.gov.tr/Eklenti/2825,akctenpdf.pdf?0>> accessed 20 October 2016

²³⁵ See Consolidated Version of the Treaty Establishing the European Atomic Energy Community, OJ C 84/1 of 30 March 2010

²³⁶ See Consolidated Version of the Treaty Establishing the European Community, OJ C 325/33 of 24 December 2002

²³⁷ Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 83/47 of 30 March 2010

²³⁸ Measures taken include inter alia Directive 96/92/EEC of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27/20 of 30 January 1997; Regulation 1228/2003/EC of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, OJ L 176/1 of 15 July 2003; Directive 98/30/EC of 22 June 1998 concerning the common rules for the internal market in natural gas, OJ L 204/1 of 21 July 1998; Directive 2004/67/EC of 24 April 2004 concerning measures to safeguard security of natural gas supply, OJ L 127/92 of 29 April 2004; Regulation No 1775/2005/EC of 28 September 2005 on conditions for access to the natural gas transmission networks, OJ L 289/1 of 3 November 2005 and Directive 2005/89/EC of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ L 33/22 of 4 February 2006; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in gas and repealing Directive 2003/55/EC, OJ L 211/94 of 14 August 2009; Regulation 713/2009/EC of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211/1 of 14 August 2009; and Directive 2009/72/EC of 13 July 2009 concerning common rules for the market in electricity and repealing Directive 2003/54/EC, OJ L 211/55 of 14 August 2009. A new Regulation has been proposed by the Commission to replace Directive 2004/67/EC concerning measures to safeguard security of natural gas supply in July 2009. After a tough round of negotiations, the regulation was eventually adopted in October 2010. See Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295 of 12 November 2010

²³⁹ See Chapter 3 (*The External Dimension of the Internal Market*)

integrated national energy champions are often inconsistent with EU law given the abuse of dominant position²⁴⁰ and other practices²⁴¹ which usually emanate from entities of this sort.²⁴² For this reason, the Union's endeavours to liberalise the energy sector and form a truly integrated internal market with free and fair competition, have largely been hindered by the lack of an effective and coherent EU energy policy and compliance with EU law amongst Member States pursuing national agendas.²⁴³

This section has tried to show the crossover between the Union's internal energy market and its external relations. In its efforts to promote its liberalisation model in its external trade relations, the Union has incentivised its market-based approach by offering a stake in the European market. In so doing, the EU behaves in a normative manner by invoking norms and the power of example. The Union exports norms through its *acquis* by requiring trade partners to reform their policies and regulation in-line with European open market norms and principles. By setting itself as an example for countries to emulate, the EU encourages states to gravitate towards an EU model founded on European values and norms which is fundamentally normative.

3.1.2. The EU's External Energy Policy - Internal Objectives Externally Pursued

The section to follow will examine the EU's external energy policy and assess to what extent its internal energy objectives have been pursued and achieved through its foreign energy relations thereby creating an external dimension to its internal objectives. The objectives of EU internal energy policy, quite simply put, entail three elements – competitiveness; security and the environment. More specifically, the three objectives relate to the EU's endeavours to provide secure and affordable energy to European consumers; curb the Union's vulnerability in its energy dependence on external suppliers; and combat climate change.²⁴⁴

²⁴⁰ See Article 102 TFEU. Article 102 TFEU is aimed at preventing undertakings who hold a dominant position in a market from abusing that position. Its core role is the regulation of monopolies, which restrict competition in private industry and produce worse outcomes for consumers and society. It is the second key provision, after Article 101, in TFEU EU Competition Law.

²⁴¹ See Article 101 TFEU. Article 101 TFEU prohibits cartels and other agreements that could disrupt free competition in the European Economic Area's internal market: 'The following shall be prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

²⁴² Commission Communication, 'Inquiry Pursuant to Article 17 of Regulation (EC) No. 1/2003 into the European Gas and Electricity Sectors', Brussels, 10 January 2006 COM (851) final

²⁴³ This is predominantly the case with Member States pushing national agendas through energy incumbents undertaking activities which fall foul of EU Competition law (i.e. Article 101 and 102 TFEU). See Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 440

²⁴⁴ Commission Communication, 'An Energy Policy for Europe', 10 January 2007, Brussels, COM(2007) 1 final, 3; Green Paper, 'A European Strategy for Sustainable, Competitive and Secure Energy', Brussels, 8 March 2006 COM (2006) 105 final

What links these three dimensions is the fact that the Union seeks to fulfil these objectives by way of a market-based approach which is heavily embedded in regulation. As such, the use of legal frameworks/instruments, such as regulations; directives; and bilateral or multilateral agreements, which is quintessentially normative, provide a platform from which the Union can pursue its energy policy objectives. This law-based agenda therefore sets the stage for the Union's internal and external policy with the different elements of the Union's internal policy serving as both instrument and objective. It follows that security, competitiveness and sustainability, each in turn, facilitate the fulfilment of the other. By way of example, a well-functioning competitive market increases energy security; whilst energy efficiency diminishes energy dependence and thereby increases energy security. Each objective therefore correlates with the other and serves as a means to satisfy an objective unto itself with the law as the preferred medium to attain these objectives.²⁴⁵ In this respect the Union's legal and market-based approach becomes a means for all other ends and in turn, an end in itself, which serves to validate the Union's normative agenda. The fact that the Union uses the law as an instrument both in the internal and external legal sphere to forward its market-based approach in the energy sector, serves to validate the Union's role not only as a normative power but in addition thereto, as a global normative energy actor.

While there is general consensus on the significance of the different elements of the Union's energy policy (i.e. security, competitiveness and sustainability), challenges inevitably remain which include inconsistencies between the EU and Member States, the institutions of the Union and the different policy areas. With respect to the potential conflict with Member States, as already mentioned, Article 194 (2) TFEU states that Member States retain the right to determine their energy mix and ultimately have the discretion to exploit their energy resources and dictate the general structure of their energy supply. However, this discretion (which also serves as a caveat to the Union's competence) entails important policy and legal consequences such as diverse energy mixes driven by national priorities rather than common EU interests. It follows that some EU Member States may be more likely to retain favourable relations with major energy suppliers because of gas imports rather than other Member States who are reluctant to, due to historical and political reasons. As a result, policy responses to import dependence can vary greatly between smaller and larger or older and newer Member States. By way of example Eastern Europe is almost entirely dependent on Russian gas whereas Western Europe has a more robust energy mix.²⁴⁶ Market power

²⁴⁵ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 444

²⁴⁶ Faber Van der Meulen, 'EU Energy Policy: The Conflict Between an Internal Liberalization Agenda and External Security Supply' in C. Stolte, Ian Buruma, R. Runhardt, F. Smits (eds), *The Future of the European Union* (Sidestone Press, 2008) 47

therefore factors heavily between Member State policies and subsequently, their respective stance and bilateral relations with major exporting countries.²⁴⁷

From a substantive perspective, competing political and commercial interests result in discrepancies as to whether emphasis should be placed squarely on security, competitiveness or sustainability. Whilst the objectives of EU energy policy are deeply enshrined in Article 194 TFEU, the evolution of energy initiatives over the years have entailed a balancing act between security of supply, market liberalisation and environmentally friendly goals, with security of supply often surfacing on top as a priority.²⁴⁸ In striking a balance between these dimensions, it is inevitably the case that Member States heavily dependent on third country energy suppliers may feel compelled to push energy security to the top of their agenda rather than principles of a well-functioning internal energy market which is fundamental to the Union's normative agenda. Similarly, EU institutions have the formidable task of orchestrating the many substantive policy considerations and Member State national interests in the pursuit of a common European energy policy, bearing in mind their competence constraints in fulfilling this objective. As mentioned above,²⁴⁹ the Union's competence in the energy domain is curbed by Member States' ability to decide their own energy mix. The Union's role as a normative energy power therefore appears to be somewhat restricted by this caveat to its competence.

In considering the developments of the EU's external energy policy, it is important to take into account the developments within the internal energy market. Given the inextricable link between the two realms of energy policy, it is inevitably the case that the internal dimension has transcended into the external dimension. It follows that the Union's internal energy policy objectives can arguably be said to have been externalised. This is probably due to the fact that EU's external energy policy is still very much in its infancy.²⁵⁰ In addition thereto, as indicated in this chapter, is the fact that the EU's external energy policy is largely internal objectives that have been pursued through external action with one of the legal basis from which the Union develops its external energy policy drawn from the CCP nexus of the

²⁴⁷ *Ibid*

²⁴⁸ European Security Strategy, 'A Secure Europe in a Better World', Brussels, 12 December 2003, 3

²⁴⁹ See second paragraph of Chapter 3 Section 3.1.2 (*The EU's External Energy Policy – Internal Objectives Externally Pursued*): Article 194 (2) TFEU states that Member States retain the right to determine their energy mix and ultimately have the discretion to exploit their energy resources and dictate the general structure of their energy supply. However, this discretion (which also serves as a caveat to the Union's competence).

²⁵⁰ Significantly, whilst Article 194 TFEU expressly confers competence in energy, there is no express *external* competence conferred on the Union. In this respect the legislative packages which the EU has adopted in the electricity and gas markets are important as any external action of the EU will have to transpire from the internal rules adopted by the Union. This is directly related to the fact that Member States retain competence to decide their own energy mix and conclude international agreements which cannot be curbed by EU internal action. Therefore, whilst the Lisbon treaty reforms bestowed the Union with constitutional and institutional capacity to act on behalf of its Member States in the field of energy, such empowerment was restricted by Article 194(2) TFEU as a caveat to the Union's competence. Article 194 TFEU (second indent of paragraph 2) states: 'Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).'

internal market and external relations. Therefore, whilst Article 194 TFEU expressly confers competence in energy, there is no express *external* competence²⁵¹ conferred on the Union, nor is the Union's energy security competence²⁵² expressly articulated but rather implied²⁵³ which will be further explored in the case study.²⁵⁴ Prior to the energy crisis of 2006, energy security was seldom, if ever, mentioned with the 2003 Energy Security Strategy illustrating this point.²⁵⁵ It was not until 2005²⁵⁶ that leaders agreed that the Union would need to define a common European energy policy in response to which the Commission published a Green Paper in March 2006 that was endorsed by the European Council.²⁵⁷ This impetus set the wheels in motion for several policy documents which followed thereafter. This included: (i) the Commission's October 2006 Communication on 'External Energy Relations - From Principles to Action'²⁵⁸; (ii) the January 2007 Communication on 'An Energy Policy for Europe'²⁵⁹ (i.e. the First Strategic Energy Review); (iii) the 2007 – 2009 Action Plan of the European Council;²⁶⁰ and (iv) the Second Strategic Energy Review of November 2008.²⁶¹

It follows that the new legal basis of Lisbon in 2009 was expected to continue this stimulus and boost momentum in developing the Union's energy policy. Consequently, in November 2010, the Commission published the 'Energy Strategy for 2020' which was endorsed at a European Council meeting specifically organised for discussing EU energy policy in February 2011.²⁶² At the European Council meeting it was also posited that the Commission submit a communication on the security of supply and international cooperation aimed at further improving the consistency and coherence of the EU's external action in the field of energy.²⁶³ Subsequently, on 7 September 2011 the Commission's communication was

²⁵¹ Although Lisbon remains silent on energy as an aspect of the Union's external policy, there is an inadvertent external dimension through the Union's ability to conclude international agreements with the EU's competence in matters of the CFSP (Article 24 TEU) and the conclusion of agreements with one or more countries (Article 37 TEU), provided the agreements relate to matters with a CFSP nexus.

²⁵² Whilst Article 37 TEU can be interpreted in light of the Union's action on the international scene (Article 23 TEU) and the CFSP competence (Article 24 TEU) with EU action guided by the promotion of EU values and principles (Article 3 TEU) and Union objectives such as democracy, rule of law and human rights (Article 21 TEU), it is important to note that none of the Union's values or objectives explicitly mention 'energy security'.

²⁵³ Although the EU's 'energy security' competence is not expressly articulated as such in the TEU, it is implied by its external powers under Article 216(1) TFEU. Article 216(1) TFEU entails a residual competence whereby the Union may conclude agreements on energy policy such as energy efficiency and renewable (Article 194 TFEU); security of supply (Article 122 TFEU); energy networks (Articles 170-172 TFEU); or nuclear energy (Euratom Treaty), which may have an adverse effect on the EU's CFSP.

²⁵⁴ See Chapter 5 Section 5.1.4 (*The Novelties of Lisbon and the 2009 Gas Crisis*)

²⁵⁵ The European Security Strategy recognised that 'energy dependence' is a special concern for Europe which was listed as one of the global challenges. European Security Strategy, 'A Secure Europe in a Better World', Brussels, 12 December 2003, 3

²⁵⁶ At the informal meeting of the European Council at Hampton Court of October 2005, leaders agreed that the Union would need to define a common European energy policy.

²⁵⁷ Conclusion of the European Council, 23-24 March 2006, DOC 7775/1/06 REV 1

²⁵⁸ Commission Communication, 'External Energy Relations – From Principles to Action', Brussels, 12 October 2006, COM (2006) 590 final

²⁵⁹ Commission Communication, 'An Energy Policy for Europe', Brussels, 10 January 2007, COM (2007) 1 final

²⁶⁰ Annex 1 of the Brussels European Council – Presidency Conclusions, European Council Action Plan (2007 – 2009)', Energy Policy for Europe, 8-9 March 2007

²⁶¹ Commission Communication, 'Second Strategic Energy Review, An EU Energy Security and Solidarity Action Plan, Brussels, 13 November 2008, COM (2008)

²⁶² Commission Communication, 'Energy 2020, A Strategy for Competitive, Sustainable and Secure Energy', Brussels, 10 November 2010, COM (2010) 639 final

²⁶³ Conclusions of the European Council, Brussels, 4 February 2011, DOC EUCO 2/1/11, 4

released with a proposal for a new legally binding instrument coordinating the Union and Member States external energy relations. On the 24 November 2011 the Energy Council adopted the Conclusions on strengthening the external dimension of EU energy policy, which was endorsed by the European Council on 9 December 2011,²⁶⁴ with the Decision on EU-Member State external energy relations adopted by the Council on 4 October 2012.²⁶⁵

Whilst the paragraphs above illustrate the progressive movement and development in the EU's external energy policy, it is important to note the challenges²⁶⁶ to the Union's energy policy in its application to EU external relations. This is significant for the purpose of assessing the Union's normative agenda and the extent to which the Union has become a global normative energy actor. In this respect the March 2006 Green Paper was significant in that it recognised the inherent need for a coherent energy policy for the purpose of delivering sustainable, competitive and secure energy, where Member States could show their commitment to finding common solutions to shared problems.²⁶⁷ Following the European Council's endorsement of the Green Paper in June 2006, the Commission and the Secretary-General / High Representative jointly presented a report on external relations and how these could be effectively used to serve the EU's energy interests by securing the objectives of the Union's energy policy.²⁶⁸ The report reiterated that EU external energy policy must be coherent, strategic, focused whilst retaining consistency with the EU's broader foreign policy objectives and interests.²⁶⁹

It follows that the usual internal challenges that the Union encounters in its energy policy is likely to surface in the external context given the extension of the EU's legal order to the international realm. Of the substantive challenges, a core issue that comes to the fore is whether the EU should pursue a market-based approach deeply imbedded in regulation as part of the Union's normative agenda or whether a strategic approach is required sensitive to the geopolitical challenges that exist in the energy sphere. The latter would suggest an energy policy that extends beyond economic and commercial considerations to include political realities. The market-based approach would entail a regulatory environment geared towards an EU model driven by the rule of law, legal certainty, stability and a climate that fosters foreign investment. If we consider that these elements are fundamentally part of what the internal energy market aims to achieve, then by implication an extension of these

²⁶⁴ Council Conclusions, 'On Strengthening the External Dimension of the EU Energy Policy', Brussels, 24 November 2011

²⁶⁵ Proposal from the Commission, 'Decision of the European Parliament and of the Council Setting up an Information Exchange Mechanism with Regard to Intergovernmental Agreements Between Member States and Third Countries in the Field of Energy' 7 September 2011, COM (2011) 540

²⁶⁶ By way of example, the lack of coherence and consistency.

²⁶⁷ Green Paper, 'A European Strategy for Sustainable, Competitive and Secure Energy', 8 March 2006, Brussels, COM (2006) 105 final, 14

²⁶⁸ Report from the Commission and the Secretary-General / High Representative to the European Council, Joint Paper 'An External Policy to Serve Europe's Energy Interests' Brussels, 30 May 2006, DOC 9971/06

²⁶⁹ *Ibid*

elements in the Union's external energy policy would entail establishing international legal frameworks with EU market-based values and principles that secure open and competitive energy markets and in turn secure energy supplies.²⁷⁰ This serves to illustrate the Union's normative agenda which transcends beyond the confines of the internal market to its external relations in its efforts to export its energy liberalisation model and regulatory regime. The European Energy Charter of 1991 is a case in point,²⁷¹ which the Union has actively promoted in its external energy relations which is indicative of a normative power given the Union's efforts to institutionalise its energy relations within a multilateral international law instrument upholding global energy cooperation.

However, as evidenced by Russia's withdrawal from the Energy Charter Treaty in July 2009, the law-based market approach does not offer a one-size-fits-all solution for all the EU's external partners which will be further explored in the case study²⁷² regarding the Union's external energy relations with Russia. It is inevitably the case that some countries are reluctant to agree to the Union's *acquis* and internal market structure in their external legal relations that involve strategic sectors of their economy. In this regard, a geopolitical approach may be more appropriate, which has been a recurring obstacle in the EU's common external energy policy. Discrepancies between the EU institutions and relevant Member States on which approach to pursue in their relevant external energy relations, has proved to be a foreign policy challenge which has by implication for many years prevented the EU's common external energy policy from coming to fruition.

3.1.3. Conclusion

The CCP is a key policy area for the Union as well as an important corollary for the maintenance of the internal market.²⁷³ Whilst the CCP resembles the Union's voice in the international trading order, it also exemplifies the inextricable link between the Union's internal and external policies.²⁷⁴ In the absence of an external energy policy, the section above has considered to what extent the internal market has been externalised. In this respect, the section has tried to ascertain whether an external dimension to the internal energy market has been developed to serve EU internal objectives. The section has also considered to what extent the different objectives of EU energy policy should be pursued

²⁷⁰ Commission Communication, 'External Energy Relations – From Principles to Action', Brussels, 12 October 2006, COM (2006) 590 final

²⁷¹ The European Energy Charter embodies the principles fundamental to international energy cooperation that is based on shared interests such as secure energy supply and sustainable economic development. See International Energy Charter <<https://energycharter.org/process/european-energy-charter-1991/>> accessed 20 October 2018

²⁷² See Chapter 5 Section 5.2.3.2.3 (*The Main Instruments in the Union's External Energy Relations with Russia - The Energy Charter Treaty*)

²⁷³ Joris Larik, 'Much More Than Trade: The Common Commercial Policy in a Global Context' (2010) in Evans, Malcolm, and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 16

²⁷⁴ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 306

by a law-based market-orientated approach given the internal challenges to extending the EU legal order and energy policy to the international domain and the Union's external relations.

3.2. EU Energy Policy and the Union's Energy Actorness

3.2.1. The Scope of Union's External Energy Competence (Pre and Post-Lisbon)

Prior to the Lisbon Treaty, legal developments in the energy sector had very much occurred in a vacuum without the existence of any explicitly conferred energy competence. The Union was explicitly conferred shared competence²⁷⁵ in the energy domain following Lisbon in December 2009 with most legislative progress spurred on the basis of the internal market and competence pursuant thereto²⁷⁶ in addition to other legal basis such as the environment²⁷⁷ from which legislative instruments predominantly emanated from. For the first time, under the Lisbon Treaty, energy was granted its own Title (Title XXI)²⁷⁸ and a new article. The express competence in energy is now enshrined in Article 194 TFEU²⁷⁹, a power which is shared between the Union and its Member States.²⁸⁰

Article 194

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;**
- (b) ensure security of energy supply in the Union;**
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and**

²⁷⁵ Further to the brief review of the Union's constitutional framework in Chapter 1, it is important to note that the TFEU elaborates on the framework established in the TEU with common provisions and policy specific provisions on competence as well as Protocols and Declarations relevant to external relations law. Competence is one of the most challenging aspects of EU external relations law. All TFEU provisions on competence lead back to the principle of conferral which relates to competence conferred to the Union by the Member States to attain the objectives set out in the TEU and TFEU. Under the principle of conferral the Member States confer competence on the EU so that it may attain the objectives which they have in common as stipulated in Article 1 TEU. Therefore despite the Union's distinct personality and ability to act as an international actor on the global scene, it is only empowered to act where the Treaties give it the capacity and ability to do so (Article 1; Article 4(1); Article 5(2) TEU). Here it is important to note that 'power' and 'competence' are synonymous and used interchangeably. The principal of conferral thus means that the Union shares external objectives with its Member States but can only pursue these objectives when empowered to do so. All competence not conferred on the Union remain with the Member States (Article 5(1) and 5(2) TEU). The TFEU then fleshes out Article 5 TEU in Article 2 – 6 TFEU which contains specific provisions relating to the nature and existence of the Union's competence to act. It is important to note that paragraph 6 of Article 2 TFEU acts as a *chapeau* to the competence for which the scope, instruments and procedures shall be determined by the provisions of the Treaties relating to each area. This means that each policy area (e.g. energy; trade; environment) entail specific provisions in the TEU and TFEU which govern how the Union may act externally in this realm. As such Article 3, 4, 5, 6 TFEU articulate the areas in which the EU has competence but they are not competence-baring provisions for the Union. In this respect, Part V TEU 'External Action by the Union' is of significance, including Part Three TFEU 'Union Policies and Internal Actions' given their predominant external dimension.

²⁷⁶ Article 114 TFEU

²⁷⁷ Article 191 TFEU

²⁷⁸ Title XXI, Energy, of Part Three, Union Policies and Internal Actions, TFEU

²⁷⁹ Whilst express competence in energy can now be found in Article 194 TFEU, other provisions also include specific references to energy such as: Article 122 TFEU (measures in case of supply disruption), Article 170 TFEU (developing trans-European energy networks) and Article 192 TFEU (environmental measures which might affect Member State's energy mixes).

²⁸⁰ Article 4(2)(i) TFEU

(d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

Article 194 TFEU has created a legal basis for the development of the Union's external energy policy given that the Lisbon reforms have bestowed on the Union the constitutional and institutional capacity to act on behalf of Member States. Notwithstanding, as mentioned above, the Union's power is curbed by Article 194(2) TFEU which enables Member States to determine their own energy mix. Despite this caveat to the Union's competence in the energy sphere, Lisbon has enabled the EU to develop an external profile in the energy domain and thereby pursue its normative agenda in its energy relations.

One of the fundamental aims of the Lisbon Treaty was the fostering of greater coherence in EU external relations.²⁸¹ The Treaty became the subject of much debate as to whether it did indeed invoke greater coherence and thereby effectiveness in the Union's external policies²⁸². In the field of energy, the Treaty introduced three novelties which will be explored later in the chapter namely: energy competence; a solidarity mechanism; and new actors in EU external relations. Article 194 TFEU established the legal basis for the development of an external EU energy policy (even though this competence was not expressly conferred).

Whilst the Lisbon treaty reforms bestowed the Union with constitutional and institutional capacity to act on behalf of its Member States in the field of energy, such empowerment was restricted by Article 194(2) TFEU as a caveat to the Union's competence. Article 194(2) TFEU prohibits the adoption of measures which 'affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply' which has reduced the pre-emptive

²⁸¹ Sijbren De Jong and Jan Wouters, 'European Energy Security Governance: Key-Challenges and Opportunities in EU-Russia Energy Relations' (Leuven Centre for Global Governance Studies, 2011) 1-66 <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1898676&download=yes> accessed on 10 October 2016

²⁸² *Ibid*

effect²⁸³ of EU legislation in the field of energy.²⁸⁴ Notwithstanding this restrictive scope, it is worth reiterating that the Lisbon treaty reforms have reinforced the Union's role as a global normative energy actor empowering the Union institutionally to act on behalf of its Member States and thereby has enabled the Union to develop an external profile in the field of energy.²⁸⁵

Whilst Article 194 TFEU is a codification of the EU's objectives in the energy domain, these were widely accepted as the three main dimensions of the Union's energy policy before Lisbon. The objectives of the Union's competence under Article 194 TFEU focus on: (i) ensuring the functioning of the internal market; (ii) security of supply; and (iii) environmentally friendly energy policies. As a result, Article 194 TFEU does not digress from EU action in the energy domain but rather serves to articulate the policy process which inevitably existed prior to Lisbon and the explicit articulation of the Union's competence. The Union's energy policy objectives was validated in the Energy 2020 programme which was the first initiative launched post-Lisbon after the Union's new-found competence.²⁸⁶ The Energy 2020 strategy of November 2010 reaffirmed that: 'The central goals for energy policy (security of supply, competitiveness, and sustainability) are now laid down in the Lisbon Treaty.'²⁸⁷ It also acknowledged that energy remains one of the greatest challenges which

²⁸³ According to the legislation-based definitions of pre-emption, Union pre-emption is the actual enactment of an item of EU legislation that ousts national lawmaking in the area concerned. Stephen Weatherhill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community' in David O'Keeffe and Patrick Toney (eds), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, 14. Advocate General Colomer, in his opinion in *Budweiser*, adopted that same perspective in what constituted at the time the only direct reference to Union Pre-emption in the European Court Reports: What we have here ultimately is the debate about Community 'pre-emption' of a measure and the situations in which the concurrent competences of the Member States in a particular field may have been displaced *by the activity of the Community legislature*. That approach also finds support in the definitions of shared EU competence introduced by the Treaty of Lisbon in Article 2(2) TFEU and in Protocol No. 25 on the Exercise of Shared Competence, which both refer to the consequences flowing from the 'exercise' by the Union of its competences. Article 2(2) TFEU ('When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not *exercised* its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.');

Protocol No.25 on the Exercise of Shared Competence ('With reference to Article 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has *taken action* in a certain area, the scope of this *exercise of competence* only covers those elements governed by the *Union act* in question and therefore does not cover the whole area.')

See also Amedeo Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen' (Jean Monnet Working Paper No. 03/2010) 9 <<https://jeanmonnetprogram.org/paper/the-doctrine-of-union-preemption-in-the-eu-single-market-between-sein-and-sollen/>> accessed on 20 October 2016

²⁸⁴ The second indent of paragraph 2 of Article 194 TFEU states that 'such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)'. This means that Member States retain competence to conclude international agreements that relate to the composition of their energy mix and that they cannot be pre-empted by any EU internal action from doing so.

²⁸⁵ Theodore Konstantinides, and Deni Mantzari, 'Common Foreign and Security Policy and Energy Policy' Steven Blockmans and Panos Koutrakos, (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar, 2017) 5

²⁸⁶ Commission Communication, 'Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy', Brussels, 10 November 2010, COM (2010) 639 final, 4

²⁸⁷ *Ibid* 2

Europe has to face which would explain why there had been limited traction vis-à-vis the Union's competence and external profile in the energy domain.²⁸⁸

Therefore whilst Article 194 TFEU may not appear to be contributing anything novel to the energy domain besides articulating what was widely accepted as the main objectives of the Union's energy policy, it nevertheless signifies an express legal basis from which the Union can evolve its own fully fledged energy policy. This indicates a move, on the part of the Union, towards developing energy policy in its own right rather than launching initiatives from other legal basis such as the internal market and the environment. Therefore, whilst the functioning of the energy market still remains the epicentre of EU energy policy, security of energy supply has now become noteworthy as an objective in EU primary law. This subsequently widens the ambit of the EU's energy policy from one that is purely market-based to one which incorporates the political and diplomatic facets of energy security.²⁸⁹ Furthermore, it broadens the Union's normative agenda beyond a market-based approach to encompass strategic and geopolitical considerations such as the EU's energy security.

The momentum to develop a European energy policy under the new legal basis of Article 194 TFEU was alluded to by the Commission in the Energy 2020 programme. As part of the drive towards a true EU energy policy, the Commission acknowledged the need to develop and enhance the two principles fundamental thereto which already existed within the Treaty, namely cooperation amongst EU Member States and the EU (Article 4(3) TEU) (the principle of sincere cooperation) and the subsidiarity of EU action (Article 5(3) TEU) (the principle of subsidiarity). As far as *subsidiarity* is concerned, it was recognised by the Commission that the time had come for energy policy to become truly European which would entail developing policy at an EU level, rather than at a Member State level which would inevitably have an impact on other Member States.²⁹⁰ Although Member States generally acknowledged the need for a fully integrated energy market and policy, larger Member States with a diversified energy mix were reluctant to forego full control and sovereignty over what was perceived to be a strategic sector of their economy.²⁹¹ On *cooperation*, the Commission made calls for Member States to act in a manner beneficial to a collective whole rather than pursuing bilateral deals in its energy relations in pursuit of national interests alone.²⁹² In the energy sector, a call for 'solidarity' became a benchmark for scrutinising Member State actions and assessing the bilateral agreements signed with

²⁸⁸ Commission Communication, 'Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy', Brussels, 10 November 2010, COM (2010) 639 final, 4

²⁸⁹ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 442

²⁹⁰ Commission Communication, 'Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy', Brussels, 10 November 2010, COM (2010) 639 final, 4

²⁹¹ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 442

²⁹² Commission Communication, 'Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy', Brussels, 10 November 2010, COM (2010) 639 final, 17

major third country suppliers which were perceived as a threat to the Union's security of supply as it further entrenched the Union's dependence on such major energy suppliers.²⁹³

The Council endorsed the Energy 2020 strategy in February 2011 and in its conclusions requested the Commission to complete a comprehensive policy document on EU energy policy which the Commission delivered on 7 September 2011 titled: 'The EU Energy Policy: Engaging with Partners Beyond our Borders'.²⁹⁴ The Commission's Communication alludes to the new direction of EU external energy policy which is predominantly driven by security of energy supply and international cooperation.²⁹⁵ The Commission's proposals were supplemented with Council Conclusions in November 2011 which were thereafter endorsed by the Council in December 2011.²⁹⁶ This set a platform for a number of initiatives which followed, the most notable of which in the Union's external relations realm, was the decision of October 2012 organising the duty of cooperation between the EU and Member States.²⁹⁷ The Commission's proposals for a 'Decision of the European Parliament and of the Council setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy' (hereinafter the 'IGA Decision')²⁹⁸ (which was repealed in 2017²⁹⁹ which will be elaborated on further in the thesis)³⁰⁰ was initially proposed to establish a mechanism whereby information could be exchanged and EU-level coordination implemented on intergovernmental agreements that are likely to have an impact on the functioning of the internal energy market or security of energy supply within the Union.³⁰¹ The Council's approval of the Decision on 4 October 2012 effectively enabled a legally binding framework regarding the exchange and coordination of information in relation to external energy policy. The Council's approval and extensive conclusion thereafter further bolstering this policy domain, stands as testament to the importance which the Union's external energy policy holds and the need to drive this policy at an EU-level rather than a national level.³⁰² This initiative also serves to highlight

²⁹³ Article 194(1) TFEU states that the aims of the Union's energy policy, will be performed 'in a spirit of solidarity' amongst member states.

²⁹⁴ Commission Communication, On Security of Energy Supply and International Cooperation – 'The EU Energy Policy: Engaging with Partners Beyond our Borders', Brussels, 7 September 2011, COM (2011) 539 final

²⁹⁵ *Ibid*

²⁹⁶ *Ibid*

²⁹⁷ Decision 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to the intergovernmental agreements between Member States and third countries in the field of energy (Text with EEA relevance), OJ 2012 No. L299/13

²⁹⁸ Proposal from the Commission, 'Decision of the European Parliament and of the Council Setting Up an Information Exchange Mechanism With Regard to Intergovernmental Agreements Between Member States and Third Countries in the Field of Energy' 7 September 2011, COM (2011) 540

²⁹⁹ Decision of the European Parliament and the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU, COM (2016) 53 final

³⁰⁰ See Chapter 6 Section 5.5.3 (*The EU as a Normative Energy Security Actor? – The Energy Security Package*)

³⁰¹ Council Conclusions, 'Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy', Brussels, 28 February 2011, 1

³⁰² Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 442

the Union's increasingly significant profile in the external energy sphere and in turn its role as a global normative energy actor.

3.2.2. Further Novelties Introduced by Lisbon

As indicated above, the purpose of this chapter has been to map-out how the Union has evolved into a global actor in energy. With the Lisbon Treaty setting the Union's energy actorness in motion with express competence enshrined in Article 194 TFEU, this impetus has been further enhanced with a solidarity mechanism and new actors in EU external relations. These novelties introduced by Lisbon coupled with the fundamental aim of facilitating greater coherence through effective multilateralism in the pursuit of Union objectives in the EU's external relations, have all served to strengthen the Union's role as a global energy actor and normative power in the energy sector, given the strong correlation between the Union's objectives in its external action and its normative agenda in its external energy relations.

3.1.2.1. Objectives in External Action

As mentioned earlier in the chapter,³⁰³ the Lisbon Treaty has facilitated more coherent external action through the principles and objectives which the Union seeks to advance in its foreign policies.³⁰⁴ More specifically, Lisbon has expanded and streamlined the Union's objectives with the inclusion of general objectives in the Treaties including in the external dimension (Article 3(5) TEU); and general principles and goals of EU external action (Article 21 TEU) with specific objectives to certain external policies.³⁰⁵

The objectives of the EU's external relations require further scrutiny because it governs the internal ramifications of the Union's mechanics with the principles of conferral, cooperation and institutional balance existing as a consequence thereof. Furthermore, the objectives set the platform for the legal and political reality within which the EU projects itself as an international actor, which as mentioned in the preceding chapters, is intrinsically normative.

Article 3(5) TEU

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

³⁰³ See Chapter 3 Section 3.1.1 (*The Internal Energy Market and External Relations - the CCP Analogy*)

³⁰⁴ Joris Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality', in Bart Van Vooren, Steven Blockmans, Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013) 7-21

³⁰⁵ *Ibid*

In this respect, the constitutional objectives as stipulated in Article 3(5) and Article 21 TEU which predominantly focus on the promotion of the Union's fundamental values and interests such as peace, security and peaceful international relations, alludes to the kind of international actor the EU is or aspires to be in the international legal order.

Article 21 TEU

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;**
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;**
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;**
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;**
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;**
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;**
- (g) assist populations, countries and regions confronting natural or man-made disasters; and**
- (h) promote an international system based on stronger multilateral cooperation and good global governance.**

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

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

It is important to note that whilst Article 3(5) and Article 21 TEU entail objectives which set agendas and action guided by certain goals and principles, objectives are often used interchangeably whilst including reference to the pursuit of 'interests' (Article 3(5) and Articles 21 TEU). The Treaties therefore include a plethora of substantive objectives such as contribution to peace, security, sustainable development, solidarity, mutual respect, free and fair trade, eradication of poverty and protection of human rights (Article 3(5) and Article 21 TEU). The Treaties articulate that the objectives are largely a reflection of, or inspired by the Union's internal values to the outside world (Article 21(1) TEU) which are largely defined by standards of international law and universally defined concepts such as sustainable development and human rights (Article 208(2) TFEU).³⁰⁶ Here it is important to recall what was stated in Chapter 2³⁰⁷ regarding Manner's normative power theory, namely that the EU's predisposition to act in a normative way stems from its political legal institution. As a polity that evolved from a treaty-based legal order with its external action and objectives derived from treaty provisions such as Article 3(5) TEU and Article 21 TEU which promotes universal rules and EU values, we can see how the Union can be said to be fundamentally normative.

Inevitably the Union's objectives have a strong emphasis on law-based goals.³⁰⁸ This is evident in the Union's obligation to contribute 'to the strict observance and the development of international law' (Article 3(5) TEU) and to promote the rule of law (Article 21(2)(b) TEU). Furthermore the Treaties promote 'stronger multilateral cooperation and good global governance' (Article 21(2)(h) TEU) with an undertaking on the part of the Union to 'promote multilateral solutions to common problems.' (Article 21(1) TEU). The Union can therefore be said to be using the law as a mechanism to pursue its agenda. This suggests that intrinsic to any examination of the role of values in the Union's external policies, is the interplay between the EU legal order and international norms which is heavily vested in the Union's perception of the link between multilateralism and a rule-based international order.³⁰⁹ This is validated by the Lisbon Treaty which brings the significance of international law and multilateralism to the Union's external policy to the fore.³¹⁰ This importance is also evident in policy documents, in particular the European Security Strategy which was adopted by the European Council in December 2003, which declared that a rule-based international order based on effective multilateralism is one of the EU's three strategic objectives:

³⁰⁶ *Ibid*

³⁰⁷ See Chapter 2 Section 2.1 (*Manners' Normative Power Europe*)

³⁰⁸ Joris Larik, 'Entrenching Global Governance: the EU's Constitutional Objectives Caught between a Sanguine World View and a Daunting Reality' in Bart Van Vooren, Steven Blockmans, and Jan Wouters (eds), *The EU's Role in Global Governance: the Legal Dimension* (OUP, 2013)

³⁰⁹ Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 276

³¹⁰ Article 3(5) TEU - 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to... the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

In a world of global threats, global markets and global media, our security and prosperity increasingly depend on an effective multilateral system. The development of a stronger international society, well-functioning international institutions and a rule-based international order is our objective... We are committed to upholding and developing International Law.³¹¹

The High Representative's Report on the Implementation of the European Security Strategy reaffirmed this commitment in 2008:

At a global level, Europe must lead a renewal of the multilateral order. The UN stands at the apex of the international system. Everything the EU has done in the field of security has been linked to UN objectives. We have a unique moment to renew multilateralism, working with the United States and with our partners around the world.³¹²

These policy statements and the treaty provisions of Article 3(5) TEU and Article 21(1) TEU illustrate the dual purpose of the EU's commitment to international law and multilateralism – firstly, as a value unto itself; and secondly, for the purpose of developing a rule-based international legal order which will in turn promote the Union's fundamental values such as human rights, democracy and the rule of law.³¹³ In so doing, the Union's endeavours to pursue a multilateral legal order, facilitate the EU's ability to export its own values and norms which affirms Manners' Normative Power theory.³¹⁴

Whilst the Union's objectives in its internal and external policies are extremely broad, its international action must be pursued through a multilateral approach based on the rule of law. It follows that the provisions in the TEU impose substantive requirements on the Union in pursuing its objectives. On the basis of Article 3(5) and Article 21 TEU it is evident that the Union's legal order is receptive to international legal norms. In sum, the Treaties codify a set of global objectives founded on EU and international law which transforms the role of the EU as a power which shapes not only its relations with its members but also the world at large through its law-based goals and objectives.³¹⁵ Applying the rationale to the EU's external relations, one can see how the Union's normative agenda is inevitable when considering its external action and engagement with its neighbourhood which is deeply embedded in legally binding multilateral frameworks that promote EU values and universal

³¹¹ European Security Strategy, 9 < <https://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>> accessed 20 October 2016

³¹² Secretary General / High Representative Report on the Implementation of the European Security Strategy – Providing Security in a Changing World, 10 December 2008, Doc 17104/08, 4 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf> accessed 20 October 2016

³¹³ Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 277

³¹⁴ *Ibid*

³¹⁵ Joris Larik, 'Entrenching Global Governance: the EU's Constitutional Objectives Caught between a Sanguine World View and a Daunting Reality' in Bart Van Vooren, Steven Blockmans, and Jan Wouters (eds), *The EU's Role in Global Governance: the Legal Dimension* (OUP, 2013)

standards. Fundamental to the EU's role as a normative power is its commitment to a rule-based international order founded on effective multilateralism.

The Union often advocates increased multilateralism in its external relations. In an effort to reinforce its foreign and security policy trajectory, in 2003 the Union released the European Security Strategy which unveiled the notion of 'effective multilateralism' as the underlying concept steering the EU's foreign policy agenda.³¹⁶ With respect to external relations, multilateralism refers to the coordinating of relations between three or more states pursuant to certain principles that govern relations amongst these states.³¹⁷ Building on the rationale of the Union's *leitmotiv* of 'effective multilateralism' in its external relations, is the perception that action at a multilateral level facilitates effective results which in turn enables the Union to fulfill its foreign policy goals.³¹⁸ One can therefore argue that effective multilateralism has become a significant criteria in the Union's external relations and action,³¹⁹ which in turn is fundamentally part of the EU's normative agenda.

The principle reference to multilateralism with respect to the Union's external relations can be found in Article 21(1) TEU, which states:

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

There appears to be a strong correlation between effective multilateralism and coherence as the Union's ability to act effectively ultimately requires the EU to conduct itself in a manner that is consistent and coherent in cooperation with key actors involved.³²⁰ Pursuant to the principle of effective multilateralism, the EU aims to undertake its external action free from contradictions between EU and Member States' objectives by utilising synergy between the actors involved for the sake of ensuring coherence in its external relations. The 2009 Gas Crisis brought the lack of coherence in the EU's action to the fore by revealing the Union's uncoordinated response to a crisis situation. Whilst the principle of coherence as included in the Treaties might have an impact on the Union and Member States' legal obligations to behave in a certain way on the international stage, the EU still maintains that further coherence is required to ensure that there is no mismatch amongst Member States

³¹⁶ Council of the European Union, A Secure Europe in a Better World, European Security Strategy, Brussels, 12 December 2003

³¹⁷ John Gerald Ruggie, *Multilateralism Matters: The Theory and Praxis of an Institutional Form*. (Columbia University Press, 1993) 8

³¹⁸ Jürgen Neyer, 'Explaining the Unexpected: Efficiency and Effectiveness in European Decision-Making' (2004) 11(1) *Journal of European Public Policy* 19-38; Jan Wouters, Sijbren De Jong and Philip De Man, 'The EU's Commitment to Effective Multilateralism in the Field of Security: Theory and Practice' (2010) 29(1) *Yearbook of European Law* 167-168.

³¹⁹ Sijbren De Jong, 'The EU's External Natural Gas Policy – Caught Between National Priorities and Supranationalism (Dissertation, KU Leuven, 2013) 6

³²⁰ *Ibid*

and the EU in its external action in the energy domain. For this purpose, one of the novelties introduced by Lisbon, was the creation of new actors that would ensure a coordinated response to any crisis or dispute with foreign and security implications. It was believed that coordination at a Union level and amongst Member States would ensure a more robust external action in the event of a crisis for the sake of managing and minimising any security repercussions.

3.1.2.2. New Actors in External Relations

As mentioned above, the 2009 Russian-Ukraine gas dispute demonstrated that the Union lacked a unified response to the energy supply crisis due to internal divergences within the Union which inhibited the Union's ability to resolve the matter.³²¹ In an effort to buttress the Union's strategy in the event of a crisis with foreign and security implications of a supply crisis, the Lisbon Treaty introduced a new set of actors and processes to address an imminent threat.³²² Such actors would, in the event of a crisis, engage on behalf of the EU in diplomatic efforts to reach political consensus to ensure consistency and coherence.³²³ The 2009 Gas Crisis illustrated that effective and coherent EU diplomacy was lacking and that the predominant form of diplomacy that surfaced was bilateralism rather than multilateralism which was incongruous with the Union's preferred external action. Increased coherence and resolve in the Union's external action was desired for which Lisbon provided the Union with new actors.

Lisbon's creation of a new High Representative / Vice-President that is both part of the Council and the Commission and assisted by the Union's diplomatic arm, namely the European External Action Service (EEAS), appears to have been specifically aimed at addressing this recurring challenge which the Union faces. These institutional efforts are arguably aimed at improving external coherence by fostering synergies amongst different actors in an effort to facilitate collective initiatives at a Union level rather than endeavours driven by influential EU Member States bilaterally. Pursuant to Art. 27(3) TEU:

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

³²¹ Sijbren De Jong, Jan Wouters and Steven Sterkx, 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon' (2010) 15(4) *European Foreign Affairs Review* 511-38, 538

³²² Lisbon's creation of a new High Representative / VP that is both part of the Council and the Commission and assisted by the Union's diplomatic arm, namely the European External Action Service (EEAS), appear to have been specifically aimed at addressing the Union's internal divergences and lack of coherence in external action.

³²³ Sijbren De Jong, Jan Wouters and Steven Sterkx, 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon' (2010) 15(4) *European Foreign Affairs Review* 511-38, 538

Pursuant to Article 18(3) TEU the High Representative presides over the Foreign Affairs Council and pursuant to Article 18(4) TEU, the High Representative is one of the VP's of the Commission and shall ensure consistency of the Union's external action. The High Representative thereby effectively took over the portfolio of hitherto External Relations Commissioner.³²⁴ The High Representative / Vice President's dual role is intended to facilitate amalgamating the Union's external political and economic relations. Whilst energy has a clear external relations component it was unclear whether energy policy would be part of the EEAS,³²⁵ given the blurred lines on whether the EEAS ambit includes all external relations or whether this is confined to external political relations.³²⁶

The Council Decision establishing the organisation and functioning of the EEAS states that the EEAS shall support the High Representative in fulfilling his/her mandates as notably articulated in Articles 18 and Articles 27 TEU. Article 3 of the Council Decision states:

The EEAS will support the High Representative, who is also a Vice-President of the Commission and the President of the Foreign Affairs Council, in fulfilling his/her mandate to conduct the Common Foreign and Security Policy ('CFSP') of the Union and to ensure the consistency of the Union's external action as outlined, notably, in Articles 18 and 27 TEU. The EEAS will support the High Representative in his/her capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council. The EEAS will also support the High Representative in his/her capacity as Vice-President of the Commission, in respect of his/her responsibilities within the Commission for responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union's external action, without prejudice to the normal tasks of the Commission services.³²⁷

The broad scope of these provisions suggests that energy falls within the scope of the High Representative / Vice-President and EEAS, to the extent that it qualifies as a CFSP matter.³²⁸ This would indeed be the case where a crisis encompassed both political and security threats rather than economic challenges alone. Furthermore, in his/her capacity as the Vice-President of the Commission, the High Representative / Vice-President is expected to coordinate 'other aspects of the Union's external action' pursuant to Article 18(4) TEU

³²⁴ *Ibid*

³²⁵ Ramsees A. Wessel, 'The Legal Framework for the Participation of the European Union in International Institutions' (2011) 33(6) *Journal of European Integration*, 621-635; Knud Erik Jørgensen, Sebastian Oberthür and Jamal Shahin, 'Introduction: Assessing the EU's Performance in International Institutions - Conceptual Framework and Core Findings' (2011) 33(6) *Journal of European Integration* 599-620; Sophie Vanhoonaeker and Natasia Reslow, 'The European External Action Service: Living Forwards by Understanding Backwards' (2010) 15(1) *European Foreign Affairs Review* 7-8

³²⁶ Giovanni Grevi and Fraser Cameron, 'Towards an EU Foreign Service', Issue Paper 29 (Brussels: European Policy Centre, 2005) 3

³²⁷ 'Council Decision establishing the organisation and functioning of the European External Action Service', Council Doc. 11665/1/10 REV 1, ANNEX (Brussels 20 Jul. 2010), 1-6 <https://eeas.europa.eu/sites/eeas/files/eeas_decision_en.pdf> accessed 20 October 2016

³²⁸ As evidenced by the recent Energy Union communication on the implementation of the EU Energy Policy Action Plan. See Energy Union Communication ('A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy') of 25 February 2015 and the European Council Conclusions of 19-20 March 2015 recognised the importance of the external dimension of the Energy Union and asked for greater engagement on energy diplomacy. On 20 July 2015, the Foreign Affairs Council adopted Council Conclusions on EU Energy Diplomacy, which included an EU Energy Diplomacy Action Plan <https://eeas.europa.eu/topics/energy-diplomacy/406/eu-energy-diplomacy_en> accessed 20 October 2016

which would inevitably encompass energy. From the provision above, it is also clear that the EEAS is required to ensure consistency³²⁹ between the different areas of the Union's external action and in turn its other policies by working in close cooperation with the General Secretariat of the Council, the Commission services, as well as with the diplomatic services of the Member States.³³⁰

The EEAS and the Commission are also required to consult each other on all matters relating to the external action of the Union in the exercise of their respective functions.³³¹ Close cooperation between the High Representative / Vice-President and the Commission is of the utmost importance where external representation is concerned in order to identify in which area of competence a particular external representation falls. The extent to which a matter qualifies as either a security or market related issue, will thereafter determine whether the President of the European Council, the Commission or the High Representative / Vice-President supported by the EEAS and Union delegations abroad will take the lead in this respect.³³²

Representation at the highest political level by the President of the European Council was alluded to in the draft gas regulation that was rolled-out to replace the 2004 gas directive³³³ pursuant to amendments requested by the European Parliament.³³⁴ This addition, in particular the articulation of 'at the highest level', would ensure that the President of the European Council would represent the Union, in the event of diplomatic action required at

³²⁹ In her latest publication Marise Cremona examines principles which she identifies as legal norms with a specific legal function distinct from rules designed to govern a set of circumstances. Rather, principles have a more fundamental character from which rules flow and should be consistent with such underlying principles. The principle of coherence has been used by the Court to guide its interpretation of the principle of institutional balance reflected in the relationship between substantive and procedural legal basis in Article 218 TFEU. See Case C-658/11 *European Parliament v Council*, Judgment, EU:C:2014:2025 paras 52–60. There may also be tensions between them, for example, between coherence and the principle of conferral; or between effectiveness and the principle of transparency; as well as tensions between the two systemic principles of coherence and effectiveness, in the sense of consistency versus *real-politik*, and between relational principles such as conferral and sincere cooperation. Marise Cremona, 'Structural Principles and their Role in EU External Relations Law' in Marise Cremona (ed.) *Structural Principles in EU External Relations Law* (Bloomsbury Publishing PLC, 2018) 28; See also Christophe Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Oxford, Hart Publishing, 2010) 87

³³⁰ 'Council Decision establishing the organisation and functioning of the European External Action Service', Council Doc. 11665/1/10 REV 1, ANNEX (Brussels 20 Jul. 2010), 1–6 <https://eeas.europa.eu/sites/eeas/files/eeas_decision_en.pdf> accessed 20 October 2016

³³¹ *Ibid*

³³² Sijbren De Jong, Jan Wouters and Steven Sterkx, 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon' (2010) 15(4) *European Foreign Affairs Review* 511-38, 536

³³³ According to the Commission, the existing Directive was insufficient given the growing import dependence and increased supply and transit risks in third countries, as well as increasing gas flows and the development of the internal gas market in the Union. Although the gas directive obliges Member States to have gas emergency plans in place, an insufficient degree of coordination of these plans seems to have contributed to limiting the Union's effectiveness in this domain. The new gas regulation was therefore aimed at improving coordination. See Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC, COM(2009) 363 final (Brussels, 16 July 2009), 3

³³⁴ Council of the European Union, Note from General Secretariat of the Council to Delegations on the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC 11892/09 ENER 253 CODEC 963, Council Doc. 8304/4/10 REV 4, Recital Point 30, Commission Proposal Text, 20. In its amendments to the Proposal, the European Parliament stresses that this coordinating role should, in particular, be fulfilled in the case of emergency situations.

the level of Heads of State, without prejudice to the powers of the High Representative / Vice-President.³³⁵

[w]here the Commission is notified by the Competent Authority that an early warning level has been declared in a Member State or where a threat of disruption of gas supplies might have a clear geopolitical dimension, the Union, represented at the highest level, shall take appropriate diplomatic actions having regard to the special role given by the Lisbon Treaty to the Vice-President/High Representative.³³⁶

However, what constitutes a ‘security’ versus a ‘market’ related issue³³⁷ is a matter that has been heavily debated at an institutional level, given that the creation of the EEAS prompted speculation that the role of the Commission could be diminished to that of technical assistance, whereas the Council’s concerns have often predominantly been focused on the Members States’ loss of clout in the Union’s foreign policy-making.³³⁸ Nevertheless, in the event of a supply disruption with political, economic and security repercussions, such as that experienced in 2009, the High Representative / Vice-President of the Commission, with the support of the EEAS, will take the lead in the diplomacy required to resolve the dispute, with the Commission’s assistance provided where necessary. As noted above, the President of the European Council is expected to step-in where diplomatic action at the level of governments or foreign heads of state is required.

Inevitably, the Lisbon Treaty has provided the Union with new actors to attend to any imminent threat of an energy supply crisis. In the event of a crisis with foreign and security implications, it will be the President of the European Council (at the highest level) or the High Representative / Vice-President, assisted by the EEAS, to engage on behalf of the EU in its diplomatic action to resolve the crisis or political dispute. In this respect, their efforts will be facilitated by emergency plans coordinated at Union level under the auspices of the Commissioner for Energy.³³⁹ As such, cooperation between the President of the European Council, the High Representative / Vice-President, President of the Commission and Energy Commissioner, and Member States are expected to bolster the EU’s resilience in its external action, in resolving and/or preventing another gas crisis.

³³⁵ Art 15(6) TEU, second paragraph: ‘[t]he President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy’.

³³⁶ Council of the European Union, Note from General Secretariat of the Council to Delegations on the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC 11892/09 ENER 253 CODEC 963, Council Doc. 8304/4/10 REV 4, Recital Point 30, Commission Proposal Text, 20

³³⁷ Sijbren De Jong, ‘The EU’s External Natural Gas Policy - Caught Between National Priorities and Supranationalism’ (PhD Dissertation, KU Leuven, 2013); Flavia Zanon, ‘The High Representative for the CFSP and EU Security Culture: Mediator or Policy Entrepreneur?’ (PhD dissertation, University of Trento, 2012)

³³⁸ Graham Avery, ‘Europe’s Foreign Service: From Design to Delivery’, in *Policy Brief* (Brussels: European Policy Center, 2009) 3

³³⁹ Sijbren De Jong, Jan Wouters and Steven Sterkx, ‘The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon’ (2010) 15(4) *European Foreign Affairs Review* 511-38, 538

The above serves to illustrate how instrumental the Lisbon Treaty has been in developing the Union's external profile in the energy domain and in turn its role as a global normative energy power. With the creation of new actors, Lisbon has facilitated the Union's objectives in its external action being undertaken in a manner consistent with effective multilateralism and coherence to ensure the EU achieves its foreign policy goals. Significantly, solidarity amongst Member States is fundamental to the Union's action on the international stage and its external relations for which Lisbon introduced a mechanism to ensure same. Lisbon's solidarity mechanism was expected to boost the Union's role as an energy actor which will be examined further below.

3.1.2.3. Solidarity Mechanism

Article 194(1) TFEU states that the aims of the Union's energy policy, will be performed 'in a spirit of solidarity' amongst member states. Although solidarity is not formally defined, it is widely understood to be a core principle which distinguishes the EU and its members from other regional arrangements and international organisations.³⁴⁰ The concept of solidarity, which is generally understood to mean union from common responsibility and interests, is used in different legal contexts in the Treaty of Lisbon.³⁴¹

The Council made repeated reference to solidarity during the 2009 Gas Crisis when gas supplies to Europe were interrupted following a dispute between Russia and Ukraine over gas prices.³⁴² In this respect, the solidarity mechanism warrants special attention as the mechanism can be seen as a test of Member State dedication to solidarity based on the level of commitment amongst member states towards acting as a unified whole as opposed to cutting bilateral deals in pursuit of national interests.³⁴³

Article 122(1) TFEU anticipates that the EU institutions act 'in a spirit of solidarity' between Member States should there be any shortage of supply of energy. Article 122(1) TFEU states:

Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic

³⁴⁰ Ines Hartwig and Phedon Nicolaidis, 'Elusive Solidarity in an Enlarged European Union' (2003) 3 EIPAScope 19

³⁴¹ Art 24 TEU (Lisbon) mentions 'mutual political solidarity among Member States' and Art 31 TEU (Lisbon) notes 'spirit of mutual solidarity' regarding external actions under Common Foreign and Security Policy; Art 67 TFEU mentions 'solidarity between Member States', upon which a common policy on asylum, immigration and external border control is based; Art 122(1) TFEU anticipates the EU institutions should act 'in a spirit of solidarity between Member States' should there be shortage of supply of energy or similar products; the 'spirit of solidarity between Member States' is mentioned in Art. 191(1) TFEU as regards the need to preserve and improve environment in the internal market; the Union's policy on energy, according to Art 194(1) TFEU, will also be performed 'in a spirit of solidarity between Member States.' See Francisco J. Lorca, 'The Treaty of Lisbon and the Irish Impasse' in Joaquin Roy and Roberto Dominguez (eds), *Lisbon Fado: The European Union under Reform* (Florida European Union Center 2009) 108

³⁴² Simon Pirani, Jonathan P. Stern and Katja Yafimava, 'The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment' (Oxford: Oxford Institute for Energy Studies, 2009), 1-66, 4

³⁴³ Sijbren De Jong, Jan Wouters and Steven Sterkx, 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon' (2010) 15(4) European Foreign Affairs Review 511-38, 525

situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

However, solidarity is not a definitive or quantifiable concept³⁴⁴ and therefore the required level of implementation cannot be derived from the Treaty. Solidarity as a legal concept has gained traction in recent years given the significant role it is playing in the shaping of the EU legal order.³⁴⁵ With the Union's evolution from a purely economic organisation to a multi-faceted hegemon with a social, political and human rights dimension, solidarity has become an integral part of the EU project in times of crisis.³⁴⁶ The multiple facets and functions of solidarity within the legal order have become significant given the discrepancy between strict market rules and the promotion of values which has become more prominent, not to mention the practical and theoretical meaning of solidarity and its subsequent legal enforcement.³⁴⁷ Despite Article 194(1) TFEU stating that the aims of the Union's energy policy will be pursued in a 'spirit of solidarity', solidarity is subject to Member State interpretation and the weight it is given in times of crisis. Nevertheless, the express mention of 'solidarity' in relation to 'energy' and 'supply' creates a legal basis whereby the Union can intervene in the event of any supply disruptions.³⁴⁸ In this respect, the solidarity mechanism creates a platform for measures to be implemented to ensure security of supply in a time of crisis thereby bolstering the Union's role as a normative energy actor.

Nevertheless, it is important to note that there are some inconsistencies between Article 122(1) TFEU and the Union's policy on energy under Article 194 TFEU. Article 194(1) TFEU sets out the aims of the EU's energy policy which includes security of supply; market liberalisation and environmental sustainability.³⁴⁹ However, Article 194(2) TFEU imposes limitations on the measures to be undertaken to achieve the objectives of the Union's energy policy under Article 194(1) TFEU which 'shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply'. Therefore, the extent to which Article 194(2) TFEU impacts the solidarity mechanism under Article 122(1) TFEU and the EU's

³⁴⁴ In a recent discussion of solidarity as an emerging principle of the EU internal legal order, Dagilytė argues that solidarity is a value rather than a general principle, given the lack of legal obligations related to solidarity in several areas of EU law. See Eglė Dagilytė, 'Solidarity: A General Principle of EU law? Two Variations on the Solidarity Theme' in Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU Law – Legal Principle in the Making* (Edward Elgar Publishing, 2018) 61-90

³⁴⁵ Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU Law – Legal Principle in the Making* (Edward Elgar Publishing, 2018)

³⁴⁶ This relates to the ongoing debates of on solidarity in the context of the European financial crisis and immigration, asylum and border checks. See Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU Law – Legal Principle in the Making* (Edward Elgar Publishing, 2018)

³⁴⁷ Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU Law – Legal Principle in the Making* (Edward Elgar Publishing, 2018)

³⁴⁸ It has been argued that the solidarity principle in Article 195 TFEU was introduced in response to concerns over security of gas supply from Russia following supply disruptions during the Russian Ukrainian gas disputes.

³⁴⁹ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 443

ability to act in the event of a supply disruption is unclear but alludes to potential conflict between these two provisions.³⁵⁰

Notwithstanding the potential conflict, the solidarity mechanism serves to illustrate the emergence of the Union as an active player in the energy realm, in particular through the Commission which has endeavoured to establish itself as a leading actor in this field. With the sluggish development of the EU's common external energy policy, the Commission has called for a more united and coherent approach to the Union's external energy relations.³⁵¹ With the Commission's calls including better coordination of EU and Member States' activities for the sake of ensuring consistency and coherence with key producers, transit countries, consumer states³⁵² and EU Member States' 'speaking with one voice',³⁵³ it is clear that the Commission has shown impetus and commitment under the aegis of the Union to fully exercise EU competence (conferred by the Member States pursuant to Lisbon) in the Union's external relations which serves to bolster the Union's role as a global energy actor, in particular in relation to the Union's energy security.³⁵⁴

The notion of solidarity was only introduced after it became increasingly clear that EU energy supply could not be sufficiently addressed by a market-based security of supply scheme.³⁵⁵ At the pinnacle of the Union's market-based approach and the Union's energy liberalisation programme was the perception that the introduction of competition would facilitate security of energy supply. It was thought that, in-line with the basic rules of commerce, energy would be driven by the markets responding to demand and where prices were highest. Unfortunately this was not the case with markets effectively failing to ensure security of supply. Energy security subsequently emerged as a source of concern for EU energy policy. The solidarity provision was therefore arguably introduced as an attempt to create a corrective mechanism to ensure security of energy supply where market forces had thus far failed.³⁵⁶ The market-based approach and security of supply scheme of the 1980s and 1990s was as a result replaced by a public-sector solidarity scheme to prevent supply disruptions like that of the Russia-Ukraine gas dispute which could not be sufficiently addressed by market forces.³⁵⁷ A public-sector-driven response apparatus was deemed

³⁵⁰ Sijbren De Jong and Jan Wouters, 'European Energy Security Governance: Key-Challenges and Opportunities in EU-Russia Energy Relations', *Leuven Centre for Global Governance Studies*, 2011, 1-66, 38 <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1898676&download=yes> accessed 10 October 2016

³⁵¹ Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 248

³⁵² Commission, 'Green Paper: A European Strategy for Sustainable, Competitive and Secure Energy', COM (2006) 105 final, 8.3.2006, 14

³⁵³ Commission Communication, 'An EU Energy Security and Solidarity Action Plan', COM (2008) 781 final, 13.11.2008, 3, 17

³⁵⁴ Johann-Christian Pielow and Britta Janina Lewendel, 'Beyond "Lisbon": EU Competences in the Field of Energy Policy' in Bram Delvaux, Michaël Hunt, and Kim Talus (eds), *EU Energy Law and Policy Issues* (Intersentia, 2011) 261-278

³⁵⁵ Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 281

³⁵⁶ *Ibid*

³⁵⁷ *Ibid*

necessary for which solidarity was considered a viable mechanism.³⁵⁸ The solidarity mechanism therefore serves to reinforce the Union's role as an energy actor, not only as an added dimension to the Union's energy competence but in its significance with respect to the EU's energy security.

3.2.3. Conclusion

This section has highlighted the novelties of Lisbon and the extent to which these new facets to the Union's competence have served to enhance the Union's role in the energy realm as an energy actor. The Lisbon Treaty paved the way for the legal formalisation of the Union's policies that significantly enhanced the external dimension of the EU internal market and the Union's role as a global normative actor which aspires to promote its own democratic, economic and legal values beyond its borders.³⁵⁹ With respect to the energy sector, this entailed the Union's energy competence formally enshrined in Article 194 TFEU and competence conferral which enabled the EU to pursue internal objectives in its external relations with a solidarity provision and a distinct set of new actors and structures to facilitate coherence and a less haphazard approach to bilateral diplomacy in the energy sector. In other words, Lisbon has provided a basis by which the EU can potentially act as a normative power in its external energy relations.

3.3. Chapter Conclusion

This chapter examined the Union's gradual development as a global energy actor, thereby setting the stage for the analysis to follow, which examines the Union's increasingly normative agenda in the energy sector which has been gaining traction since the Union's energy actorness had been set in motion. The objectives of the Union's normative agenda has been twofold: first, to enhance the position of the Union as a global player; and second, to ensure the functioning of a friendly and secure neighbourhood in the Union's periphery.³⁶⁰ With respect to the Union's normative agenda in the energy sector, the objectives remain the same with the exception that the Union endeavours to Europeanise not only its periphery, but also their respective energy sectors, through the sectoral export of its *acquis* to ensure consistency with an EU model. This progression has facilitated the Union's enhanced international capacity to promote its democratic and market economy values to third countries, by Europeanising their institutional and legal structures in-line with EU norms and principles.³⁶¹ The Union's Europeanisation efforts which is reminiscent of

³⁵⁸ *Ibid*

³⁵⁹ Roman Petrov, 'Energy Community as a Promoter of the European Union's Energy *Acquis* to Its Neighbourhood' (2012) 39 (3) Legal Issues of Econ. Integration 331

³⁶⁰ *Ibid*

³⁶¹ Roman Petrov, 'Energy Community as a Promoter of the European Union's Energy *Acquis* to Its Neighbourhood' (2012) 39 (3) Legal Issues of Econ. Integration 331

normative behaviour has been most prominent in its neighbourhood which will be further examined in the following section.

Chapter 4: The EU as a Normative Power in its Neighbourhood (Benchmark Comparator)

In the preceding chapter, the thesis analysed the scope of the Union's external energy competence and the interplay between the Union's internal market and external energy relations. Building on this insight, the following chapter assesses to what extent the Union qualifies as a normative power in its neighbourhood and the extent to which its internal energy objectives have been externalised in its foreign energy relations. For this purpose the chapter first examines the Union's *acquis* export in its neighbourhood generally and then scrutinise to what extent the Union has Europeanised its neighbourhood and their respective energy sectors through its energy *acquis*. As such, the chapter examines the instruments of the Union's external energy policy and assesses to what extent the Union is displaying characteristics of a normative actor in the energy sector. As an extension of the theoretical framework, the chapter applies Manners' criteria for a normative power as established in Chapter 2,³⁶² to determine to what extent the Union is normative in its periphery. To pursue this line of enquiry, Section 4.1 of the chapter applies the normative criteria and assesses to what extent the Union satisfies any of the criteria in its neighbourhood, namely: (i) to what extent it has a normative identity; (ii) to what extent it has normative interests; (iii) to what extent it exhibits normative means of power or influence; (iv) to what extent it behaves in a normative way, in accordance with existing rules and norms; and (v) to what extent it achieves normative outcomes. The aim of this analysis is to determine the extent to which the Union is revealing normative aspects to its identity and behaving in a normative manner by institutionalising its relations in its neighbourhood within shared multilateral normative frameworks, an ideal conceptualisation of a normative power³⁶³ (as outlined in Chapter 2).³⁶⁴

The chapter thereafter considers in Section 4.2 whether the Union uses mechanisms of a normative power (which are ancillary to Manner's criteria)³⁶⁵ as a means of influence in the neighbourhood, namely through persuasion; invoking norms; shaping discourse and setting an example, by way of its *acquis* and regional integration in the neighbourhood. In this respect, it may be argued that in the Union's efforts to Europeanise the fringes of its

³⁶² See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

³⁶³ Tuomas Forsberg and Hiski Haukkala, *The European Union and Russia*. (Palgrave Macmillan 2016) 229

³⁶⁴ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

³⁶⁵ As mentioned in Chapter 2, Manners has established certain criteria which are deemed to be indicative of a normative power. These include: (i) normative identity; (ii) normative interests; (iii) normative means of power; (iv) normative behaviour; and (v) the ability to achieve normative outcomes. As a supplemental part of Manners' normative criteria, in particular in relation to *normative means of power* (item (iii) of Manners' criteria listed above) is the notion of different mechanisms of normative power whereby the Union exerts its influence on the global stage and in its external relations. The normative mechanisms of power are not part of Manners' criteria but rather serve as an ancillary element to the *normative means of power*, which would explain why there is sometimes an overlap between Manners' *normative means of power* criteria and the *normative mechanisms* undertaken.

boundaries and their respective energy sectors, through its *acquis*, the Union arguably upholds international norms, promotes universal rules and projects its values on third countries thereby yielding power through its influence and shaping discourse through its norms. This would then, according to Manners, allude to normative behaviour with the Union invoking norms, shaping discourse and leading by example.³⁶⁶ For the purpose of the examination of this chapter, the analysis undertaken focuses on the most prominent forms of normative power through which the Union exercises its influence in the European neighbourhood (as already stipulated in Chapter 2)³⁶⁷, namely through the activation of international norms (i.e. invoking norms)³⁶⁸ and power of example (i.e. setting an example).³⁶⁹

In undertaking this analysis the chapter assesses whether the normative power theory offers a viable explanation for the Union's conduct in the energy sector with its neighbouring partners and to what extent the Union can indeed be said to qualify as a global normative energy actor based on the normative power criteria established by Manners. In this respect it is important to note Manners' argument that merely accepting the normative basis of the EU (i.e. that the EU is a normative power because it has a normative identity which is derived from its treaty-based legal order that predisposes it to act in a normative way), does not automatically qualify it as a normative power.³⁷⁰ Notwithstanding, it is not clear from Manners' argument whether all five criteria need to be fulfilled.³⁷¹ With this in mind, the chapter assesses to what extent the Union fulfils any of the aforementioned criteria to establish whether the Union has normative aspects to its nature without an expectation that all criteria need to be fulfilled for the purpose of establishing the Union's normativity in its neighbourhood.

4.1. Theoretical Framework – Manners' Normative Power Criteria

Drawing from Ian Manners' Normative Power Europe theory, the section to follow examines to what extent the Union has Europeanised the institutional and legal structures of its neighbourhood in-line with the *acquis*. For this purpose, the chapter applies Manners'

³⁶⁶ Ian Manners, 'Normative Power Europe: a Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235-258, 229

³⁶⁷ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

³⁶⁸ As already mentioned in Chapter 2, the act of invoking norms refers to the activation of norms to which third parties have already committed themselves which can be seen as another mechanism of power typically associated with normative power. Here the activation of commitments refer to the normative clauses which exist within agreements between the EU and third countries, which can be invoked by one party when they are violated by another.

³⁶⁹ As already mentioned in Chapter 2, the power of example or 'model power' entails the mechanism of spreading norms by example which includes regional integration as the most prominent form of power of example, with the EU using its economic might to set the standard and define the terms of regional cooperation.

³⁷⁰ Ian Manners, 'The Normative Ethics of the European Union' (2008) 48(1) *International Affairs* 45-60; Ian Manners, 'The Social Dimension of EU Trade Policies: Reflections From a Normative Power Perspective' (2009) 14(5) 782 – 805

³⁷¹ *Ibid*

normative power criteria and assess to what extent the Union is normative by committing itself to upholding and promoting its values as an objective in its external relations, by developing norms at an international level which it then incorporates into its own legal order and promotes in its relations with third states through its *acquis* export in the immediate eastern neighbourhood. The analysis therefore focuses on the role of Union values in the Union's legal order and the extent to which the Union has promoted its market economy norms and values in its external relations with its periphery. The Union's norm export in its external relations through its *acquis* is significant for the purpose of establishing whether the EU is normative as it suggests that the Union is trying to shape its neighbourhood by what it perceives as 'normal' through the values it embodies. The relevance of values to the normative power debate lies in Manners' shorthand definition of what 'normative power' constitutes which is on par with an 'ideological power' rather than a military one, namely 'the ability to shape conceptions of "normal"' which is based on the values that the Union embodies.³⁷² The Union's normativity is therefore linked to its identity which is based on its values which would suggest that values are a precondition to a normative identity.

By arguing that the most important factor shaping the Union's role as an international actor on the global stage, 'is not what the Union does or what it says but what it is', the role of values in the normative power argument becomes obvious if we concede that the Union is often perceived as a Union of values.³⁷³ This also explains why Manners' defined normative power as the power of example which is derived from the Union's values which it considers universal.³⁷⁴ For this purpose, the chapter looks at the different values (Article 2 TEU) which the EU claims as its own that are deeply imbedded in the Treaties³⁷⁵ that are constitutive of the Union's identity and its self-perception and self-projection as an international actor to determine to what extent the Union has a Normative Identity. Applying Manners' criteria, specific attention has been paid to: (i) the role of values in the Union's external relations (Article 3(5) TEU) and its objectives in its external action (Article 21 TEU) to determine to what extent the Union has Normative Interests; (ii) how these values and objectives find practical expression through legal norms to determine to what extent the Union has Normative Behaviour; and (iii) how the EU exports these norms in its external relations with its neighbourhood (Article 8 TEU) through *acquis* export to determine to what extent the Union has Normative Means of Influence which would ultimately affirm its normative power in its efforts to effect change in favour of an EU model; which would ascertain (iv) the extent to which the Union achieves Normative Outcomes.

³⁷² Ian Manners, Normative Power Europe: A Contradiction in Terms? (2002) 40 Journal of Common Market Studies 252

³⁷³ *Ibid*

³⁷⁴ *Ibid*

³⁷⁵ The Union is based on the Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) which constitute 'the Treaties' on which the Union is founded.

The chapter looks at the ENP (in particular the Eastern neighbourhood), to illustrate how the EU endeavours to incorporate a set of values in its foreign policy objectives and to what extent its norm export in its external relations with its neighbourhood, is alleged to be value-based or driven by strategic interests. This then sets the platform for the analysis undertaken in the case study vis-à-vis Russia with respect to the Union's norm export and promotion of values. With the Europeanisation of the Union's neighbourhood and its energy sector the main indicators of the Union's normativity in its neighbourhood, the chapter examines how the Union integrates its periphery into its sphere of influence through conformity to EU norms and values embodied in legal instruments.

4.1.1. Does the EU have a Normative Identity in the Neighbourhood?

As illustrated in Chapter 2,³⁷⁶ the first of the normative power criteria is the view that a normative power has a normative identity. In this respect Manners argues that the EU is 'normatively constituted' and that fundamental to its normative identity is the fact that it has evolved from a treaty-based legal order with a predisposition to act in a normative way. Manners asserts that the Union's unique political-legal constitution make it a unique hybrid of international organisation and sui generis entity with its own values, interests and policies that it seeks to promote on the wider political stage. The Union's efforts to spread its values, interests and policies as an extension of its itself in the international arena, ultimately alludes to a normative power given the Union's role as a promoter of values and exporter of norms.

The Treaty of Lisbon lists the foundation values in Article 2 TEU which includes democracy, the rule of law, respect for human rights, freedom and equality as well as rights belonging to minorities. These values are said to be common to the Member States in a society of pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women. These values are to be upheld and promoted by the Union in its relations with the wider world as stipulated in Article 3(5) TEU which are therefore directly linked to the EU's external policy. Other Union objectives that are linked to the EU's external action which are also linked to its values (as already mentioned in Chapter 3),³⁷⁷ include peace, solidarity and mutual respect amongst people. The Treaty of Lisbon also provides that the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world (Article 21(1) TEU). These principles reflect the values and objectives set out in Article 2 and 3 TEU which includes democracy, the rule of law, universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, respect for the principles of the UN Charter and international law.

³⁷⁶ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

³⁷⁷ See Chapter 3 Section 3.2.2 (*Further Novelties Introduced by Lisbon – Objectives in External Action*)

The common set of objectives in the Union's external action as set out in Article 21(2) TEU include safeguarding the Union's common values, consolidating and supporting democracy, the rule of law, human rights and the principles of international law. Further to expanding the list of Union values beyond that associated with external policy, the Lisbon Treaty reiterates that the Union's external action should be guided by its values.³⁷⁸

As mentioned above, the Union's values (as listed in Article 2 TEU) provide a sense of identity with the Union's perception and projection of itself defined in terms of its values.³⁷⁹ As mentioned elsewhere,³⁸⁰ the notion of the EU as a union of values, found its inception in the Laeken Declaration which launched the Convention on the Future of Europe (officially the European Convention)³⁸¹ specifically in relation to the EU's external policy.³⁸² The Union's sense of self is evident in its external projection of its internal policies (as indicated in Chapter 3)³⁸³ which suggests an external dimension to the EU's values.³⁸⁴ If we consider that the EU's developed identity is on the basis of its values which serves as both the result and cause of its foreign policy, the Union can be said to be largely normative given it is norm and value-based which will be further illustrated below.³⁸⁵ The EU therefore finds justification in the increasingly important role of values in its external policy from which it draws its inspiration and defines itself to its citizens and the world at large.³⁸⁶ With respect to its objectives, the Union's values arguably serve as a moral compass to guide the Union's actions in its foreign policy. In this respect it is important to note that whilst the interconnectedness between EU values and foreign policy find their basis in the EU Treaties, this is not only in the form of explicit references to 'values' but also statements pertinent to the 'principles' governing the Union and the 'objectives' of its policies.

³⁷⁸ Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 280

³⁷⁹ Laeken Declaration on the Future of the Union, European Council, 14-15 December 2001

³⁸⁰ See Chapter 2 (*Manners' Normative Power Europe*)

³⁸¹ The Convention on the Future of Europe (officially the European Convention), was a body established by the European Council in December 2001 as a result of the Laeken Declaration.

³⁸² 'What is Europe's role in this changed world? Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law.' See Laeken Declaration on the Future of the Union, European Council, 14-15 December 2001

³⁸³ See Chapter 3 (*External Dimension of the EU Internal Market*)

³⁸⁴ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235; Helene Sjursen, 'The EU as a 'Normative' Power: How Can This Be?' (2006) 13 *Journal of European Public Policy* 235

³⁸⁵ Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 276

³⁸⁶ Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge, 2006)

The inclusion of values in the legal basis of the EU's foreign policy goals in its external relations and in particular with respect to its neighbourhood affirms the Union's normative identity but this does not purport to suggest that the values and objectives take priority over other aims. Although the Lisbon Treaty is more devout in its commitment to 'values' than the preceding Treaties, there is linguistic ambiguity in the overlap in terminology with 'values', 'principles' and 'objectives' often being used interchangeably.³⁸⁷ The 'principle of complementarity' (Article 3(5) TEU and Article 21 (2) TEU) which requires that both values and interests are safeguarded in the Union's external policies, inadvertently mean that vital possession goals (such as trade and energy security) can be prioritised over milieu goals in the neighbourhood,³⁸⁸ which will be further explored below³⁸⁹ and the chapter to follow. Notwithstanding which goals preside in the Union's neighbourhood, for the sake of determining whether the Union satisfies the first of the normative power criteria, it is important to note what Manners advocates in this respect, namely that the Union's normative identity is derived from its nature as a treaty-based hybrid polity and that this unique nature constitutes, rather than causes, the nature of the EU which Manners believes is 'good' and thereby normative.³⁹⁰ Whilst Manners' assumption is questionable, it inevitably suggests that the Union constitutes a normative identity by sheer virtue of the fact that it is a *sui generis* entity. The very basic claim that Manners makes is that the EU is a normative power because it has a normative identity which is derived from the nature of its hybrid polity and treaty-based legal order.³⁹¹ The Union's postmodern internalised values and integration with its Eastern neighbourhood as part of a peace project therefore do not qualify the Union's identity. Whilst this may bolster the normative identity argument vis-à-vis its Eastern neighbourhood and its energy sector, the significance lies in the distinction with other traditional powers.

4.1.2. Does the EU have Normative Interests in the Neighbourhood?

As illustrated in Chapter 2,³⁹² the second of the normative power criteria is the view that a normative power has normative interests. In this respect Manners argues (as already

³⁸⁷ The list of foundation 'values' in Article 2 TEU is repeated in Article 21(1) as 'principles', and the Preamble to the Charter of Fundamental Rights distinguishes between the indivisible universal 'values' of human dignity, freedom, equality and solidarity and the 'principles' of democracy and the rule of law.

³⁸⁸ Sieglinde Gstöhl, 'The Contestation of Values in the European Neighbourhood Policy: Challenges of Capacity, Consistency and Competition' in Sara Poli (ed.) *The European Neighbourhood Policy--Values and Principles*. Routledge (Routledge, 2016) 58-78

³⁸⁹ See below: *The Interests vs Values Dilemma in the Union's Neighbourhood Regarding Energy*

³⁹⁰ Ian Manners, 'The Normative Ethics of the European Union' (2008) 48(1) *International Affairs* 45-60; Ian Manners, 'The Social Dimension of EU Trade Policies: Reflections From a Normative Power Perspective' (2009) 14(5) 782 – 805

³⁹¹ As mentioned in Chapter 2 and reiterated in Chapter 3, Manner's normative power theory asserts that the EU has a predisposition to act in a normative way which stems from its political legal institution. As a polity that has evolved from a treaty-based legal order with its external action and objectives derived from treaty provisions such as Article 3(5) TEU and Article 21 TEU which promotes universal rules and EU values, the Union can be said to be fundamentally normative. See also Chapter 3 (*EU Energy Policy and the Union's Energy Actorness - Objectives in External Action*).

³⁹² See Chapter 2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

mentioned in Chapter 2)³⁹³ that a normative power is considered to have fundamentally different interests from a traditional power whose interests are generally perceived as strategic or self-regarding.³⁹⁴ Instead, a normative power would be construed as pursuing foreign policy goals that represent a common good³⁹⁵ and are not means/end oriented but rather the pursuit of values which is a trait often used to distinguish the EU from other foreign policy actors.³⁹⁶ In this respect, there is a general sense that in its external policies, the EU promotes norms and values rather than (or in addition to) its own interests; whereas in its external relations with the ENP (in particular the Eastern Neighbourhood) and Russia there is a growing perception (as this thesis will show, in particular with respect to Russia and the EU's external energy relations) that the Union's agenda is not solely derived from a desire to promote its own values but also a move to fulfil its own interests. The assumption that the EU is a value-driven actor with a normative agenda for its neighbourhood is therefore questionable, as evidenced in Chapter 2.³⁹⁷

Some of the literature argues that despite the fact that the Union has been built on a solid normative foundation that extends to its foreign policy dimension, when dealing with its neighbourhood (the ENP and Eastern Neighbourhood), the Union has a tendency to favour its own pragmatic interests rather than core values.³⁹⁸ Whilst the ENP is framed as a stabilisation instrument, with its goals generally based on stability, security and prosperity, some scholars³⁹⁹ claim that this policy framework serves the Union's interests in the pursuit of its main objective – namely, security. The Union has endeavoured to achieve this objective by creating a 'ring of friends' that constitutes stable and well-governed states

³⁹³ See Chapter 2 (*Manners' Normative Power Europe*)

³⁹⁴ Asle Toje, 'The Consensus—Expectations Gap: Explaining Europe's Ineffective Foreign Policy' (2008) 39(1) *Security Dialogue* 121-141, 127

³⁹⁵ Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Johns Hopkins University Press, 1962) 67-80

³⁹⁶ Asle Toje, 'The Consensus—Expectations Gap: Explaining Europe's Ineffective Foreign Policy' (2008) 39(1) *Security Dialogue* 121-141, 127

³⁹⁷ See Chapter 2 (*Criticism of the Normative Power Framework*)

³⁹⁸ Hrant Kostanyan (ed.), *Assessing European Neighbourhood Policy: Perspective from the Literature* (Rowman & Littlefield, 2017) 2

³⁹⁹ Michele Comelli, *Potential and Limits of EU Policies in the Neighbourhood* (Notre Europe, 2013); Sandra Lavenex and Frank Schimmelfennig, 'EU Democracy Promotion in the Neighbourhood: From Leverage to Governance?' (2011) 18(4) *Democratization*, 885-909; Raffaella A. Del Sarto and Tobias Schumacher, 'From Brussels with Love: Leverage, Benchmarking, and the Action Plans with Jordan and Tunisia in the EU's Democratization Policy', (2011) 18(4) *Democratization*, 932-955; Charles Thépaut, 'Can the EU Pressure Dictators? Reforming ENP Conditionality after the Arab Spring' (2011) EU Diplomacy Paper No. 6, College of Europe; Pol Morillas, 'From Policies to Politics: The European Union as an International Mediator in the Mediterranean' (2015) IEMed Euromesco series No. 23, European Institute of the Mediterranean; Tania A. Börzel and Vera Van Hüllen, 'One Voice, One Message, But Conflicting Goals: Cohesiveness and Consistency in the European Neighbourhood Policy' (2014) 21(7) *Journal of European Public Policy*, 1033-1049; Rossa Balfour, 'EU Conditionality After the Arab Spring' (2012) IEMed Euromesco series No. 16, European Institute of the Mediterranean; Alexander Duleba, Vladimír Benč, and Vladimír Bilčík, 'Policy Impact of the Eastern Partnership on Ukraine: Trade, Energy, and Visa Dialogue' (Research Center of the Slovak Foreign Policy Association, 2012); Erwan Lannon, 'More for More or Less for Less: From the Rhetoric to the Implementation of European Neighbourhood Instrument in the Context of the 2015 ENP review' (2015) IEMed Overview, European Institute of the Mediterranean, 220-224; Hiski Haukkala, 'The EU's Regional Normative Hegemony Encounters Hard Realities: The Revised European Neighbourhood Policy and the Ring of Fire' in Dimitris Bouris and Tobias Schumacher (eds), *The Revised European Neighbourhood Policy: Continuity and Change in EU Foreign Policy* (Palgrave Macmillan, 2017)

around its borders.⁴⁰⁰ Nevertheless, despite the literature suggesting a preference for security when dealing with an interests-vs-values dilemma in the neighbourhood, there is both consensus and divergence with regard to the overlap between interest and values and the way they are used in the literature.⁴⁰¹ Although the EU's interests (e.g. security and stability) and values (e.g. democracy, human rights, rule of law, respect for principles of international law, multilateral coherence, etc) are likely to coincide, scholars⁴⁰² have a tendency to compartmentalise the different explanatory variables. There is therefore arguably a gap in the literature regarding the interests vs values dilemma and the potential oversight of the overlap and combination of both variables in the Union's foreign policy agenda.⁴⁰³ This is particularly the case in the context of the Union's energy policy in the ENP (in particular the Eastern neighbourhood) where the Union's security and stability interests are at the fore of the Union's engagement with its periphery in its efforts to build a 'ring of friends' based on shared values.⁴⁰⁴ One could therefore argue that the Union pursues both values and interests in its external relations or alternatively as Tocci indicates, the EU sometimes has normative interests but not always.⁴⁰⁵

Whilst it would indeed be unreasonable to expect a hegemon of the Union's magnitude to be solely driven by normative goals without regard to its own economic and security interests, as mentioned in Chapter 2,⁴⁰⁶ the EU is generally perceived as a normative actor and promoter of values rather than a provider of security and stability to the neighbourhood. Although the normative agenda of the Union's foreign policy cannot be disputed, the critique of some of the sceptical voices in the literature lies in the fact that the EU is portrayed as a

⁴⁰⁰ Hrant Kostanyan (ed.), *Assessing European Neighbourhood Policy: Perspective from the Literature* (Rowman & Littlefield, 2017) 2

⁴⁰¹ *Ibid*

⁴⁰² Michele Comelli, *Potential and Limits of EU Policies in the Neighbourhood* (Notre Europe, 2013); Sandra Lavenex and Frank Schimmelfennig, 'EU Democracy Promotion in the Neighbourhood: From Leverage to Governance?' (2011) 18(4) *Democratization*, 885-909; Raffaella A. Del Sarto and Tobias Schumacher, 'From Brussels with Love: Leverage, Benchmarking, and the Action Plans with Jordan and Tunisia in the EU's Democratization Policy', (2011) 18(4) *Democratization*, 932-955; Charles Thépaut, 'Can the EU Pressure Dictators? Reforming ENP Conditionality after the Arab Spring' (2011) EU Diplomacy Paper No. 6, College of Europe; Pol Morillas, 'From Policies to Politics: The European Union as an International Mediator in the Mediterranean' (2015) IEMed Euromesco series No. 23, European Institute of the Mediterranean; Tania A. Börzel and Vera Van Hüllen, 'One Voice, One Message, But Conflicting Goals: Cohesiveness and Consistency in the European Neighbourhood Policy' (2014) 21(7) *Journal of European Public Policy*, 1033-1049; Rossa Balfour, 'EU Conditionality After the Arab Spring' (2012) IEMed Euromesco series No. 16, European Institute of the Mediterranean; Alexander Duleba, Vladimír Benč, and Vladimír Bilčík, 'Policy Impact of the Eastern Partnership on Ukraine: Trade, Energy, and Visa Dialogue' (Research Center of the Slovak Foreign Policy Association, 2012); Erwan Lannon, 'More for More or Less for Less: From the Rhetoric to the Implementation of European Neighbourhood Instrument in the Context of the 2015 ENP review' (2015) IEMed Overview, European Institute of the Mediterranean, 220-224; Hiski Haukkala, 'The EU's Regional Normative Hegemony Encounters Hard Realities: The Revised European Neighbourhood Policy and the Ring of Fire' in Dimitris Bouris and Tobias Schumacher (eds), *The Revised European Neighbourhood Policy: Continuity and Change in EU Foreign Policy* (Palgrave Macmillan, 2017)

⁴⁰³ Hrant Kostanyan (ed.), *Assessing European Neighbourhood Policy: Perspective from the Literature* (Rowman & Littlefield, 2017) 6

⁴⁰⁴ Article 8 TEU

⁴⁰⁵ Natalie Tocci, 'The European Union as a Normative Foreign Policy Actor' in Nathalie Tocci (ed), *Who is a Normative Foreign Policy Actor?.* (Centre for European Policy Studies, 2008) 10

⁴⁰⁶ See Chapter 2 Section 2.1 (*Manners' Normative Power Europe*)

'force for good' in international society (see Solana's statement)⁴⁰⁷ with a convenient blindness to its own interests.⁴⁰⁸ The gap between the Union's rhetoric (in favour of values) and its actions (in pursuit of interests) suggest a discrepancy or inconsistency which gives credence to the critical assertions in the prevailing scholarship.⁴⁰⁹ Although it would be negligent to deny that the promotion of norms and values are fundamentally part of the EU's external policies, it would be equally misleading to focus on this normative dimension alone with a complete disregard of the Union's interests.⁴¹⁰ As mentioned above and as will be shown further below, there appears to be a strong emphasis on the role of norms and values in the Union's foreign policy, in particular with regard to its neighbourhood. In this respect, the role of norms and values as the driving force behind the Union's foreign policy agenda, serve as a litmus test to determine the extent to which the Union is driven by values or interests, which might indicate the extent to which it is a normative power. Whilst this does not purport to suggest that a normative power is only driven by norms and values over interests as far as the Union's external action in its periphery is concerned, the pursuit of values appears to be intertwined with the Union's interests. There therefore appears to an overlap between the Union's values and interest in the neighbourhood (namely 'good neighbourliness' founded on the values of the Union for the sake of ensuring security and stability in the region) which will be further explored in the sections to follow.⁴¹¹

⁴⁰⁷ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

⁴⁰⁸ Knud Erik Jørgensen and Katie V. Laatikainen, (2004) 'The EU and the UN: Multilateralism in a New Key?' (2004) paper presented at the Second Pan-European Conference on EU Politics, 'Implications of a Wider Europe: Politics, Institutions and Diversity', Bologna, 24–26 June 2004. 15

⁴⁰⁹ Michele Comelli, *Potential and Limits of EU Policies in the Neighbourhood* (Notre Europe, 2013); Sandra Lavenex and Frank Schimmelfennig, 'EU Democracy Promotion in the Neighbourhood: From Leverage to Governance?' (2011) 18(4) *Democratization*, 885-909; Raffaella A. Del Sarto and Tobias Schumacher, 'From Brussels with Love: Leverage, Benchmarking, and the Action Plans with Jordan and Tunisia in the EU's Democratization Policy', (2011) 18(4) *Democratization*, 932-955; Charles Thépaut, 'Can the EU Pressure Dictators? Reforming ENP Conditionality after the Arab Spring' (2011) EU Diplomacy Paper No. 6, College of Europe; Pol Morillas, 'From Policies to Politics: The European Union as an International Mediator in the Mediterranean' (2015) IEMed Euromesco series No. 23, European Institute of the Mediterranean; Tania A. Börzel and Vera Van Hüllen, 'One Voice, One Message, But Conflicting Goals: Cohesiveness and Consistency in the European Neighbourhood Policy' (2014) 21(7) *Journal of European Public Policy*, 1033-1049; Rossa Balfour, 'EU Conditionality After the Arab Spring' (2012) IEMed Euromesco series No. 16, European Institute of the Mediterranean; Alexander Duleba, Vladimír Benč, and Vladimír Bilčík, 'Policy Impact of the Eastern Partnership on Ukraine: Trade, Energy, and Visa Dialogue' (Research Center of the Slovak Foreign Policy Association, 2012); Erwan Lannon, 'More for More or Less for Less: From the Rhetoric to the Implementation of European Neighbourhood Instrument in the Context of the 2015 ENP review' (2015) IEMed Overview, European Institute of the Mediterranean, 220-224; Hiski Haukkala, 'The EU's Regional Normative Hegemony Encounters Hard Realities: The Revised European Neighbourhood Policy and the Ring of Fire' in Dimitris Bouris and Tobias Schumacher (eds), *The Revised European Neighbourhood Policy: Continuity and Change in EU Foreign Policy* (Palgrave Macmillan, 2017)

⁴¹⁰ Knud Erik Jørgensen and Katie V. Laatikainen, (2004) 'The EU and the UN: Multilateralism in a New Key?' (2004) paper presented at the Second Pan-European Conference on EU Politics, 'Implications of a Wider Europe: Politics, Institutions and Diversity', Bologna, 24–26 June 2004. 15

⁴¹¹ The role of values in the Union's foreign policy forms part of a wider debate on the constitutionalism of the international legal order and the EU's contribution to that legal order through the substantive interconnections the EU has developed over the years with the rest of the world. The emergence of EU values which are largely considered by the Union as global in nature given the perception that they are (or should be) shared by the international community, means that such values have influenced the interaction between the EU and third countries. In turn, these values have had an impact on the legal order and other polities given the Union's efforts to shape third country legal systems in-line with its rules and principles. Drawing from Manner's assertion that the EU as a normative power invokes norms in an effort to promote universal rules and project its values, the

4.1.2.1. The Interests vs. Values Dilemma in the Union's Neighbourhood Regarding Energy

The section above has served to illustrate that the Union's normative agenda in the ENP and Eastern Neighbourhood is contested in the literature. If we concede that the main objective of the ENP as a policy framework⁴¹² is ensuring stability, security and prosperity in the region, the Union appears to give priority to its interests over values. Whilst there is a clear overlap between values and interests in the neighbourhood which justifies the divide in the literature regarding the Union's priorities in its external relations with its periphery generally, as far as the Union's energy security is concerned, the interests vs values dilemma is less pronounced. In other words, there appears to be less of a dilemma with respect to energy security which is pushed to the fore in terms of gravity and significance (i.e. interests are deemed more important than values in the context of energy). The Union's energy dependence has made energy security a top-priority on the EU agenda. The EU has an increasing demand for energy which is intrinsic to its economy and the prosperity of its citizens. Given the Union does not have the prerequisite resources at its disposal, it is dependent on resource-rich exporting countries such as Russia from which it fulfils its energy needs. In the interest of curbing over-dependence on such countries, the Union has employed a strategy of diversification of energy supplies and promotes market liberalisation. In this context, the region between the EU and Russia is of significant geopolitical value when it comes to energy:

[t]he European Union is the world's largest energy (oil and gas) importer and the second largest consumer and is surrounded by the world's most important reserves of oil and natural gas (Russia, the Caspian basin, the Middle East and North Africa). It will increasingly depend on imports, from its current level of 50% to 70% by 2030, on present projections. Neighbouring countries play a vital role in the security of the EU's energy supply. Many countries seek improved access to the EU energy market, either as current or future suppliers (for instance, Russia, Algeria, Egypt, Libya) or transit countries (Ukraine, Belarus, Morocco, Tunisia). The Southern Caucasus countries are also important in this respect in terms of new energy supplies to the EU from the Caspian region and Central Asia.⁴¹³

Union's normativity can therefore be assessed in light of the legal and political context within which the Union pursues its values in its external relations with its periphery. See Malcom Evans and Panos Koutrakos, 'Introduction' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 1

⁴¹² Since 2004, the European Neighbourhood Policy has provided a framework for relations between the EU and its 16 geographically closest neighbours. This framework offers enhanced cooperation and access to the European market by means of bilateral action plans leading ultimately to association agreements. It is complemented by three regional initiatives: the Union for the Mediterranean (UfM), the Black Sea Synergy and the Eastern Partnership. The UfM and the Eastern Partnership are multilateral and involve shared institutions (Euro-Mediterranean Assembly, Euronest, regular summits). The major geopolitical upheavals brought about by the Arab Spring in the southern Mediterranean since 2011 and by the conflict in Ukraine since 2014 have prompted the EU to overhaul what it is doing in the neighbourhood to assert itself as an international player in the region.

⁴¹³ European Commission (2004) European Neighbourhood Policy – Strategy Paper. Available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2004_communication_from_the_commission_european_neighbourhood_policy_-_strategy_paper.pdf>

In this respect, the ENP plays an important role in bridging the EU and its Eastern⁴¹⁴ and Southern⁴¹⁵ neighbouring states in this geopolitically significant region. This is particularly the case with the Eastern neighbours that fall within the ambit of what is perceived to be Russia's traditional realm of influence. In this respect, it is important to take heed of the ENP Strategy of 2004 whereby it was stated that:

The European Neighbourhood Policy's vision involves a ring of countries, sharing the EU's fundamental values and objectives, drawn into an increasingly close relationship, going beyond co-operation to involve a significant measure of economic and political integration.⁴¹⁶

Through the political and economic integration of the Eastern European neighbours into the EU's domain, the Union is able to exercise influence over its energy corridors thereby reducing Russia's clout over the region. Here it is important to recall what was stated in Chapter 1⁴¹⁷ regarding Russia's use of energy as a geostrategic tool to pursue its political agenda towards states that are heavily dependent on its energy supplies. Through the ENP however, the EU is able to pursue its security objectives through 'the closest possible political association and the greatest possible degree of economic integration'⁴¹⁸ by which the Union is able to achieve traction in its influence in the region and control over decision-making in the neighbourhood. Although political association and economic integration are fundamentally part of the Union's normative agenda and a means of influence ('model power') which will be explored later in the chapter,⁴¹⁹ the objective in the neighbourhood with respect to energy, is at its core strategic (i.e. in the interest of security rather than values). As such, the ENP serves as a useful tool for the Union to exercise power over the territory and space along its borders and beyond with the aim of pursuing political objectives and shaping political realities. Beyond an instrument of cooperation with respect to trade, the internal market, development and the environment, the ENP, in particular the Eastern Partnership, can be said to be an instrument promoting energy security:

'[t]he Eastern Partnership aims to strengthen energy security through cooperation with regard to long-term stable and secure energy supply and transit, including through better regulation, energy efficiency and more use of renewable energy'⁴²⁰

⁴¹⁴ The six eastern European partners include: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

⁴¹⁵ The ten southern European partners include: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Syria, Palestine and Tunisia.

⁴¹⁶ European Commission (2004) European Neighbourhood Policy – Strategy Paper. Available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2004_communication_from_the_commission_european_neighbourhood_policy_-_strategy_paper.pdf>

⁴¹⁷ See Chapter 1 Section 1.2 (*Background: EU External Relations with Russia*)

⁴¹⁸ External Action Service (2016) European Neighbourhood Policy: In Depth Analysis. Available at <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/595865/EPRS_IDA\(2016\)595865_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/595865/EPRS_IDA(2016)595865_EN.pdf)>

⁴¹⁹ See Chapter 4 Section 4.2 (*Normative Mechanisms*)

⁴²⁰ Council of the European Union (2009) Joint Declaration of the Prague Eastern Partnership Summit. Available at <http://europa.eu/rapid/press-release_PRES-09-78_en.htm>

Aware of the geostrategic value of its neighbours, the Union's ENP arguably serves as an attempt to gain influence in its neighbourhood on matters of strategic importance such as energy security.⁴²¹ More specifically, the Union can be said to use the ENP in a strategic manner for the purpose of obtaining political advantage through change in policies that contribute towards strengthened European security of supply.⁴²² Whilst this means of influence in its immediate periphery may be normative given the approximation of legislation and policies in favour of an EU model, the goal is strategic.⁴²³ Against this backdrop, if we consider, as the analysis has advocated, that the role of norms and values serve as a litmus test to determine the extent to which the Union is normative in its neighbourhood with respect to energy, then the Union's objectives which are primarily focused on energy security, would suggest that the Union is more strategic in the pursuit of its interests than normative in the pursuit of its values. Therefore, whilst the Union does have normative interests in its neighbourhood generally, this is not exclusively normative with the Union's normativity questionable as far as energy and its periphery is concerned. Therefore, the research demonstrates that whilst the EU pursues both interests and values in its neighbourhood given the overlap between these foreign policy objectives, as far as the Union's energy security is concerned, values are simply not the dominant narrative regarding energy relations which suggests that the Union gives priority to its security interests.

4.1.2.2. Values, Principles and Objectives in the Union's External Relations

Building on the analysis above and the extent to which the Union fulfils Manners' criteria regarding normative interests, the section below illustrates the complexity in ascertaining whether the Union pursues normative foreign policy goals (i.e. promoting values) over strategic goals (i.e. pursuing interests) given the lack of coherence in the use of certain terms. As mentioned elsewhere,⁴²⁴ the Treaties often refer to values, principles and objectives interchangeably which has often resulted in ambiguity and lack of clarity. According to the literature, the Union's pivot between its values and interests is largely attributed to the fact that the values are ill-defined and ambiguous in nature which has subsequently led to an overlap and potential conflict between them.⁴²⁵ By way of example, the list of *values* in Article 2 TEU is repeated in Article 21(1) TEU as *principles*, which includes the principles of the UN Charter,⁴²⁶ of which the Preamble distinguishes between

⁴²¹ *Ibid*

⁴²² *Ibid*

⁴²³ *Ibid*

⁴²⁴ See Chapter 3 Section 3.1.2.1 (*EU Energy Policy and the Union's Energy Actorness – Objectives in External Action*)

⁴²⁵ Hrant Kostanyan (ed), *Assessing European Neighbourhood Policy: Perspective from the Literature* (Rowman & Littlefield, 2017) 2

⁴²⁶ The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute

indivisible universal *values* (human dignity, freedom, equality and solidarity) and the *principles* of democracy and the rule of law.⁴²⁷ It is posited that the shift in language from *values* in Article 2 TEU to *principles* in Article 21(1) TEU is perhaps indicative of the shift in defining the Union's identity to setting out the Union's policies and actions.⁴²⁸ Both terms are used within the Union in many different ways, either: (i) in relations to the Union's identity; (ii) as a basis for policy; (iii) as implementation of policy, and (iv) as a goal or objective for action.⁴²⁹ It follows that the lack of clarity following the inconsistent use of terminology has somewhat blurred the lines between what these words actually constitute in the context within which it is used. What is therefore perceived as a value or a principle may sometimes be construed as an objective, or vice versa. Inevitably, the linguistic ambiguity calls for further reflection and analysis of the context within which the terms are used and for what purpose.

An illustration of this linguistic ambiguity is evident in the use of 'democracy' which features in EU external relations as a value, a principle and an objective (Article 21 TEU and Article 205 TFEU).⁴³⁰ With each term arguably constituting a different concept as alluded to above by Cremona⁴³¹, a distinction is required despite the said terms being used interchangeably due to poor treaty drafting. In the absence of clearly defined meanings established at law, there have been efforts within scholarship to differentiate between these terms. In distinguishing between values and principles, values reflect internal ethical beliefs, while principles are characterised by legal norms which impose restrictions on the Union's actions.⁴³² In contrast to values, compliance with principles is obligatory.⁴³³ When drawing a distinction between objectives and principles, objectives represent an indicator for the final aim of the action.⁴³⁴ The EU's external action is therefore, according to scholarship, limited by the principles by which it is guided whilst trying to achieve its objectives.⁴³⁵ In applying this rationale to democracy, this would mean that the Union's actions are restricted

of the International Court of Justice is an integral part of the Charter. See United Nations, 'Charter of the United Nations', 24 October 1945, 1 UNTS XVI

<<http://www.un.org/en/charter-united-nations/>> accessed 20 October 2018

⁴²⁷ See Preamble to Charter of the United Nations

⁴²⁸ Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 281

⁴²⁹ *Ibid*

⁴³⁰ Nariné Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Bloomsbury Publishing, 2014) 17

⁴³¹ See Chapter 4 Section 4.1.2.2 (*Does the EU Have Normative Interests in the Neighbourhood? - Values, Principles and Objectives in the Union's External Relations*) above. See also Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 280

⁴³² Hrant Kostanyan (ed.), *Assessing European Neighbourhood Policy: Perspective from the Literature* (Rowman & Littlefield, 2017) 40

⁴³³ Armin Von Bogdandy, 'Founding Principles' in Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, 2010) 22

⁴³⁴ *Ibid* 23

⁴³⁵ Nariné Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Bloomsbury Publishing, 2014) 17

by the principle of democracy in its efforts to achieve consolidation of democracy as an end goal to its international efforts.⁴³⁶

Scholarship suggests that the vagueness and lack of distinction surrounding the Union's objectives and values have resulted in indistinct blurry guidelines from which the Union's conduct is undertaken. With no clear prioritisation of Union goals, it is argued that the EU is at liberty to choose its objectives on an *ad hoc* basis as it deems appropriate within the circumstances.⁴³⁷ The EU's objectives are therefore not balanced with priority arguably given to security within the CFSP.⁴³⁸ The Union's objectives are thereby broadly formulated to reflect interests such as security, economic development and multilateral cooperation which creates legal space for the EU to pursue both 'possession goals' (i.e. strategic objectives) and 'milieu goals' (i.e. normative objectives) which scholars have identified as the two types of foreign policy objectives.⁴³⁹

Milieu goals deal with the transformation of an actor's environments whilst trying to pursue both altruism and self-interest, the ENP being a prime example.⁴⁴⁰ Here it is important to note the purpose of the ENP, namely to provide security and stability among European borders by creating a 'ring of friends' with states in close proximity to its periphery.⁴⁴¹ Significantly, the fact that ENP was established to stabilise the region and in turn deal with the 'integration-security-dilemma' gives credence to the assertion that the ENP pursues both altruism and self-interest and is thereby reflective of milieu goals.⁴⁴² In contrast, possession goals are strategic objectives which serve a narrower interest of the EU in economics, trade, energy security and conflict resolution.⁴⁴³ Here it is important to note that besides economic integration and cooperation amongst many sectors, the ENP covers energy security which is fundamental to the 'energy partnership' within the ENP, as revealed in the ENP strategy paper of 2004.⁴⁴⁴ A fundamental part of the ENP is therefore security of energy supply which it aims to achieve through cooperation, long-term stable and secure supply and transit routes and regulation.⁴⁴⁵

⁴³⁶ *Ibid*

⁴³⁷ Hrant Kostanyan (ed.), *Assessing European Neighbourhood Policy: Perspective from the Literature* (Rowman & Littlefield, 2017) 2

⁴³⁸ Alan Dashwood, et al. *Wyatt and Dashwood's European Union Law* (Bloomsbury Publishing, 2011) 904

⁴³⁹ Kristian L. Nielsen and Maili Vilson, 'The Eastern Partnership: Soft Power Strategy or Policy Failure?' (2014) *European Foreign Affairs Review* 19(2) 235; Nariné Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Bloomsbury Publishing, 2014) 13

⁴⁴⁰ Nariné Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Bloomsbury Publishing, 2014) 13

⁴⁴¹ Christopher S. Browning, and Pertti Joenniemi, 'Geostrategies of the European Neighbourhood Policy' (2008) 14(3) *European Journal of International Relations* 520-524

⁴⁴² *Ibid*

⁴⁴³ Kristian L. Nielsen and Maili Vilson, 'The Eastern Partnership: Soft Power Strategy or Policy Failure?' (2014) *European Foreign Affairs Review* 19(2) 235

⁴⁴⁴ European Commission (2004) *European Neighbourhood Policy – Strategy Paper*. Available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2004_communication_from_the_commission_european_neighbourhood_policy_-_strategy_paper.pdf>

⁴⁴⁵ Council of the European Union (2009) *Joint Declaration of the Prague Eastern Partnership Summit*.

Whilst the pursuit of both possession goals and milieu goals (as opposed to milieu goals alone) implies external action on the part of the EU fulfilling interests detached from a purely normative agenda, for reasons linked to the notion of European identity, the EU generally gives prominence to values in its embryonic foreign policy.⁴⁴⁶ However, as suggested above and as illustrated by the Union's rhetoric and strategy regarding the significance of the ENP⁴⁴⁷ and Eastern partnership,⁴⁴⁸ as far as the Union's energy sector is concerned for which there is a strong CFSP nexus, the Union appears to give priority to its interests over values given the overwhelming focus on the EU's energy security. As such, interests play a prominent role in the Eastern Partnership (a regional dimension to the ENP) with the Union's possession goals in its quest for energy security being pushed to the fore over the Union's milieu goals in the neighbourhood. If we concede, as illustrated by the research, that political and economic integration of the Eastern European neighbours into the EU's sphere of influence enables the EU to exert control over decisions made over pipeline projects and in turn enables the EU to pursue its energy objectives such as diversification, then the ENP and more specifically the Eastern Partnership can be seen as a strategic tool to pursue the Union's possession goals, namely energy security, rather than its milieu goals which are more normative.

4.1.2.3. Promoting and Exporting Values as an EU Objective in the Union's External Policy

As has been established above, the promotion of values is an explicit objective of the Union, pursuant to Article 3(5) TEU which has subsequently become an important aspect of the EU's external policy.⁴⁴⁹ Article 3(5) TEU which has often been dubbed as the Union's 'missionary principle' regulates the Union's presence on the global scene and sets the goals by which the EU should undertake its relations with the wider world.⁴⁵⁰ According to the European Security Strategy, the EU's strategic objectives are in pursuit of an overarching aim, namely defending its security and promoting its values.⁴⁵¹ There are many ways in which the EU promotes its values and thereby its normative agenda, including bilateral and multilateral agreements, conditionality⁴⁵² and strategic partnerships which are founded on

Available at < http://europa.eu/rapid/press-release_PRES-09-78_en.htm>

⁴⁴⁶ Stefan Lehne, *Time to Reset the European Neighborhood Policy* (Carnegie Endowment for International Peace, 2014) 221

⁴⁴⁷ European Commission (2004) *European Neighbourhood Policy – Strategy Paper*. Available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2004_communication_from_the_commission__european_neighbourhood_policy_-_strategy_paper.pdf>

⁴⁴⁸ Council of the European Union (2009) *Joint Declaration of the Prague Eastern Partnership Summit*.

Available at < http://europa.eu/rapid/press-release_PRES-09-78_en.htm>

⁴⁴⁹ K Smith, *European Union Foreign Policy in a Changing World* (2nd edition, Cambridge, Polity Press, 2008) chapter 5

⁴⁵⁰ Morten Broberg, 'What is the Direction of the EU's Development Cooperation After Lisbon: A Legal Examination' (2011) 16 *European Foreign Affairs Review* 539

⁴⁵¹ *European Security Strategy*, 6 <https://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>

⁴⁵² The principle of conditionality is considered the Union's most powerful instrument for integrating candidate and potential candidate states into the EU. Conditionality is geared towards reconciliation, reconstruction and

the basis of shared values. This suggests that the core values the EU promotes such as democracy, human rights and the rule of law, are not only promoted as European but as fundamentally universal values in addition thereto.⁴⁵³ As noted above, shared values are also foundational to the ENP⁴⁵⁴ with the overall goal of the policy focused on the creation of ‘an area of shared prosperity and values’:

The EU wishes to define an ambitious new range of policies towards its neighbours based on shared values such as liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.⁴⁵⁵

This gave credence to Prodi’s speech on the Wider Europe in December 2002 whereby it was declared that:

The aim is to extend to this neighbouring region a set of principles, values and standards which define the very essence of the European Union.⁴⁵⁶ **The Lisbon Treaty affirms this goal in the Union’s relations with its neighbours by confirming that an area of prosperity and good neighbourliness shall be founded on the Unions values and characterized by peaceful cooperation.**⁴⁵⁷

However references to shared values and thereby the Union’s normative agenda are not restricted to recent policy papers on the ENP alone, with references to strategic partnerships founded on ‘shared values and common interest’⁴⁵⁸ and ‘shared values enshrined in the common heritage of European civilization’⁴⁵⁹ explicitly mentioned in the (now expired) Common Strategies adopted by the European Council in relation to Ukraine, Russia and the Mediterranean.⁴⁶⁰ The commitment to shared values is also mentioned in the Joint Declaration of the Prague Summit which launched the Eastern Partnership:

The Eastern Partnership will be based on commitments to the principles of international law and to fundamental values, including democracy, the rule of law and the respect for human rights and fundamental freedoms, as well as to, market economy, sustainable development and good governance.⁴⁶¹

reform which it intends to promote by prescribing criteria to EU-granted benefits and accession. See Othon Anastasakis and Dimitar Bechev ‘EU Conditionality in South east Europe: Bringing Commitment to the Process’ (South East European Studies Programme. 2003) 1 – 20; Frank Schimmelfennig and Ulrich Sedelmeier, ‘Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe’ (2004) 11(4) Journal of European Public Policy 661-679

⁴⁵³ Commission Communication, ‘The External Dimension of the EU’s Human Rights Policy: From Rome to Maastricht and Beyond’, COM(1995) 567, 3 <http://www.eidhr.eu/files/dmfile/HRMaastrichtandbeyond.pdf>

⁴⁵⁴ Giselle Bosse, ‘Values in the EU’s Neighbourhood Policy: Political Rhetoric or Reflection of a Coherent Policy?’ (2007) 7 European Political Economy Review 38

⁴⁵⁵ Council Conclusions, 16 June 2003 on Wider Europe – New Neighbourhood, para. 2

⁴⁵⁶ Romano Prodi, ‘A Wider Europe: A Proximity Policy as the Key to Stability’, Brussels, SPEECH/02/619 http://europa.eu/rapid/press-release_SPEECH-02-619_en.pdf

⁴⁵⁷ Article 8 TEU

⁴⁵⁸ Common Strategy of the EU on Ukraine, adopted by the European Council at Helsinki, 11 December 1999, at para 1

⁴⁵⁹ Common Strategy of the EU on Russia, adopted by the European Council at Cologne, 4 June 1999, Part I

⁴⁶⁰ Core values include ‘human rights, democracy, good governance, transparency and the rule of law’. Common Strategy of the EU on the Mediterranean Region, adopted by the European Council at Feira 19-20 June 2000, at para 7

⁴⁶¹ Joint Declaration of the Prague Eastern Partnership Summit, Prague, 7 May 2009, Doc 8435/09 (Presse 78) http://europa.eu/rapid/press-release_PRES-09-78_en.pdf

In addition to the promotion of shared values, the EU also encourages partner countries to sign-up to international agreements,⁴⁶² thereby promoting international standards and norms. This includes accession to the WTO⁴⁶³ which indicates the EU's commitments to multilateral frameworks (as discussed in Chapter 3).⁴⁶⁴ It also suggests that the EU is not only engaged in promoting its own values, but also principles considered by the EU to be fundamental in international law.⁴⁶⁵ In so doing, the Union behaves in a normative manner by setting a threshold for political conditionality with the level of Union integration dependent on the extent to which partner countries uphold the Union's values and embrace international norms and standards as their own.⁴⁶⁶

By promoting accession to international frameworks and international organisations, the Union throws its weight behind multilateralism and a rule-based international order which could be regarded as a normative principle or value in itself and thereby reflective of the Union's normative interests.⁴⁶⁷ In so doing, the Union builds values and promotes values, by spreading the implementation of norms which reflects its values and normative interests in upholding an international legal order.⁴⁶⁸ Although the act of building and promoting norms and values could arguably be construed as normative behaviour, for the purpose of this analysis it will be deemed as reflective of the EU's normative interests given the Union's ultimate objectives being pursued (i.e. values and a law-based international order). Whilst an overlap between Manners' criteria is likely and almost inevitable, as far as the Union's normative interests are concerned, the promotion of norms and values are fundamentally indicative of this criteria. Despite the subtle distinction, it is inevitably the case that the promotion of and building of norms are inherently connected. Whilst the EU's building of norms is informal and thereby harder to document, it is consequently difficult to assess the EU's contribution to norm-building⁴⁶⁹ albeit a fundamental aspect of the EU's foreign policy and its role as a normative power.⁴⁷⁰

⁴⁶² This includes support for the accession to the WTO but also many other agreements such as Codes of Conduct on corruption (e.g. the Council of Europe Civil Law and Criminal Law Conventions on Corruption of 1999); arms control (e.g. the EU Code of Conduct of Arms Exports) and mine control (e.g. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction).

⁴⁶³ Examples with respect to Russia, the focus of the thesis, include the EU's involvement in Russia's accession to the WTO after almost twenty years of protracted negotiation.

⁴⁶⁴ See Chapter 3 Section 3.2.2 (*Further Novelities Introduced by Lisbon – Objectives in External Action*)

⁴⁶⁵ Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 303

⁴⁶⁶ *Ibid*

⁴⁶⁷ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84 *International Affairs* 45

⁴⁶⁸ This stems from the normative principle that Ian Manners termed the supranational rule of law. Ian Manners, 'The Normative Ethics of the European Union' (2008) 84 *International Affairs* 45

⁴⁶⁹ An important aspect of the EU's strategy in norm building is the building of policy consensus which was best illustrated in the Union's campaign on the abolition of the death penalty which has been used as a prime example to illustrate what Ian Manners famously dubbed 'normative power Europe'. Ian Manners, *Normative Power Europe: A Contradiction in Terms?* (2002) 40 *Journal of Common Market Studies* 235

⁴⁷⁰ Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 303

There are important aspects to the EU's strategy in norm-building which include: (i) consensus building which is not limited to the EU and its neighbours (e.g. ENP) but also includes the development of strategic partnerships (e.g. Russia) in order to achieve EU objectives such as strengthening the international legal order through effective multilateralism (e.g. ECT and WTO)⁴⁷¹; and (ii) Treaty-making (e.g. Energy Community Treaty) where the EU actively engages in the shaping and development of international norms by concluding international agreements either through its Member States or on its own behalf.⁴⁷² It follows that the EU undertakes a process whereby its values are both imported into and exported from the EU legal order through international legal norms, which provide both a source and means of promoting Union values. Values have both a constitutive and instrumental aspect which is evident in the Treaties (TEU and TFEU) including the Lisbon Treaty where concepts such as rule of law, respect for international law, democracy and human rights are both foundational Union values as well as principles and objectives of EU external action. It follows that the Union's commitment to international law provides a normative basis for the EU's foreign policy towards its own Member States as well third countries with the Treaty directing the EU to promote and uphold its values in its external action (Article 3(5) TEU). There are several ways in which the Union promotes values including through Guidelines⁴⁷³, dialogues⁴⁷⁴, *démarches*⁴⁷⁵ or action plans⁴⁷⁶, trade preferences⁴⁷⁷, technical assistance programmes⁴⁷⁸, bilateral agreements and reciprocal partnerships⁴⁷⁹ with third countries, based on 'shared values' which are expressed in

⁴⁷¹ The European Security Strategy confirmed the Union's willingness to work with 'any country which shares our goals and values and is prepared to act in their support'. Javier Solana, 'A Secure Europe in a Better World', adopted by the Thessaloniki European Council, June 2003, as the European Union's Security Strategy, 15

⁴⁷² Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 311

⁴⁷³ EU Guidelines on Human Rights Dialogues, adopted by Economic and Financial Affairs Council of 13 December 2001, updated Guidelines adopted 19 January 2009, Council Doc 1652/08

⁴⁷⁴ While Guidelines prioritise general matters such as the signing, ratification and implementation of international human rights instruments, and cooperation with international human rights procedures and mechanisms, dialogues are held on a reciprocal basis and enable third countries to raise the human rights issue in the European Union. See EU Guidelines on Human Rights Dialogues, adopted by Economic and Financial Affairs Council of 13 December 2001, updated Guidelines adopted 19 January 2009, Council Doc 1652/08

⁴⁷⁵ In June 2003 the Council of Ministers endorsed both a statement of basic principles and Action Plan for the implementation of basic principles pertaining to the EU strategy against the proliferation Weapons of Mass Destruction. See Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction, Council Doc 10352/03

⁴⁷⁶ Action Plans adopted within the ENP are examples of non-binding instruments the main objective of which includes the promotion of EU values. See GAERC Council Conclusions on European Neighbourhood Policy, 14 June 2004, para. 4

⁴⁷⁷ The current Regulation establishing the Union's Generalised System of Preferences (GSP) incorporates incentives in the form of further preferences to those countries that have ratified and directly implemented core international conventions related to sustainable development, good governance, core labour standards and human rights such as the International Convention on the Elimination of All Forms of Racial Discrimination; Convention Against Torture; Convention of Rights of the Child; the Genocide Convention; and several ILO Conventions.

⁴⁷⁸ Financial and technical assistance programmes support the promotion of values and implementation of international norms – the main instrument for the promotion of democracy and human rights have been Regulation 1889/2006/EC (EIDHR) which replaced Regulations 975/99/EC and 976/99/EC. See Regulation 1886/2006/EC, [2006] OJ L386/1

⁴⁷⁹ The Common Strategies adopted by the European Council in relation Russia, Ukraine and the Mediterranean (which have all expired) made explicit references to a strategic partnership based on shared values and common

binding and non-binding instruments,⁴⁸⁰ as will be explored in the following section with respect to the ENP.⁴⁸¹ The formation of international norms therefore give concrete substance to its values which the Union then integrates into its own legal order, either directly through international treaties or indirectly through membership conditionality, guidelines or policy documents, in its relations with third countries,⁴⁸² which serves to validate the Union's normative interests in its neighbourhood.

4.1.2.4. EU Engagement with its Neighbourhood: Article 8 TEU and 'Good Neighbourliness' Founded on EU Values

Further to the analysis above regarding the Union's promotion of norms and values in its which is a fundamental aspect of its normative interests, the section to follow assesses to what extent the Union promotes its norms and values in its external relations with its neighbourhood to determine if it has normative interests vis-à-vis the ENP. Under the Treaty of Lisbon, the ENP has obtained explicit legal grounding in EU primary law with Article 8 entrenching the Union's special relations with its neighbours constitutionally.⁴⁸³ For many years the EU has projected its rules and principles onto its neighbourhood, despite there being no legal basis for it pre-Lisbon.⁴⁸⁴ Nevertheless, the existence of Article 8 TEU in the common provision of the TEU was deemed necessary by the European Convention for the purpose of avoiding new dividing lines between neighbouring states that were part of the 2004 enlargement and those that were not.⁴⁸⁵ The ENP, being the instrument through which the Union engages with non-candidate states seeking further development and cooperation with the EU, with Article 8 TEU a coherent framework for such engagement under a neighbourhood policy.⁴⁸⁶

As evidenced above, the EU has committed to respect and to promote international law in general and the UN Charter in its relations with the 'wider world'. Article 3(5) TEU and Article

interests and 'foundations of shared values enshrined in the common heritage of European civilization'. See Common Strategy of the EU on Ukraine, adopted by the European Council at Helsinki, 11 December 1999, at para.1; Common Strategy of the EU on Russia, adopted by the European Council at Cologne, 4 June 1999, Part 1.

⁴⁸⁰ Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 313

⁴⁸¹ See Chapter 4 Section 4.1.2.4 (*EU Engagement with its Neighbourhood: Article 8 TEU and 'Good Neighbourliness' Founded on EU Values*); and Chapter 4 Section 4.1.2.5 (*The Normative Legitimacy of the Transformative Mandate under Article 8 TEU*)

⁴⁸² This is evident in the Union's campaign for the complete abolition of the death penalty which the EU seeks to extend universally, a norm that has been accepted regionally, that has become a *sine qua non* of EU membership. See Charter of Fundamental Human Rights of the EU, [2010] OJ C83/389, Art. 2. See also Marise Cremona, 'Values in EU foreign policy' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 314

⁴⁸³ Christophe Hillion, 'Anatomy of EU Norm Export Towards the Neighbourhood' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and the Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge, 2014) 13

⁴⁸⁴ *Ibid*

⁴⁸⁵ European Convention, Title IX: The Union and its Immediate Environment, Brussels, 2 April 2003, CONV 649/03

⁴⁸⁶ *Ibid*

21(1) TEU give credence to this assertion. As already mentioned,⁴⁸⁷ Article 3(5) TEU imposes an obligation on the Union to contribute to the 'strict observance and the development of international law, including respect for the principles of the United Nations Charter' in its relations with the wider world.⁴⁸⁸ Further, Article 21(1) TEU refers to the 'respect for the principles of the United Nations Charter and international law'. This is also evident in the New Association Agreements with ENP countries which provide that:

[t]he respect for democratic principles, human rights and fundamental freedoms and respect for the principle of the rule of law, promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery constitute essential elements of that Agreement.⁴⁸⁹

The passage above illustrates the increasingly important role of values (in particular human rights, the rule of law and democracy) in the Union's external policy by which the Union defines itself in terms of its values to the world, which is fundamental to the normative power argument.⁴⁹⁰ This demonstrates the external dimension to EU values which is both characteristic of the EU's identity as a normative power as well as key to achieving specific Union objectives such as security and stability in Europe and its neighbourhood. The EU's normative identity is thus defined in terms of its values which is reflected in its external policies.⁴⁹¹

In addition to the new Association Agreements with the ENP countries, Article 8(1) TEU provides that good neighbourliness is based on the foundational values of the Union. In particular:

[t]he Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.⁴⁹²

Here we can see the Union establishing itself as a model for values. If we concede, as posited by the research undertaken, that values are fundamentally part of the Union's normative identity, then the external projection of itself in its external policies is evident in the Union's efforts to set itself up as a model to emulate. It is important to note that the Union's 'model power' is a normative mechanism which will be explored further below (see Section 4.2). Whilst the normative mechanisms are independent and ancillary to Manners'

⁴⁸⁷ See Chapter 3 Section 3.1.2.1 (*Further Novelty Introduced by Lisbon – Objectives in External Action*)

⁴⁸⁸ Joris Larik, 'Shaping the International Order as an EU Objective', in Dimitry Kochenov and Fabian Amtenbrink (eds), *European Union's Shaping of the International Legal Order* (Cambridge: CUP 2013), 62-86

⁴⁸⁹ Article 2 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ [2004] L 161/3, 29.5.2014

⁴⁹⁰ Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge, 2006)

⁴⁹¹ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies*, 235-58, 235

⁴⁹² Article 8(1) TEU

normative criteria, there is inevitably an overlap between the different normative mechanisms and the criteria. Here the Union uses its power of example to disseminate its values in the wider world. In so doing, the Union becomes a model of regional economic integration in its efforts to promote common European values as a means of achieving its external objectives of peace, prosperity and security in the region.⁴⁹³ This characteristic of the EU as a model derives its emphasis on what Manners considered fundamentally normative,⁴⁹⁴ which is significant for Manners' normative interests criterion given the EU's self-perception and projection as a Union of values to be upheld as a model to emulate.

However the EU's aim to develop good relations with its neighbours and partners through its endeavours to invoke change is highly problematic as the key element of the Union's strategy, namely conditionality, appears to be incongruous with the promotion of values.⁴⁹⁵ This is particularly true of promotion that is based on a presumption of commonly shared values between the EU and its partners. If one would consider that the values are shared, then a conditionality approach towards partners would be deemed redundant, for values that are essentially expected to be embraced as their own. However, in a post-Crimea setting, the notion of commonly shared values across the European continent appear to be waning in reality.⁴⁹⁶ Therefore, whilst the promotion of values may be construed as quintessentially normative and reflective of normative interests, the fact that such promotion is undertaken by way of conditionality which may be construed as coercive, serves to dilute the normative interests' criterion.

It is important to note that Article 8 TEU suggests that the EU views good neighbourliness through the prism of its own values.⁴⁹⁷ Namely, the values enshrined in Article 2 TEU, which include:

respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities [which] are common to the Member States in a society in which pluralism, non-discrimination, justice, solidarity and equality between women and men prevail.⁴⁹⁸

⁴⁹³ Article 21(2)(c) TEU

⁴⁹⁴ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84 *International Affairs* 45

⁴⁹⁵ If the formal integration of the Union's neighbourhood policies in the EU constitutional framework coerce the Union to engage with its periphery, then conditionality would appear to be incongruous with the terminology of Article 8 TEU. See discussion below in Chapter 4 (*The Normative Legitimacy of the Transformative Mandate under Article 8 TEU*). See also Marise Cremona, and Christophe Hillion. 'L'Union Fait la Force? Potential and limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy', (European University Institute, Law Working Paper Paper No. 39/2006, 2006); Dimitry Kochenov, and Elena Basheska. 'ENP's Values Conditionality from Enlargements to Post-Crimea' (CLEER Papers, 2015/1) 9

⁴⁹⁶ Dimitry Kochenov, and Elena Basheska. 'ENP's Values Conditionality from Enlargements to Post-Crimea' (CLEER Papers, 2015/1) 9

⁴⁹⁷ *Ibid*

⁴⁹⁸ Article 2 TEU

Nevertheless, the EU's values are far from unique⁴⁹⁹ as they generally draw their inspiration from the fundamental values pertinent to international relations as established by the United Nations Millennium Declaration.⁵⁰⁰ The question that ultimately remains is whether the EU's partners are equally committed to promoting and upholding these values. Inevitably Article 8 TEU and the principle of conditionality⁵⁰¹ (which is the cornerstone of the ENP) rests on the assumption that the proclaimed values of Article 8 TEU (which are also reflected in other Treaty instruments) are shared between the EU and its partners.⁵⁰² These 'shared values' were formulated by the European Commission in the following way: 'the Union is founded on the values of respect of human dignity, liberty, democracy, equality, the Rule of Law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination. The Union's aim is to promote peace, its values and the well-being of its peoples'.⁵⁰³ The earlier formulation of the list of values on which the policy is based, which is contained in the Commission's Communication on Wider Europe was marginally different with the inclusion of 'democracy, respect for human rights and the rule of law, as set out within the EU in the Charter of

⁴⁹⁹ P. Leino and E. Petrov, 'Between "Common Values" and Competing Universals—The Promotion of the EU's Common Values through the European Neighbourhood Policy', 15 *5 ELJ* 2009, 654-671

⁵⁰⁰ These include: a) Freedom (meaning that) men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights; b) Equality (meaning that) no individual and no nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured; c) Solidarity (meaning that) global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most; d) Tolerance (meaning that) human beings must respect one other, in all their diversity of belief, culture and language. Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted; e) Respect for nature (meaning that) prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development [...]; f) Shared responsibility (meaning that) responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role. See the fundamental values essential to international relations in the twenty-first century were highlighted in the United Nations Millennium Declaration, UNGA Res 55/2 [2003] A/Res/55L.2, 8 September 2000

⁵⁰¹ The principle of conditionality is considered the Union's most powerful instrument for integrating candidate and potential candidate states into the EU. Conditionality is geared towards reconciliation, reconstruction and reform which it intends to promote by prescribing criteria to EU-granted benefits and accession. The effects of conditionality have been most apparent in the Central European candidate countries that have acceded to the EU. In most of these countries, EU conditions have entailed the embrace of EU norms and practices with market-based and democratic reforms. See Othon Anastasakis and Dimitar Bechev 'EU Conditionality in South east Europe: Bringing Commitment to the Process' (South East European Studies Programme. 2003) 1 – 20; Frank Schimmelfennig and Ulrich Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) 11(4) *Journal of European Public Policy* 661-679

⁵⁰² The prescribed values, which include democracy, the protection of human rights, the free market economy and the Rule of Law, are recalled almost verbatim to the Copenhagen political criteria applied in the Eastern enlargement and are also vested in the text of Article 2 TEU and the constitutional traditions of the Member States. The Copenhagen criteria are rules that determine whether a country qualifies or is eligible to join the EU. These rules were laid down at the June 1993 European Council in Copenhagen, Denmark, from whence it draws its name. See Christophe Hillion, 'The Copenhagen Criteria and Their Progeny', in Christophe Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford: Hart 2004), 1-22, at 19; D. Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', 8 *EloP* 2004, 1-34, 10

⁵⁰³ *European Commission, European neighbourhood policy. Strategy paper. Communication from the Commission. COM (2004) 373 final*, 7 [http://aei.pitt.edu/38132/1/COM_\(2004\)_373.pdf](http://aei.pitt.edu/38132/1/COM_(2004)_373.pdf)

Fundamental Rights'.⁵⁰⁴ Building on that assumption of shared values is the idea that adherence to these values is possible given the incentive of a stake in the internal market. Access to the internal market as the ultimate reward for compliance with these values, thereby ensure conformity to an EU model. By invoking change and setting itself up as an ideal to be emulated, the EU affirms Manners' normative power argument.⁵⁰⁵ Despite the inherent differences between the Union and its neighbours, they are drawn together by the values they share (or aspire to be sharing) with the EU, albeit under the guise of a stake in the internal market.⁵⁰⁶ Here the Union's value promotion and norm diffusion in its endeavours to Europeanise its neighbourhood under the pretext of such norms and values being 'shared' serve as an ideal conceptualisation of the Union's normative interests and normative means of power which will be further explored below.

4.1.2.5. The Normative Legitimacy of the Transformative Mandate under Article 8 TEU

The concept of the EU's norm export has evolved with the Union's active engagement as a 'rule generator'⁵⁰⁷ which has subsequently gained pace in the Union's external relations in general, and policy towards its neighbourhood in particular.⁵⁰⁸ Here it is important to recall, as already mentioned in Chapter 3,⁵⁰⁹ that the EU's external action is based on the notion that the export of EU values and norms are fundamental to upholding security, stability and prosperity in Europe and the world at large⁵¹⁰ with the constitutional basis for EU norm export to the neighbourhood stipulated in Article 8 TEU. The Treaty of Lisbon has therefore contributed greatly to this normative evolution with an explicit 'transformative mandate' under Article 8 TEU in relation to the Union's neighbourhood, namely to establish an area of prosperity based on its own values and in conformity with the constitutional objectives of Article 3(5) TEU and Article 21(1) TEU.⁵¹¹ If one concedes, as illustrated by the analysis, that the Union's competence in its neighbourhood includes an obligation to engage, would

⁵⁰⁴ European Commission Communication Wider Europe— Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours. Communication from the Commission. COM (2003) 104 final. fn 2 http://eeas.europa.eu/archives/docs/enp/pdf/pdf/com03_104_en.pdf

⁵⁰⁵ By setting itself up as an ideal to be emulated, the Union uses the normative mechanism of 'model power' which will be examined later in the Chapter – See Chapter 4 Section 4.2 (*Normative Mechanisms*)

⁵⁰⁶ Dimitry Kochenov, and Elena Basheska. 'ENP's Values Conditionality from Enlargements to Post-Crimea' (CLEER Papers, 2015/1) 14

⁵⁰⁷ Marise Cremona, 'The Union as Global Actor: Roles, Models and Identity' in Alison McDonnell (ed), *A Review of Forty Years of Community Law: Legal Developments in the European Communities and the European Union* (Kluwer Law International, 2005) 278

⁵⁰⁸ Roman Petrov, *Exporting the Acquis Communautaire Through European Union External Agreements* (Nomos Verlagsgesellschaft mbH & Co. KG, 2011)

⁵⁰⁹ See Chapter 3 Section 3.1.2.1 (*Further Novelties Introduced by Lisbon - Objectives in External Action*)

⁵¹⁰ The constitutional objectives as stipulated in Articles 3(5) TEU and Article 21(1) TEU predominantly focus on the promotion of EU fundamental values and interest such as peace, security and peaceful international relations. See also Peter Van Elsuwege and Roman Petrov, 'Setting the Scene: Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016) 1

⁵¹¹ Christophe Hillion, 'Anatomy of EU Norm Export Towards the Neighbourhood: the Impact of Article 8 TEU' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 19

the Union's conditionality approach then be inappropriate? Furthermore, does the Union's conditionality amount to a normative means of power if it entails coercion? In this regard, scholarship has considered positive forms of conditionality such as political engagement, technical assistance, aid and market access as preferable forms of influence to negative conditionality such as sanctions or war.⁵¹² Unlike negative forms of leverage, positive conditionality allows for open political dialogue with third states which facilitates different avenues to channel influence.⁵¹³ Against this backdrop, what deserves further attention is the legitimacy of the Union's norm export, where this is imposed on its neighbours that are reluctant to conform to an EU model. While Article 8 TEU provides the legal basis for engagement towards the neighbourhood, the word 'shall' suggests that such engagement is compulsory.⁵¹⁴ In contrast to the Union's accession process, the EU's interaction with its neighbourhood and subsequent projection of its norms is not subject to conditions (save for the requirement to be a 'neighbouring country') but is mandatory.⁵¹⁵ The Union's neighbourhood competence as enshrined in Article 8 TEU, compels the Union to act to ensure the fulfilment of the Union's objective, namely to 'establish an area prosperity and good neighbourliness founded on the values of the Union'. The Union's value promotion therefore obtains an assertive stance with the EU's neighbourhood competence obliging it to engage.⁵¹⁶

As Hillion aptly points out, Article 8 TEU binds the EU to engage with its neighbours with a view to asserting its own values which is fundamentally normative but where the Union's strategic security interests are at stake, any conditionality becomes a moot point as the

⁵¹² David Cortright, 'Incentives and Cooperation in International Affairs' in David Cortright (ed), *The Price of Peace: Incentives and International Conflict Prevention* (Rowman and Littlefield, 1997) 3-20; Han Dorussen, 'Mixing Carrots with Sticks: Evaluating the Effectiveness of Positive Incentives' (2001) 38(2) *Journal of Peace Research* 251-262

⁵¹³ Natalie Tocci, 'The European Union as a Normative Foreign Policy Actor' in Nathalie Tocci (ed), *Who is a Normative Foreign Policy Actor?* (Centre for European Policy Studies, 2008) 10

⁵¹⁴ Christophe Hillion, 'Anatomy of EU Norm Export Towards the Neighbourhood: the Impact of Article 8 TEU' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016) 16

⁵¹⁵ *Ibid*

⁵¹⁶ If the formal integration of the Union's neighbourhood policies in the EU constitutional framework coerce the Union to engage with its periphery, then conditionality would appear to be incongruous with the terminology of the said article. However, the fact that the article articulates that the EU is mandated to develop an area of prosperity founded on the values of the Union, arguably prevents the EU from fostering any special relationships with countries refusing to commit themselves to such values. In this respect, one may argue that the Union's use of market access as a bargaining chip to effect change in the domestic arena of its external partners, does not amount to legitimate influence. Whilst this may suggest a shift from a 'normative power' (i.e. behaving as a community of values pursuing a normative objective) to a 'market power' (i.e. behaving as a large market with regulatory capacity and competing interests), as mentioned in Chapter 2 this thesis does not distinguish between these conceptualisations of the EU as an international actor as free markets and regulation are fundamentally part of the normative agenda. The thesis is therefore of the view that this pivot is justified and in conformity with its own constitutional framework and within the ambit of Article 3(5) TEU? If we concede that Article 3(5) TEU includes an undertaking on the part of the Union to uphold and promote its values and interests in the wider world, then to the extent that the Union is promoting its values through the conditional deepening of its foreign relations (i.e. market access in exchange for the adoption of EU legislation), such acts are justified. Marise Cremona, and Christophe Hillion. 'L'Union Fait la Force? Potential and limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy', (European University Institute, Law Working Paper Paper No. 39/2006, 2006); Roman Petrov and Peter Van Elsuwege. 'Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?' (2011) *European Law Review* 36(5) 688.

Union cannot passively wait for countries to align themselves with the EU's normative agenda before initiating active engagement.⁵¹⁷ Therefore, whilst the terminology of Article 8 TEU and the neighbourhood security nexus restrict the Union from refusing a 'special relationship' with its neighbours that do not commit to the values of the Union, Article 8 TEU arguably caters to a partial departure from conditionality, where the Union's strategic interests are concerned which are conspicuously aligned with a stable and prosperous neighbourhood.⁵¹⁸ Article 8 TEU therefore illustrates a normative shift in the Union's neighbourhood policy from engagement based on 'shared values' (as referred to in most ENP strategic documents) to a proactive policy based on Union interests. This caveat to the Union's normative agenda in favour of strategic interests suggests that the Union is able to retain its normative power status in its engagement with its neighbourhood where this is in pursuit of European security. This pivot suggests a strategic dimension to the Union's normativity as far as its security interests in the neighbourhood are concerned. As such, Article 8 TEU confirms the Union's role as a normative power acting in conformity with its own constitutional framework and within the ambit of Article 3(5) TEU,⁵¹⁹ which reflects a balance between the normative power argument (with the EU's engagement based on shared values) and the perception of the EU as a strategic actor (where the Union's self-regarding interests such as stability and security are at stake).

In view of the Union's transformative mandate in relation to its neighbourhood with which it has been bestowed post-Lisbon, one can deduce that the neighbourhood competence vested in Article 8 TEU encapsulates an advanced form of norm export and norm projection. The Union's norm export under Article 8 TEU affirms the mechanism of normative power most pronounced in the neighbourhood, namely the invocation of norms and power of example as discussed in Chapter 2.⁵²⁰ While Article 3(5) TEU and Article 21(3) TEU provide beacons for the Union's actions guided by its values, Article 8 TEU actively asserts these values within its agile policy of transformation of the neighbouring states. In so doing, upholding Union values in the neighbourhood becomes the aim of the Union's engagement rather than a pre-condition to fostering special relations which affirms the Union's normative interests in its Neighbourhood.⁵²¹

⁵¹⁷ Marise Cremona, and Christophe Hillion. 'L'Union Fait la Force? Potential and limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy', (European University Institute, Law Working Paper No. 39/2006, 2006)

⁵¹⁸ *Ibid*

⁵¹⁹ Christophe Hillion, 'Anatomy of EU Norm Export Towards the Neighbourhood: the Impact of Article 8 TEU' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 18

⁵²⁰ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

⁵²¹ Christophe Hillion, 'Anatomy of EU Norm Export Towards the Neighbourhood: the Impact of Article 8 TEU' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 20

4.1.3. Does the EU Exhibit Normative Means of Power or Influence in the Neighbourhood?

As mentioned in Chapter 2,⁵²² one of the defining characteristics of a normative power is the use of normative means of power or influence in its engagement which entails promoting general rules and practices and the subsequent gains through cooperation. In this respect, it is important to note that as an economic hegemon, the EU does not only engage in normative means of influence. As an economic power that accounts for over a fifth of world trade, the EU also resorts to economic means of influence with the Union often advocating a desire to develop a 'full toolbox' of foreign policy instruments.⁵²³ The subtlety and nuance lies in the normative means of power which is predominantly values-based as opposed to economic means of influence which is inspired by the 'Union's interests. Notwithstanding the distinction, as mentioned in Chapter 1,⁵²⁴ this thesis does not distinguish between these conceptualisations of the EU as an international actor (i.e. normative power as opposed to economic power) as free markets and regulation are fundamentally part of the normative agenda. Therefore, whilst it would be unrealistic to suggest that the EU relies exclusively on purely normative means of power, the main source of influence which the Union applies in its neighbourhood, remains normative.⁵²⁵ The Union can therefore be seen to be engaging with its neighbourhood through the promotion of general rules and practices (promoted through the adoption of the *acquis*) and the subsequent mutual gains made possible through cooperation (advocated through legislative approximation) which will be explored below.

With the Union's policies imbedded in values and its instruments predominantly norm-based, the following section on the EU's *acquis* export in its neighbourhood and legislative approximation reveals how the EU's normative agenda and means of influence is inevitable when considering the Union's nature as an international actor (both generally and in the energy sector). However, with respect to the Union's energy security interests, the section reveals that the normative agenda remains questionable given the Union's interests vs values dilemma as illustrated above.⁵²⁶ Here a distinction is drawn between the Union's interests and its means of influence and the extent to which it is normative. Therefore, whilst the analysis above⁵²⁷ has illustrated that the Union exhibits strategic interests in its neighbourhood as far as its energy security is concerned, the analysis to follow shows that

⁵²² See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

⁵²³ Tuomas Forsberg, 'Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183 – 1204, 1194

⁵²⁴ See Chapter 1 Section 1.3 (*Objectives of this Thesis*)

⁵²⁵ *Ibid*

⁵²⁶ See Chapter 4 Section 4.1.2.1 (*The Interest vs Values Dilemma in the Union's Neighbourhood Regarding Energy*)

⁵²⁷ See Chapter 4 Section 4.1.2.1 (*The Interest vs Values Dilemma in the Union's Neighbourhood Regarding Energy*)

the Union's means of power and influence remains fundamentally normative given the norm-based promotion of its values and *acquis* export.

4.1.3.1. *Acquis* Export in the Neighbourhood

As already mentioned in Chapter 2⁵²⁸, the Union's *acquis* export⁵²⁹ or external Europeanisation uses different levels of integration in the Union's external relations to export its values, norms and rules beyond its borders to third countries.⁵³⁰ This integration without membership is most pronounced in the European peripheries where the Union offers access to certain sectors of the internal market to its neighbourhood partners in exchange for political economic and legal reforms.⁵³¹ This is evident in the ENP,⁵³² the Eastern Partnership⁵³³ and the Common Spaces roadmaps with Russia⁵³⁴ (which will be examined below) which all facilitate deeper integration between the Union and its neighbours. Whilst the Union has the ability to influence law and policy beyond its periphery, its techniques vary based on its neighbours and the foreign policy tools it engages in its respective external relations. The ENP, Eastern Partnership and Common Spaces roadmaps (as will be shown below) give credence to this assertion given the different levels of integration envisioned by the said instruments and respective target countries.

Whilst the Union uses the law as its main medium of choice and as a mechanism to forward its agenda, which is fundamental to its normative power, more often than not, the shape and form of these instruments vary based on the respective country's willingness to conform to an EU model driven by European values. Here it is important to note the two different challenges and limitations to the *acquis* export which are worthy of distinction: first, the third country states' willingness to accept the Union's legal order; and second, the EU's agenda

⁵²⁸ See Chapter 2 Section 2.3 (*The Treaty of Lisbon and its Relevance to the Normative Power Framework*)

⁵²⁹ *Acquis communautaire* is a French term referring to the cumulative body of European Union laws, comprising the Union's objectives, substantive rules, policies and, in particular, the primary and secondary legislation and case law – all of which form part of the legal order of the European Union (EU). This includes all the treaties, regulations and directives passed by the European institutions, as well as judgements laid down by the European Court of Justice. The term is most often used in connection with preparations by candidate countries to join the Union. They must adopt, implement and enforce all the *acquis* to be allowed to join the EU. As well as changing national laws, this often means setting up or changing the necessary administrative or judicial bodies which oversee the legislation. In the context of this thesis, the *acquis* export, refers to non-candidate countries who are expected to align their law and policy with that of the EU with no prospect of membership but rather for a stake or access to the EU market.

⁵³⁰ Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 19

⁵³¹ Amichai Magen, 'Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of EU External Influence' (2007) 9(3) *European Journal of Law Reform* 361-92

⁵³² ENP countries include Algeria, Morocco, Egypt, Israel, Jordan, Lebanon, Libya, Palestine, Syria, Tunisia in the South and Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine in the East and Russia has special status with EU-Russia Common Spaces instead of ENP participation.

⁵³³ The Eastern Partnership addresses Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

⁵³⁴ Russia's objection to partake in the ENP which consequently lead to the 'Four Spaces' were first alluded to at the May 2003 EU-Russia St. Petersburg Summit and later outlined at the May 2005 EU-Russia Moscow Summit officially unveiled as the Four Road Maps. See EU-Russia Summit, Saint Petersburg, 31 May 2003. Joint Statement of the Summit available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/75969.pdf

of promoting its legal order under the guise of shared values and norms. Therefore, whilst the law functions as an instrument of the EU's external action and engagement, which is fundamental to its normative power status and necessary to ensure that norms are applied consistently, there is often inconsistency in the application and pursuit of norms (in particular in the way the Union tries to export them) with the Union potentially using norms to justify particular interests. This normative shift is evident in the manoeuvres employed by the Union in the different countries with which it engages and the forms of integration used in the Union's policy towards its neighbours. The ENP, the Eastern Partnership and Common Spaces roadmaps (as will be shown below) suggest that the Union's manoeuvres and actions that are masquerading under the pretext of 'shared values' more often than not reflect the Union's pursuit of its own principles and interests.⁵³⁵ The Union's external actions in its neighbourhood are therefore often said to be plagued by an interests vs values dilemma with this dilemma less prevalent where its security is concerned, in particular its energy security, as has been illustrated above⁵³⁶ and will be further explored below.

4.1.3.2. Legislative Approximation as the Method of *Acquis* Export in the Neighbourhood

As mentioned above, the Union uses different methods of integration in its periphery, namely: (i) approximation;⁵³⁷ (ii) harmonisation;⁵³⁸ and (iii) convergence.⁵³⁹ For the purpose of this thesis, the section to follow focuses on 'approximation' as the most widely used form of *acquis* export and significantly, the most frequently used term in the Union's foreign policy and agreements with the Eastern Partnership and Russia. Notwithstanding there is a fundamental difference in the Union's *acquis* export between the Eastern Partnership and Russia which will be examined below for the purpose of drawing a distinction and thereby illustrating the significance of *acquis* export vis-à-vis the Eastern Partnership and the objectives pursued which serve to bolster the Union's normative means of power criterion. For this purpose, the analysis focuses on approximation, which serves as a *sui generis*

⁵³⁵ Christophe Hillion, 'Anatomy of EU Norm Export Towards the Neighbourhood: the Impact of Article 8 TEU' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 18

⁵³⁶ See Chapter 4 Section 4.1.2.1 (*The Interest vs Values Dilemma in the Union's Neighbourhood Regarding Energy*)

⁵³⁷ Approximation alludes to the action of change towards achieving similarity in elements such as different laws such or diverse sovereign jurisdictions by eliminating differences unilaterally, bilaterally or multilaterally. See Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 26

⁵³⁸ Harmonisation entails the global process of rule-making or standard-setting directed towards a coherent legal system of international trade. It aims at consistency of laws, regulations, standards and practices so that the same rules apply in different jurisdictions. Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in Fletcher L. Mistelis and Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet and Maxwell, 2001): 3-27, 8

⁵³⁹ Convergence constitutes the evolution of legal institutions of different legal systems where the legal institution of one system resembles the other and the legal norms, principles and scholarly comments of both are used in equal measure and regarded with equal authority. Peter De Cruz, *A Modern Approach to Comparative Law* (Kluwer Law International, 1993) 34

model of regional integration in the Union's Eastern European countries, to determine whether the Union is normative in its efforts to change its periphery in conformity with a model founded on EU norms and values.⁵⁴⁰

The Union has developed several methods to export its norms and values which vary based on its integration objectives, the most frequently used model being legislative approximation⁵⁴¹ to the EU *acquis*. Whilst the objective, scope and level of approximation may vary in the non-EU member context, the methods all relate to different forms of integration that are exclusively Eurocentric in nature.⁵⁴² When considering approximation in the EU legal context, it is important to draw a distinction between the internal dimension, which relates to the European integration process through conditionality; and the external dimension that entails the export of the *acquis* to non-member states. In the context of the European neighbourhood, the main purpose of approximation is the creation of a stable and secure European continent which coincides with the strategic interests of the Union and indeed its neighbourhood policy for which the Union deploys instruments to fulfil its objective.⁵⁴³ The instruments include diverse levels of integration through law reform using legal and political tools which reflect the Union's norms and values, namely regulation, legislation, market practices and standards as well as international agreements.⁵⁴⁴

With the Eastern Partnership countries, the main goal of *acquis* export, is to achieve political association and economic integration through legislative and regulatory approximation amounting to convergence with EU norms and standards.⁵⁴⁵ With Russia, the rationale of *acquis* export is somewhat different as Russia does not have any aspirations of joining the

⁵⁴⁰ Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 22

⁵⁴¹ It is important to draw a distinction when considering approximation in the EU legal context between the internal dimension, which relates to the European integration process and the external dimension that entails the export of the *acquis* to non-member states. More specifically, within the European integration process, approximation is aimed at harmonisation and a conscious effort on the part of the Union to drive change towards a harmonised regime through revised legal and administrative rules and structures. See Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 28; Noreen Burrows and Hilary Hiram, 'The Legal Articulation in the EC' in Terence C. Daintith (ed), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (Wiley and Sons, 1995) 41

⁵⁴² Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 29

⁵⁴³ Article 3(5) TEU. See discussion above in Chapter 4 Section 4.1.2.3 (*Promoting and Exporting Values as an EU Objective in the EU's External Policy*): 'The promotion of values is an explicit objective of the Union, pursuant to Article 3(5) TEU which has subsequently become an important aspect of the EU's external policy. Article 3(5) TEU which has often been dubbed as the Union's 'missionary principle' regulates the Union's presence on the global scene and sets the goals by which the EU should undertake its relations with the wider world. According to the European Security Strategy, the EU's strategic objectives are in pursuit of an overarching aim, namely defending its security and promoting its values'. Therefore whilst the EU is normative in promoting its values pursuant to its constitutional framework, it is also strategic in its objective to maintain security in the region.

⁵⁴⁴ Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 26

⁵⁴⁵ Council of the EU, Joint Declaration of the Prague Eastern Partnership Summit, 7 May 2009, doc.8435/09. http://europa.eu/rapid/press-release_PRES-09-78_en.htm

EU or becoming part of the ENP.⁵⁴⁶ The Union's *acquis* export vis-à-vis Russia does not envision the unilateral alignment with EU laws, norms and standards although it is supposed to facilitate trade and investment albeit in the absence of a free trade arrangement.⁵⁴⁷ Whilst the general overarching goal of the Union's *acquis* export is the creation of a stable and secure European continent, as mentioned above, with each different category of countries the ultimate objective of the Union's *acquis* export varies – with respect to the Eastern Partnership countries, this entails political association and economic integration whereas for Russia this includes gradual legislative convergence rather than unilaterally imposed conformity to EU norms and standards. The increased differentiation is evident with the Eastern Partnership countries where the intention to establish DCFTAs that require more extensive commitments and developed enforcement and dispute settlement mechanisms with regards to approximation than what is applicable with respect to Russia.⁵⁴⁸ Therefore, although the EU always pursues the same objectives in its neighbourhood (i.e. economic integration and political association) for the sake of ensuring regional stability and security, the different kinds of relationships it has with the various neighbouring states means that the EU achieves its objectives to different degrees.

At an external level, *acquis* export involves the establishment and development of cooperation to promote economic, political and social change (in areas such as trade, competition, environment, human rights, democracy) based on an EU model.⁵⁴⁹ The main objective being eventual economic integration and political association for the purpose of ensuring regional security, stability and prosperity inspired by EU values as posited by Article 8 TEU.⁵⁵⁰ It follows that legislative approximation as a form of *acquis* export and a method of integration, shows the fundamental shift from the internal dimension of the EU's legislative approximation, which is predominantly based on harmonisation, to that of

⁵⁴⁶ Instead, the goal is to implement road maps for the establishment of four Common Spaces which include: (i) Common Economic Space; (ii) Common Space of Freedom, Security and Justice; (iii) Common Space on External Security; and (iv) Common Space on Research and Education, including Cultural Aspects. The road maps were unveiled at the St. Petersburg Summit in May 2003, whereby the EU and Russia agreed to reinforce their cooperation by creating in the long term four 'common spaces' in the framework of the Partnership and Cooperation Agreement and on the basis of common values and shared interests. Whilst the Common Economic Space includes several references to 'the gradual approximation of relevant legislation and alignment of standards' which is fundamentally normative, the said process does not endeavour to achieve any economic integration on the part of Russia with the EU on the basis of a free trade arrangement.

⁵⁴⁷ Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 42

⁵⁴⁸ Christophe Hillion, 'Russian Federation', in Steven Blockmans and Adam Lazowski (eds), *The European Union and its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration* (TMC Asser, 2006) 494

⁵⁴⁹ Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 34

⁵⁵⁰ Article 8 TEU empowers the Union to 'develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on values of the Union'. 'See also Christophe Hillion, 'Anatomy of EU Norm Export Towards the Neighbourhood: the Impact of Article 8 TEU' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 13

conformity in the external dimension by way of imposing a model founded on EU norms and values.⁵⁵¹ This alludes to the Union's hyperactivity as a 'rule generator'⁵⁵² given the evolution of its norm export in its external relations and policy with its neighbourhood which has been facilitated by the Treaty of Lisbon.⁵⁵³ Article 8 TEU establishes specific EU competence for the Union's norm export which has enshrined the Union's normative power character, given its active projection of EU values and principles towards its neighbours for which there is now a legal basis post-Lisbon.⁵⁵⁴

Legislative approximation⁵⁵⁵ as a form of *acquis* export is most prominent in the PCAs with the Eastern European and Central Asian countries⁵⁵⁶ with a distinct provision included which pertains to legislative cooperation.⁵⁵⁷ The provision includes an undertaking that the said country will endeavour to ensure that its legislation be gradually made compatible with that of the Union. The PCA's clear objective is the legislative approximation of the third country's legislation to that of the EU in order to facilitate political and economic transition. This normative objective and aim to promote respect for the rule of law, democracy and human rights as important values held sacred to the Union, are considered fundamental in expediting the said state's transition and integration in a world economy:

CONVINCED of the paramount importance of the rule of law and respect for human rights, particularly those of persons belonging to minorities, the establishment of a multi-party system with free democratic elections and economic liberalization aimed at setting up a market economy.⁵⁵⁸

Despite the clear objective and precondition to strengthening economic ties with the EU, legislative approximation imposes a soft law obligation rather than a formal legal commitment that the said country shall 'endeavour'⁵⁵⁹ to ensure that its legislation is compatible with EU legislation. This unilateral commitment to follow an EU model which is fundamentally normative relates mostly to market reform and development issues which

⁵⁵¹ Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 37

⁵⁵² Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' in Alison McDonnell (ed.) *A Review of Forty Years of Community Law: Legal Developments in the European Communities and the European Union* (Kluwer Law International, 2005) 277 - 278

⁵⁵³ Article 8 TEU

⁵⁵⁴ Article 8 TEU

⁵⁵⁵ See approximation clauses of PCAs with the Eastern European and Central Asian countries in general. By way of example, Article 43 of the PCA with the Republic of Azerbaijan (1999) states: 'The Parties recognise that an important condition for strengthening links between the Republic of Azerbaijan and the Community is the approximation of legislation to that of the Community. The Republic of Azerbaijan shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.'

⁵⁵⁶ The EECAs refer to all the former Soviet Republics (except the Baltic States that are now members of the EU).

⁵⁵⁷ By way of example, see Title V Legislative Cooperation, Article 43 of the PCA with Azerbaijan, an important energy partner – the approximation of laws extends to the 'exploitation and utilization of natural resources'.

⁵⁵⁸ By way of example, see PCA with Azerbaijan

⁵⁵⁹ The legislative approximation clauses of the PCAs with the Eastern European and Central Asian countries are considered to be a soft-law obligation given the undertaking to 'endeavour' to ensure that its legislation will be gradually made compatible with that of the Community which is not definitive.

were non-existent under Soviet rule.⁵⁶⁰ It does not however entail an automatic application of EU law, but rather serves as an instrument of gradual market reform based on a European standard.⁵⁶¹ The PCAs are therefore instruments aimed at law reform and market development with the prospect of further economic integration which make them fundamental to the Union's normative agenda.⁵⁶² Nevertheless, the approximation clauses of the PCAs entail a voluntary political commitment rather than a legally binding provision, as such implementation varies greatly amongst the pertinent Eastern European states depending on the success of the Union's use of conditionality.⁵⁶³ Although the clauses are not legally binding, they still facilitate reform based on an EU model which bolsters the normative power argument.

The principle of conditionality is considered a powerful instrument for integrating candidate and potential candidate states into the EU through conditions which entail the embrace of EU norms and practices with market-based and democratic reforms. The principle, which the Union developed in a pre-accession context, however does not facilitate or cater to fundamental values such as democracy and the rule of law in the same capacity as concrete rules such as the *acquis* as conditionality is based on political commitments rather than legally binding provisions.⁵⁶⁴

The EU's *acquis* export highlights the different ways in which trade serves as a medium for interaction between the Union and the World,⁵⁶⁵ which alludes to the Union's ambitions of influencing the world at large through its normative agenda. The Union's normative traits are evident in its efforts to invoke norms through its *acquis* and lead by example through its regional integration and multilateral cooperation. The section above has illustrated how the EU uses different levels of integration in its external relations to export its values, norms and rules beyond its borders in an effort to Europeanise its neighbourhood. The Union can therefore be seen to be influencing the institutional and legal structures of its neighbourhood through its market economy norms and values. In so doing, we can see the Union using

⁵⁶⁰ By way of example, this would include company law, accounts and taxes, competition rules, public procurement, consumer protection, banking law, financial services, customs law, technical rules and standards.

⁵⁶¹ Roman Petrov, 'Recent Developments in the Adaptation of Ukrainian Legislation to EU Law' (2003) 8(2) *European Law Review* 125-42

⁵⁶² Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 39

⁵⁶³ By way of example, see Article 51 of the PCA with Ukraine.

⁵⁶⁴ This is significant for the Union's normative agenda vis-à-vis Russia given the need for legislative and institutional reforms in EU-Russia energy relations and Russia's strong opposition to the ENP and the Union's apparent endeavours to 'Europeanise' its neighbourhood by way of legal approximation under the *acquis*.⁵⁶⁴ This also explains why the Union has been eager to revise the bilateral framework in place with Russia following Russia's withdrawal from the ECT, an instrument which reflects EU market-based practices and norms which affirms the Union's normative agenda vis-à-vis Russia. Dimitry Kochenov, 'The Issue of Values', Roman Petrov and Peter Van Elsuwege (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* (London: Routledge 2014) 46–62

⁵⁶⁵ Joris Larik, 'Much More than Trade: the Common Commercial Policy in a Global Context' in Malcom Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing, 2011) 16

trade and access to its markets as a model to export its own norms and as a mechanism of integration with third countries and other regions in pursuit of substantive political, economic and legal reforms. Against this backdrop, the Union appears to be asserting its role as an international normative actor by Europeanising its periphery in-line with an EU model vested in European values and norms.

4.1.3.3. Energy *Acquis* Export in the Neighbourhood

The section above has served to illustrate the extent to which the Union displays normative means of power through its *acquis* export and legislative approximation in the neighbourhood. In the section to follow however, the chapter examines the EU's energy *acquis* export which is predominantly pursued through mechanisms such as treaties and financial assistance. Through legal instruments such as treaties, the Union pursues its normative agenda and external energy goals by establishing legal obligations with partner countries. While energy is addressed in most treaties of economic cooperation, it is rarely dealt with as a sector in isolation.⁵⁶⁶ It is for this reason that the EU's energy *acquis* export will be examined against the backdrop of the Union's general *acquis* which entailed the overall convergence to EU norms and standards in all domains, including the energy sector. For a lengthy period of time, the 1994 Energy Charter Treaty⁵⁶⁷ was the only energy specific treaty to which the EU had acceded together with the Energy Community Treaty⁵⁶⁸ (another energy-specific treaty between the EU and third countries of South-Eastern Europe, who have undertaken to implement the Union's energy *acquis*) signed in 2005. The general treaties therefore predominantly focus on trade with specific obligations relating to energy largely absent and only recently gaining traction in EU treaty negotiation.⁵⁶⁹

The use of treaties and financial assistance programmes complement each other as the EU usually requires a treaty for the purpose of committing itself to the provisions of technical aid. By allocating funds (formerly known as 'development aid') provided through technical assistance projects in the energy sector the Union helps partner countries obtain expertise they would not otherwise have or be able to afford. Technical assistance programmes have

⁵⁶⁶ This includes major energy exporting countries. By way of examples see Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, OJ L 265/2, 10.11.2005

⁵⁶⁷ See Chapter 4 Section 4.1.4.2.1 (*Does the EU Engage in Normative Behaviour in the Neighbourhood and their Energy Sectors? – Multilateral Frameworks – Energy Charter Treaty*)

⁵⁶⁸ See Chapter 4 Section 4.1.4.2.1 (*Does the EU Engage in Normative Behaviour in the Neighbourhood and their Energy Sectors? – Multilateral Frameworks – Energy Community Treaty*)

⁵⁶⁹ By way of example, see Article 9 of the revised Cotonou Agreement which refers to rule of law, human rights and democratic principles. Cotonou Agreement [2005] OJ L 209/27

included TACIS⁵⁷⁰, PHARE⁵⁷¹, SYNERGY⁵⁷², ALTENER⁵⁷³, SAVE⁵⁷⁴, INOGATE⁵⁷⁵ which have served multiple purposes. Through technical assistance projects, the Union is able to potentially influence partner state policies in a manner consistent with EU policy (e.g. liberalisation, opening up industries for increased trade and investments and eventually regulatory energy regimes in-line with EU energy directives and law) which makes these projects inherently normative. Technical assistance projects also enable EU companies and the vast EU consultancy industry to penetrate new markets of which the EU may be in competition with the US's technical assistance programme (USAID)⁵⁷⁶ which pursues a similar strategy to that of the EU, thereby enabling the EU to bolster its presence as a normative actor on the global stage. This enables the growth of professional knowledge-based networks including officials, corporate executives, academics, and NGO experts which facilitate the outreach of EU specialisation and expertise.⁵⁷⁷ By creating professional networks, the programmes are intended to assist countries with legislative reform,

⁵⁷⁰ Technical Assistance to the Commonwealth of Independent States (TACIS) is a foreign and technical assistance programme implemented by the European Commission to help members of the Commonwealth of Independent States, in their transition to democratic market-oriented economies. TACIS is now subsumed in the EuropeAid programme.

⁵⁷¹ The PHARE programme (meaning 'lighthouse in French) is one of the three pre-accession instruments financed by the European Union to assist the applicant countries of Central and Eastern Europe in their preparations for joining the European Union. It was originally created in 1989 as the Poland and Hungary: Assistance for Restructuring their Economies (PHARE) programme which thereafter expanded to cover additional countries to Poland Hungary, including: the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia as well as Bulgaria and Romania to mark a period of economic restructuring and political change.

⁵⁷² SYNERGY finances cooperation activities with non-Community countries in the field of formulation and implementation of energy policy to the mutual benefit of the two parties concerned. Unlike the other cooperation programmes which are of a more general nature and include energy as one of several aims, SYNERGY is a specific energy policy programme. SYNERGY can operate in any non-member country, which is an advantage compared with the other Commission cooperation programmes and instruments with their limited geographical scope. It is therefore very easy to carry out a project covering both the countries of Central and Eastern Europe and the CIS with SYNERGY, something which is more difficult under the PHARE and TACIS programmes.

⁵⁷³ The ALTENER programme was adopted in September 1993 and aims to encourage the promotion of renewable energy sources and to considerably reduce CO₂ emissions. However, because of the long lead time necessary for the penetration into the market and the lack of appropriate market incentives for these new energy sources, most of ALTENER's effects are expected to appear only after the year 2000. It has given support to many pilot actions in fields such as infrastructures for training and information, test campaigns for bio-fuels, setting up regional plans for the development of renewable energies etc. Moreover, a set of normative measures has been adopted, e.g. mandates for standardisation in the field of thermal solar energy, photo voltaic energy, and wind energy. ALTENER established an information exchange network launching a major information programme to stress the environmental benefits of using more renewable energy, especially in terms of CO₂ emission levels.

⁵⁷⁴ The SAVE programme, launched in 1991, has two aims. The first is to contribute to stabilising CO₂ emissions, the second is to attain the 1986 energy policy objective of 20% energy efficiency improvement by 1995. Building on the experience of SAVE, based on recommendations made by the independent experts, and conscious of the need to continue progress, SAVE II was proposed in May 1995 to develop policy instruments that complement existing Community actions in the field of energy efficiency. One specific goal of SAVE and SAVE II is to promote energy efficiency legislation that will remove institutional and administrative barriers to investment in energy efficiency and create standards for energy equipment.

⁵⁷⁵ The Interstate Oil to Gas Programme (INOGATE) which is part of TACIS, the European Community's technical assistance programme for the new independent states (NIS) of the former USSR, aims at supporting the NIS' efforts to improve the management of oil and gas pipelines. Its objective is to facilitate the flow of oil and gas between the NIS themselves, and to assist producers and transit countries in accessing European markets. Both producer and transit countries are beneficiaries of this project. They include: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

⁵⁷⁶ USAID is the lead U.S. Government agency that works to end extreme poverty. USAID leads international development and humanitarian efforts to save lives, reduce poverty, strengthen democratic governance and help people progress beyond assistance, available at <<https://www.usaid.gov/>> accessed 20 October 2018

⁵⁷⁷ Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 221

institution-building and training to ensure conformity with EU energy law with the European energy directives, the ECT and EU competition law as the most relevant benchmarks for energy sector reform in the Eastern neighbourhood.⁵⁷⁸ It follows that the technical assistance programmes serve as a platform to channel an EU model of best practices to countries that lack an effective approach to governance in their own right.⁵⁷⁹

Significantly, the TACIS programme provided technical assistance to Russia and other post-Soviet countries⁵⁸⁰ with the aim of facilitating transition to a market economy and the reinforcement of democracy and the rule of law as important values of the Union. With sufficient national reserves and production, the concern in the post-Soviet space was creating a regulatory regime based on an EU model that would facilitate upstream energy investment and development, fair access to pipelines, market-based incentives for production and consumption. While the TACIS programme had substantial funds to drive the above-mentioned objectives forward, they were insufficient to exercise financial leverage on Russia, a state unwilling to adopt foreign-imported policies on account of its traditional supremacy.⁵⁸¹ Therefore, despite the limited success of TACIS with Russia, the Union's influence on external energy policies through the use of technical assistance with the Eastern neighbourhood is one of persuasion (and thereby normative) but with respect to treaties, the Union's normative influence is one of invoking norms through the activation of norms and commitments within legally binding frameworks. These mechanisms of normative power (which will be examined below)⁵⁸² within which the EU exercises its normative influence (i.e. through persuasion and invoking norms) is in contrast to a direct infliction of power (that is synonymous with a military power), which is facilitated by a common quest for peace and prosperity in the region.⁵⁸³ The EU therefore integrates energy cooperation in bilateral or inter-regional legal and policy instruments with a range of developing countries and regions. The Union's efforts at using legal instruments for the purpose of encompassing energy cooperation within binding regional and multilateral frameworks serves to bolster the normative power framework. This commitment to a rule-based international order founded on effective multilateralism is fundamental to the Union's objectives⁵⁸⁴ in its external action and Manners' normative power theory. Notwithstanding

⁵⁷⁸ *Ibid*

⁵⁷⁹ Thomas Walde and J. Gunderson, 'Legislative Reform in Transition Economies', 43 *International & Comparative Law Quarterly* (1994), 347-379; T. Walde and C. von Hirschhausen, 'Legislative Reform in the Energy Industry of Post-Soviet Societies', in R. Seidman, A. Seidman and Thomas Walde (eds), *Making Development Work: Legislative Reform for Good Governance* (Kluwer, 1999).

⁵⁸⁰ These included: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

⁵⁸¹ Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 224

⁵⁸² See Chapter 4 Section 4.1.2.2 (*Normative Mechanisms*)

⁵⁸³ Thomas Walde and James Gunderson, 'Legislative Reform in Transition Economies', 43 *International & Comparative Law Quarterly* (1994), 347-379; Thomas Walde and Christian von Hirschhausen, 'Legislative Reform in the Energy Industry of Post-Soviet Societies', in R. Seidman, A. Seidman and Thomas Walde (eds), *Making Development Work: Legislative Reform for Good Governance* (Kluwer, 1999)

⁵⁸⁴ The Union's commitment to a rule-based international order founded on effective multilateralism expressed in its relations with the wider world under Art. 3(5) TEU ('the strict observance and development of international

the Union's commitment to international law and the strengthening of the international legal order through effective multilateralism, the Union is actively engaged in the development of new international norms at a bilateral, regional and multilateral level through which it seeks to promote its own rule-based approach which serves to bolster the normative power agenda as will be further illustrated below.

4.1.4. Does the EU Engage in Normative Behaviour in the Neighbourhood and their Energy Sectors?

As indicated in chapter 2,⁵⁸⁵ one of the fundamental ways in which a normative power is defined, is its ability to uphold international law and principles such as multilateralism. In this respect, the Union can arguably be said to be behaving like a normative power in its preference for institutionalising its relations in its neighbourhood within international legal instruments and multilateral frameworks. In the section to follow, the chapter assesses to what extent the Union behaves according to international norms which it seeks to advance in its bilateral, multilateral and regional interactions with its neighbourhood. For this purpose the section examines the bilateral and multilateral frameworks in the neighbourhood which the Union uses to promote EU values and norms in an effort to Europeanise its outskirts. Applying this analysis to the energy sector, the section examines the Union's role as a normative power with a specific reference to the energy sector by examining the extent to which the Union seeks to advance its own rule-based agenda in neighbouring energy corridors, specifically through the export of its *acquis* to the Eastern and Southern fringes of its boundaries.

4.1.4.1. Bilateral Frameworks

4.1.4.1.1. Association and Economic Cooperation Agreements

The Union is party to several economic cooperation agreements which, as already mentioned above,⁵⁸⁶ vary based on the level of integration envisioned with the relevant partner countries. Unlike the ENP and Eastern Partnership which are integration agreements that are regional in focus with respect to the Union's neighbourhood, economic cooperation agreements deal with bilateral aspects of the Union's foreign policy vis-à-vis partner countries and have no specific energy focus.⁵⁸⁷ Whereas association agreements can cover energy as evidenced by the Association Agreement with Albania⁵⁸⁸ for example.

law') and its action on the international scene under Art. 21(1) TEU ('promote multilateral solutions to common problems')

⁵⁸⁵ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

⁵⁸⁶ See Chapter 4 Section 4.1.3.2 (*Acquis Export in the Neighbourhood – Legislative Approximation as the Method of Acquis Export in the Neighbourhood*)

⁵⁸⁷ Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 226

⁵⁸⁸ Association Agreement with Albania which was signed on 12 June 2006 and entered into force on 1 April 2009. Article 107 states that: 'Energy Cooperation shall focus on priority areas related to the Community *acquis* in the field of energy, including nuclear safety aspects as appropriate. It shall reflect the principles of the market

Other countries include Georgia, Moldova and Ukraine which are members of the Eastern Partnership.

As such, economic cooperation agreements differ from that aimed at setting a platform for discussion and potential future cooperation; to development and trade preferences with the eventual integration into a customs union; or gradual adoption of EU law for the purpose of Union accession. Such agreements are broad in nature and have a tendency to focus on the promotion of foreign investment generally rather than energy specifically. Energy is therefore dealt with in the broader spectrum of development aid, as part of a customs union and the alignment with EU law. The language of the agreements are largely declarations of goodwill relating to foreign investment without incurring any legally binding undertakings that one would expect from bilateral investment treaties (BITs)⁵⁸⁹ which subsequent to the Union's post-Lisbon foreign direct investment (FDI) competence, means that the Union and the Member States will jointly conclude investment agreements under the common international investment policy.⁵⁹⁰

Since the Treaty of Rome, when the then EEC was bestowed with the competence to conclude association agreements with third countries and international organisations, the EU has been using this competence to conclude associations with several countries for different purposes and objectives.⁵⁹¹ The current legal basis in Article 217 TFEU suggests that agreements for the purpose of establishing an association can be concluded to cover all areas of EU policy and Union activities.⁵⁹² Whilst association agreements can cover energy they do not do so in isolation.⁵⁹³ Instead, association agreements predominantly focus on four different kinds of association⁵⁹⁴, namely: (i) association as a precursor to EU membership⁵⁹⁵; (ii) association as an alternative to membership⁵⁹⁶; (iii) association as a development tool⁵⁹⁷; and (iv) association as an instrument for regional cooperation.⁵⁹⁸ Here it is important to note that the association agreements with the Eastern Partnership

economy and it shall be based on the signed regional Energy Community Treaty with a view to the gradual integration of Albania into Europe's energy markets.'

⁵⁸⁹ Although BITs are not specifically drafted for energy, their provisions apply to a broad range of investments which inevitably include investments in the energy sector.

⁵⁹⁰ The Lisbon Treaty (Article 207(1) TFEU and 206 TFEU) has brought foreign direct investment within the scope of the Union's Common Commercial Policy bringing this within the realm of the EU's exclusive competence. Although the change in the EU's competence will not have an immediate effect on existing BITs pursuant to Regulation 1219/2012 which establishes a transitional regime, it is anticipated that all existing BITs pursuant to Regulation 1219/2012 will eventually be replaced by new agreements with the EU pursuant to art 207 TFEU. See Philip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Hart Publishing, 2014) 251

⁵⁹¹ Article 217 TFEU

⁵⁹² G. Marin Duran and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing, 2012) 60

⁵⁹³ By way of example, Association Agreement with Albania (signed on 12 June 2006 and entered into force 1 April 2009). Available at <[https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22009A0428\(02\)](https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22009A0428(02))

⁵⁹⁴ G. Marin Duran and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing, 2012) 58-59

⁵⁹⁵ By way of example, Turkey and South-Eastern European Countries

⁵⁹⁶ By way of example, Norway and the Euro-Mediterranean Partnership Countries

⁵⁹⁷ By way of example, the Cotonou Agreement

⁵⁹⁸ By way of example, Chile and South Africa

countries serve as an instrument of regional cooperation which aims to deepen and strengthen relations between the Union and its six neighbours: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.⁵⁹⁹ In this framework, guiding the EU's relations with its neighbours, is the EU's Global Strategy and the revised ENP which call on the need to focus on increasing the stabilisation and resilience of the EU's Eastern neighbours.⁶⁰⁰

With respect to association agreements as a prelude to EU membership, the Union's financial assistance is conditional on the objectives of the association agreement being fulfilled.⁶⁰¹ In this respect, the Union monitors progress which is linked to the approximation of laws within the said association country. This suggests conformity to an EU model which is synonymous with the Union's relations with its neighbourhood under Article 8 TEU, which compels the Union to foster relations with its neighbours in the interest of prosperity and 'good neighbourliness' founded on the values of the Union.⁶⁰² If we concede, as suggested in the research undertaken, that association agreements are instruments of European integration and that through these instruments the Union endeavours to integrate its periphery on the basis of EU norms and values through legal approximation, then the Union's normative agenda (and in turn its normative behaviour) is affirmed through the use of such types of agreements in its engagement with its periphery.

With preferential access to EU markets and the potential of a customs union as an incentive, association agreements facilitate dialogue and provide the EU with some leverage to address governance issues which bolsters its normative objective.⁶⁰³ This is relevant to the EU's external energy relations given that Association Agreements can cover energy, as is

⁵⁹⁹ The overall framework guiding relations between the EU and its six Eastern Partners is provided by the relevant bilateral agreements, such as the Association Agreements, as well as the Association Agendas and the Partnership Priorities and the EaP 20 Deliverables for 2020 aligned along the four key priority areas, namely: stronger economy; stronger governance; stronger connectivity; and stronger society. Cooperation then takes place both at bilateral (with individual partners: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine) and at regional level, depending on the nature of the action. This is then supported through the relevant dialogues, both at bilateral level, such as the Association Council, as well as at multilateral level through thematic Platforms and Panels of the Eastern Partnership. See Eastern Partnership - 20 Deliverables for 2020 focusing on key priorities and tangible results. Available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eap_20_deliverables_for_2020.pdf>

⁶⁰⁰ In order to achieve these objectives, cooperation has been based on four key priority areas agreed at the Eastern Partnership Summit in Riga in 2015: (i) Economic development and market opportunities; (ii) Strengthening institutions and good governance; (iii) Connectivity, energy efficiency, environment and climate change; (iv) Mobility and people-to-people contacts. See 2015 Riga Summit Declaration Available at <https://www.consilium.europa.eu/en/meetings/international-summit/2015/05/riga-declaration-220515-final_pdf/>

⁶⁰¹ Article 112 of the Association Agreement with Albania states: 'In order to achieve the objectives of this Agreement and in accordance with Articles 3, 113 and 115, Albania may receive financial assistance from the Community in the form of grants and loans, including loans from the European Investment Bank. Community aid remains tied to the fulfilment of the principles and conditions set out in the conclusions of the General Affairs Council of 29 April 1997 taking into account the results of the annual reviews of the countries of the Stabilisation and Association process, the European Partnerships, and of other Council conclusions, pertaining in particular to the respect of adjustment programmes. Aid granted to Albania shall be geared to observed needs, chosen priorities, the capacity to absorb and repay, and the measures taken to reform and restructure the economy.'

⁶⁰² Article 8 TEU

⁶⁰³ This is particularly the case with the Mediterranean countries and Turkey.

the case with Georgia, Moldova and Ukraine.⁶⁰⁴ Through the institutional machinery for dialogue that association agreements entail by way of Councils or Committees, the Union is able to address governance concerns using its financial, trade and political clout which extends to the energy sector. This is evident in the association agreements with the Mediterranean countries⁶⁰⁵ and Turkey⁶⁰⁶ where the agreements were originally implemented under the MEDA⁶⁰⁷ programme which included projects relating to energy. Whilst there are no specific energy agreements in EU-Mediterranean relations, some countries have considered the ECT as a framework with most expressing reluctance to the legally binding commitments and exposure to its ISDS mechanism.⁶⁰⁸ This reflects the political realities of the Mediterranean region which is rife with weak governments and the issues in engaging with such states despite their significance from an energy perspective.

In contrast to the Mediterranean states, the Union's engagement with Russia and the Caucasus is much different. As far Russia and the Caspian / Caucasus countries are concerned, the Union continues to strive for solid commercial relations with these countries acknowledging that it is unable to establish a universal system of global governance, without the support from strong domestic allies.⁶⁰⁹ By way of example, Azerbaijan is considered an important energy partner bringing Caspian gas from the Southern Gas Corridor and Georgia is considered a key transit country that will bring Caspian gas from Azerbaijan to European markets.⁶¹⁰ In so doing, the Union endeavours to influence institutional and legal structures of its neighbourhood by fostering commercial relationships with partners that seek greater economic exchange. Although these endeavours might be construed as general

⁶⁰⁴ The Association Agreements with Georgia, Moldova and Ukraine are quite explicit in acknowledging the need for enhanced energy cooperation and a commitment to enhancing security of energy supply in addition to approximation towards the EU *acquis*. See Association Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part, OJ [2014] L 261/5, 30 August 2014; Association Agreement between the European Union and its Member States, of the one part, and Moldova, of the other part, 29 May 2014; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ [2014] L 161/3, 26 November 2013

⁶⁰⁵ See Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and respectively, the People's Democratic Republic of Algeria, the Arab Republic of Egypt, the Hashemite Kingdom of Jordan, the State of Israel, the Kingdom of Morocco, and the Republic of Tunisia

⁶⁰⁶ Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ L 051, 26.2.2008, 1-18

⁶⁰⁷ The MEDA Programme was formed to implement the cooperation measures designed to help Mediterranean non-member countries reform their economic and social structures and mitigate the social and environmental consequences of economic development. It was launched in 1996 (MEDA I) and amended in 2000 (MEDA II). It enables the European Union (EU) to provide financial and technical assistance to the countries in the southern Mediterranean: Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, the Palestinian Territory, Syria, Tunisia and Turkey. The MEDA programme takes the place of the various bilateral financial protocols that exist with the countries in the Mediterranean basin. It is inspired by the Phare and TACIS programmes, especially as regards transparency and information.

⁶⁰⁸ Syria signed the 1991 European Energy Charter on 28 June 2010; and Morocco signed the 1991 European Energy Charter on 20 September 2012

⁶⁰⁹ Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 227

⁶¹⁰ See Partnership and Cooperation Agreement between the European Communities and their Member States, on the one part, and the Republic of Azerbaijan, OJ [1999] L 246, 17 September 1999; Association Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part, OJ [2014] L 261/5, 30 August 2014

commercial objectives that are not specific to the energy sector, it relates to potential future cooperation and trade preferences with gradual alignment with EU laws that inevitably includes the energy sector and energy trade. Through the use of dialogue, assistance and treaties, the Union endeavours to build stable systems of good democratic governance in all areas of trade and cooperation (including the energy sector), in-line with a European model. In promoting the adoption of common norms, rules and standards in exchange for greater commercial and economic gains, the Union ultimately pushes its normative agenda and in turn its global governance objectives in all potential fields of cooperation which affirms the EU's normative power status in its Eastern neighbourhood, both generally in trade and development and thereby inadvertently in the energy sector.

4.1.4.1.2. The Association Agreements and Deep and Comprehensive Free Trade Agreements (DCFTAs)

As mentioned in Chapter 2, one of the dimensions of the external reach of EU law whereby the Union uses the law as a mechanism in its external relations and as a means of conducting its foreign policy, is the Union's mode of integration in the neighbourhood in particular the Eastern Partnership. As alluded to above and as will be shown further below, the EU extends the reach of EU law through the *acquis* by way of its international agreements. This *integration through law* is pronounced in the Association Agreements and DCFTAs with Georgia, Moldova and Ukraine which entail a substantial degree of alignment to the EU *acquis*, including sectoral alignment to the EU's energy sector.⁶¹¹ Here, legal integration is evident in the closer gravitation of these countries towards the EU and the internal market through an extension of the *acquis*, with approximation to the EU legal order being the prime objective.

⁶¹¹ By way of example, the Association Agreement with Georgia states that Georgia shall be: COMMITTED to enhancing the security of energy supply, including the development of the Southern Corridor by, inter alia, promoting the development of appropriate projects in Georgia facilitating the development of relevant infrastructure, including for transit through Georgia, increasing market integration and gradual regulatory approximation towards key elements of the EU *acquis*, and promoting energy efficiency and the use of renewable energy sources' while 'ACKNOWLEDGING the need for enhanced energy cooperation, and the commitment of the Parties to implement the Energy Charter Treaty'; The Association Agreement with Moldova states that Moldova shall be: 'COMMITTED to enhancing the security of energy supply, facilitating the development of appropriate infrastructure, increasing market integration and regulatory approximation towards key elements of the EU *acquis*, and promoting energy efficiency and the use of renewable energy sources' while 'ACKNOWLEDGING the need for enhanced energy cooperation, and the commitment of the Parties to implement the Treaty establishing the Energy Community ('the Energy Community Treaty)'; and the Association Agreement with Ukraine states that Ukraine shall be: 'COMMITTED to enhancing energy cooperation, building on the commitment of the Parties to implement the Energy Community Treaty' and 'COMMITTED to enhancing 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'. See Association Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part, OJ [2014] L 261/5, 30 August 2014; Association Agreement between the European Union and its Member States, of the one part, and Moldova, of the other part, 29 May 2014; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ [2014] L 161/3, 26 November 2013

The key aim of the Association Agreements are the use of integration to help Georgia, Moldova and Ukraine to transition into fully functioning market economies.⁶¹² In this particular context, EU law can be seen to be used as a model of modernization.⁶¹³ However the Association Agreements do not function as instruments of integration alone, they are also designed to serve EU interests, in particular its foreign policy and security objectives in the neighbourhood. This is evident in the Association Agreement of Georgia, Moldova and Ukraine with the Union's political and economic interest clearly articulated in the Preamble.⁶¹⁴ By way of example the Ukraine Association Agreement refers to 'ever-closer convergence' on matters of 'mutual interest' as well as 'common values on which the European Union is built'. Significantly, common values are specifically identified with that of the EU which suggests that the EU's Association Agreements go beyond 'economic transition' in its integration endeavours.

Therefore, whilst the normative elements of the EU's actions in the neighbourhood cannot be over-emphasised (i.e. exploring values, principles and legislation), the geopolitical and strategic considerations cannot be underestimated.⁶¹⁵ As already mentioned earlier, the Eastern Partnership is indeed an interest driven policy framework with its inception inspired from the Union's normative heritage.⁶¹⁶ Normative elements are evident in the standard 'common values' conditionality language in the Preamble of the Association Agreements⁶¹⁷ with an 'essential elements' clause referring to democratic principles, human rights and fundamental freedoms as well as the ECHR amongst other human rights instruments.⁶¹⁸ The 'essential elements' clause is supplemented by a provision for 'appropriate measures' including suspension in the event of violation.⁶¹⁹

Furthermore, the EU's Association Agreements include a number of principles that are considered to 'enhance' or 'underpin' the relationship⁶²⁰ including the principles of a free market economy, the rule of law, good governance and effective multilateralism which are

⁶¹² See for example Article 1 (*Objectives*) of the Ukraine Association Agreement which specifically mentions that one of the aims of the association is 'to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area as stipulated in Title IV (Trade and Trade-related Matters) of this Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the Union'.

⁶¹³ Marise Cremona and Gabriella Meloni (eds), 'The European Neighbourhood Policy: A Framework for Modernisation?', EUI Working Paper 2007/21.

⁶¹⁴ See Preamble of the Ukraine Association Agreement: 'COMMITTED to a close and lasting relationship that is based on common values, namely respect for democratic principles, the rule of law, good governance, human rights and fundamental freedoms, including the rights of persons belonging to national minorities, non-discrimination of persons belonging to minorities and respect for diversity, human dignity and commitment to the principles of a free market economy, which would facilitate the participation of Ukraine in European policies.'

⁶¹⁵ Serena Giusti, 'The EU's Transformative Power Challenged in Ukraine' (2016) 21(2) *European Foreign Affairs Review* 165-183, 166

⁶¹⁶ *Ibid* 176

⁶¹⁷ See Article 2 and Article 3 of the Ukraine Association Agreement

⁶¹⁸ Commission Communication on the inclusion of respect for democratic principles and human rights in agreement between the Community and third countries, 23 May 1995, COM(95)216 final

⁶¹⁹ See Article 478 of the Ukraine Association Agreement

⁶²⁰ See Article 3 of the Ukraine Association Agreement

all considered fundamental EU values which are linked to EU interests. This is evident in the Union's market access conditionality included in the DCFTAs which link market opening to legal approximation and implementation of measures that conform to an EU model.⁶²¹ The Association Agreements are therefore considered the most far-reaching instruments of the ENP which are reflective of the Union's normative power in its use of the law and integration to pursue its external relations by penetrating the respective neighbouring country's legal infrastructure. Whilst the EU's integration through the Association Agreements can be seen as a form of 'exporting' the *acquis* and EU law operating beyond its borders, EU law does not take effect in Georgia, Moldova or Ukraine as such (due to the absence of direct effect). However the fact that the implementation of norms modelled on that of EU law are envisioned, the approximation and conformity can arguably be seen as a form of *acquis* export and thereby indicative of the global reach of EU law with the EU's laws operating beyond its borders.

4.1.4.1.3. Partnership and Cooperation Agreements

As mentioned above, PCAs provide a platform for technical assistance and are generally used to foster economic and trade policy dialogue. This hybrid of agreement which will be examined in greater detail in the case study⁶²² has been the preferred instrument for the EU's external relations with Russia⁶²³ and the post-Soviet states⁶²⁴, where (generally speaking) neither accession nor a customs union is envisioned in the near future. The PCAs are largely general agreements with wide-ranging objectives including cooperation; free trade; transition to a market-based economy; the promotion of democracy and upholding the rule of law.⁶²⁵ Whilst the PCAs deal with general trade policy that is not specific to the energy sector (save for the PCA with Russia where energy cooperation is specifically dealt with under Article 65), the wider ranging ambit of the PCA's arguably include energy trade and cooperation with the aim of gradual integration with energy markets in Europe that once again affirms the Union's normative power in its efforts to influence its outskirts in conformity to a European model.⁶²⁶

4.1.4.1.4. Energy Dialogues

⁶²¹ See Article 475(5) of the Ukraine Association Agreement

⁶²² See Chapter 5 Section 5.2.3.2.1 (*Partnership and Cooperation Agreement (PCA)*)

⁶²³ Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part – Protocol 1 on the establishment of a coal and steel contact group – Protocol 2 on mutual administrative assistance for the correct application of customs legislation – Final Act – Exchanges of letters – Minutes of signing, OJ L 327, 28.12.1997, 3-69

⁶²⁴ Council and Commission Decisions 99/602/EC, 99/614/EC, 99/515/EC, 99/490/EC, 99/491/EC, 98/401/EC, 97/800/EC, 98/149/EC, 2009/989/EC on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, the Republic of Azerbaijan, Georgia, the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, the Russian Federation, Ukraine, and the Republic of Uzbekistan, Tajikistan or the other part, respectively.

⁶²⁵ Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 229

⁶²⁶ Article 65(1) of the Partnership and Cooperation Agreement with Russia

The Union has several institutional dialogues in place which are predominantly driven by EU policies and approaches which the Union tries to impose on its partner countries under the guise of ‘shared’ values and objectives (as has been highlighted above)⁶²⁷ in the context of the Union’s means of influence and normative power. The significance of energy dialogues lies in the fact that countries reluctant to sign-up to legally binding frameworks in the interest of keeping their strategic sectors of the economy beyond the ambit of the international legal architecture, are likely to be more receptive of soft law mechanisms such as dialogues as a forum for potential reform rather than formal legal commitments.⁶²⁸ The dialogues are therefore mechanisms of persuasion (and thereby normative)⁶²⁹ rather than a forum for discussion and open negotiation alone.⁶³⁰ The power of persuasion refers back to Manners’ normative power theory. As mentioned in Chapter 2,⁶³¹ one of the mechanisms by which the Union exercises its normative power as a means of influence is through persuasion.⁶³² Under dialogues as instruments, the EU is able to monitor partner countries and their internal implementation of domestic standards based on an EU model and threshold of what is perceived as appropriate.⁶³³

⁶²⁷ See Chapter 4 Section 4.1.2.4 (*EU Engagement with its Neighbourhood: Article 8 TEU and ‘Good Neighbourliness’ Founded on EU Values*)

⁶²⁸ By way of example, the EU-Russia Energy Dialogue.

See https://ec.europa.eu/energy/sites/ener/files/documents/2011_eu-russia_energy_relations.pdf
https://ec.europa.eu/energy/sites/ener/files/documents/2013_03_eu_russia_roadmap_2050_signed.pdf

⁶²⁹ See Chapter 4 Section 4.2 (*Normative Mechanisms*)

⁶³⁰ Päivi Leino, ‘The Journey Towards all that is Good and Beautiful: Human Rights and the “Common Values” as Guiding Principles of EU Foreign Relations Law’, in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law* (Hart Publishing, 2008)

⁶³¹ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners’ Criteria and its Adherents*)

⁶³² See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners’ Criteria and its Adherents*). See also Ian Manners, *Normative Power Europe: A Contradiction in Terms?* (2002) 40 *Journal of Common Market Studies* 244; Tuomas Forsberg, ‘Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type’ (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1196

⁶³³ This is evident in the EU-Russia Energy Dialogue, the most prominent energy dialogue (which will be examined in the case study), where there are several Groups established for the purpose monitoring developments in the energy sector. These include: (i) Energy Strategies, Forecasts and Scenario Groups⁶³³ (The Energy Strategies, Forecasts and Scenario Group was established in order to exchange views on the EU’s and Russia’s strategies, policies, and forecasts in energy and to bring coherence to their respective energy forecasts and scenarios by 2030. It also contributes to the development of bilateral data exchange and monitoring systems in order to enhance transparency and mutual confidence in energy matters, and identifies and jointly analyses potential mid- and long-term issues.

See

https://ec.europa.eu/energy/sites/ener/files/documents/2007_energy_scenarios_terms_of_reference_en.pdf);

(ii) Market Development Groups⁶³³ (The Market Development Group seeks to build trust and promote transparency by exchanging information on current and planned regulations and policy developments. It also follows important market developments and works at improving the investment climate in energy.

See https://ec.europa.eu/energy/sites/ener/files/documents/2007_market_dev_terms_of_reference_en_0.pdf);

(iii) Energy Efficiency Groups⁶³³ (Energy Efficiency Group provides a platform to exchange information on laws, regulations, and experiences related to energy efficiency. It also cooperates on energy efficiency projects. See https://ec.europa.eu/energy/sites/ener/files/documents/2007_energy_efficiency_terms_of_reference_en.pdf);

and (iv) Gas Advisory Council⁶³³ (The Gas Advisory Council of the Energy Dialogue consists of representatives from leading EU and Russian gas companies, and academic research organisations. The Council meets to assess developments in long-term EU-Russia gas cooperation.

See https://ec.europa.eu/energy/sites/ener/files/documents/2011_10_18_rules_of_procedure_final.pdf) which all promote transparency through the exchange of information regarding regulations and policies so as to facilitate coherence and reform in the respective energy sectors.

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

This approach stems largely from the nature of the EU as a global actor and normative power which is an entity acting on behalf of its Member States whence it draws its bargaining power and clout. With the EU maintaining pre-conceived ideas of what is good and just based on a Union-inspired ideal, the stance undertaken by the Union within these dialogues often reflects a regimented approach with little or no flexibility.⁶³⁴ This is particularly problematic where dialogues (generally) are used as a mechanism to discuss negotiable points with very little room for manoeuvre at the negotiating table.⁶³⁵ With dialogues specific to the energy sector, however the situation is different given that the EU is unable to impose its views on supplying and producing countries on which it is dependent. Here the Energy Dialogue between the EU and Russia serves as a case in point. Whilst the Energy Dialogue initiated in October 2000 was intended to cover cooperation in the energy domain and issues such as energy security, energy efficiency, infrastructure, investment and trade, it was also intended to serve as a forum to discuss sensitive issues where opinions differ.⁶³⁶ Russian ratification of the ECT was in particular high upon the EU agenda which once again brings the Union's normative approach to the fore in its efforts to bind parties to legally binding and multilateral frameworks. Whilst the Energy Dialogue has been used as a platform to exchange views, it has had significant shortcomings without major breakthroughs⁶³⁷ which will be elaborated on in the case study to follow.⁶³⁸

4.1.4.2. Multilateral Frameworks

The EU has a strong preference for multilateral frameworks (as mentioned above)⁶³⁹ which stems from its inherent need to institutionalise its external relations with third countries through legally binding instruments in pursuit of a rule-based international order.⁶⁴⁰ Whilst a rule-based international legal order alludes to both bilateral and multilateral frameworks, the Union has indicated a preference for multilateral frameworks which is (as mentioned in the preceding chapter)⁶⁴¹ evident in the Union's quest for 'effective multilateralism' in its foreign policy agenda, as revealed in the European Security Strategy.⁶⁴² As far as energy is concerned, the ECT remains the Union's primary institutional framework although

⁶³⁴ Päivi Leino, 'The Journey Towards all that is Good and Beautiful: Human Rights and the "Common Values"' as Guiding Principles of EU Foreign Relations Law', in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law* (Hart Publishing, 2008) 679

⁶³⁵ G. Marin Duran and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing, 2012) 231

⁶³⁶ European Commission, 'EU-Russia Energy Dialogue: the First Ten Years: 2000 – 2010' https://ec.europa.eu/energy/sites/ener/files/documents/2011_eu-russia_energy_relations.pdf

⁶³⁷ *Ibid*

⁶³⁸ See Chapter 5 (*The Main Instruments in the Union's External Energy Relations with Russia – Energy Dialogue*)

⁶³⁹ See Chapter 4 Section 4.1.4 (*Does the EU Engage in Normative Behaviour in the Neighbourhood and their Energy Sectors?*)

⁶⁴⁰ Marise Cremona, 'Values in EU Foreign Policy' in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Hart Publishing, 2011) 276

⁶⁴¹ See Chapter 3 Section 3.1.2.1 (*Further Novelties Introduced by Lisbon – Objectives in External Action*)

⁶⁴² Council of the European Union, *A Secure Europe in a Better World, European Security Strategy*, Brussels, 12 December 2003

arguably its significance has lost traction over the years following Russia's refusal to ratify the treaty and having withdrawn from its provisional application.⁶⁴³

Although the EU has actively promoted the ECT since its inception, there has been a general misconception that the ECT was an instrument of the EU's foreign policy towards the ex-Soviet space. This perception was fuelled by the fact that the ECT found its inception at a time when unprecedented opportunities for economic cooperation in the energy sector emerged following the dissolution of the Soviet Union.⁶⁴⁴ This misperception that the ECT is an EU foreign policy instrument, has been somewhat problematic as it dilutes the credibility of the Secretariat and the Conference as self-sustaining arrangements capable of functioning independent of the EU and its agenda in the post-Soviet outskirts.⁶⁴⁵ The close proximity between the EU and the ECT has inevitably blurred the lines between the Energy Charter process⁶⁴⁶ and the Union's energy policy towards its eastern periphery.⁶⁴⁷ Similarly to the ECT, the Energy Community Treaty serves as a multilateral aspect of the Union's external energy policy, which shows a preference on the part of the Union for multilateral frameworks and international law instruments which are intrinsically normative traits.

In the section to follow the chapter examines the ECT and the Energy Community Treaty as external manifestations of EU energy law and policy. The purpose of this analysis, as mentioned in the preceding paragraph, will be to illustrate the Union's normativity in its preference for using multilateral instruments to pursue a rule-based agenda in its external energy relations with its near neighbourhood which in turn illustrates the Union's normative behaviour. Although the WTO is a multilateral framework with a significant role to play in the global legal architecture, it will not be examined as an instrument of the Union's external energy policy. As indicated above, the EU has actively promoted the ECT in its external energy relations as an instrument that reflects the principles of the Union's market economy for the purpose of the gradual integration of third country states into Europe's energy markets. While the WTO, ECT and Energy Community Treaty are all treaty-based regimes, the WTO is a broad trade framework regulating trade in all goods and services of its

⁶⁴³ A. Konoplyanik, 'A Common EU Russia Energy Space: The New EU Russia Partnership Agreement, *Acquis Communautaire*, the Energy Charter and the New Russian Initiative', in K. Talus and P. Fratini (eds), *EU-Russia Energy Relations* (Euroconfidential, 2010)

⁶⁴⁴ Ernesto Bonafé and Natasha A. Georgiou, 'The New International Energy Charter and the Rule of Law in the Global Energy Architecture' in Martha M. Roggenkamp and Catherine Banet (eds), *European Energy Law Report XI* (Intersentia, 2017) 93 – 120

⁶⁴⁵ Craig S. Bamberger and Thomas Walde, 'The Energy Charter Treaty', in M. Roggenkamp et al. (eds), *Energy Law in Europe* (Oxford University Press, 2008)

⁶⁴⁶ The Energy Charter process is to be understood as all activities directed to the correct implementation of the ECT rules and the International Energy Charter (IEC) principles as well as its geographical expansion across the world. The governing body is the ministerial Energy Charter Conference, which meets once a year and is assisted by a small Secretariat in Brussels. ECT signatories are contracting parties, while IEC signatories are observer members to the Conference.

⁶⁴⁷ Craig S. Bamberger and Thomas Walde, 'The Energy Charter Treaty', in Martha Roggenkamp et al. (eds), *Energy Law in Europe* (Oxford University Press, 2008)

members, whereas the ECT and Energy Community Treaty are specialised regimes regulating trade and investment in the energy sector. Unique features to energy have set this sector apart that have revealed limitations in the WTO regime which will be touched on in the next chapter. Whilst the Union generally promotes WTO accession on account of the fact that the objective of the WTO is to eliminate discriminatory treatment in international trade by promoting free trade and reducing tariffs or other trade-related barriers,⁶⁴⁸ the WTO will not be examined as a medium for the Union's energy *acquis* export.

4.1.4.2.1. Energy Charter Treaty

The Energy Charter began as a political initiative launched in Europe in the early 1990s. The European Energy Charter Declaration which was signed in 1991, was initially proposed by the then Dutch Prime Minister, Lubbers, at the meeting of the European Council in Dublin in June 1990. In response to the collapse of the USSR, Lubbers suggested that economic recovery in Eastern Europe and the former Soviet Republic could only be facilitated and expedited through cooperation in the energy sector. Having welcomed the suggestion, the Council invited the Commission of the European Communities to implement cooperation, pursuant to which, in February 1991, the concept of a European Energy Charter was proposed.⁶⁴⁹ The European Energy Charter Declaration, which was not a legally binding agreement but rather a declaration of common principles, represented a political commitment to energy cooperation.⁶⁵⁰ Having emphasised two objectives, namely ensuring security of energy supply in the West and providing capital for energy exploration in the East, the Energy Charter process facilitated the development of economies in transition, thereby serving a broader objective of a legal and political platform for East-West cooperation.⁶⁵¹ The European Energy Charter Declaration also highlighted the necessity of an appropriate international legal framework for energy cooperation.⁶⁵² The general consensus amongst Eurasian states was that an established foundation for developing energy cooperation was required, for the purpose of overcoming economic divisions between the Eastern and Western European countries.⁶⁵³ It was widely acknowledged that

⁶⁴⁸ Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, art II.1 ('Scope of the WTO'): 'The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.'

⁶⁴⁹ The Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, available at <www.encharter.org/fileadmin/user_upload/document/EN.pdf>

⁶⁵⁰ Yulia Selivanova, 'The Energy Charter and the International Energy Governance' in *European Yearbook of International Economic Law (EYIEL)*, Vol. 3 (2012). (Springer Berlin Heidelberg, 2012) 308

⁶⁵¹ Craig S. Bamberger, Jan Linehan, and Thomas Walde. 'Energy Charter Treating 2000: In a New Phase', *Journal of Energy & Natural Resources Law* 331 (18) (2000) 2

⁶⁵² Yulia Selivanova, 'The Energy Charter and the International Energy Governance' in *European Yearbook of International Economic Law (EYIEL)*, Vol. 3 (2012). (Springer Berlin Heidelberg, 2012) 308

⁶⁵³ With the end of the Cold War providing new impetus to mutually beneficial cooperation in the energy sector, the energy charter process began after the breaking down of the Berlin wall. The emergence of the need for energy resources in Western Europe, were met by reciprocal needs amongst the Soviet states for investment to exploit their energy resources. See Ernesto Bonafé and Natasha A. Georgiou, 'The New International Energy

multilateral rules, rather than bilateral agreements, would provide an efficient framework for international cooperation, given the growing interdependence between net energy exporters and importers in the region. Based on these considerations, the Energy Charter was born,⁶⁵⁴ which largely reflected the European sentiment to bridge dividing lines.⁶⁵⁵ The Energy Charter therefore plays an important role in establishing the legal foundation for energy security, based on the principles of open, competitive markets and sustainable development, largely founded on an EU model.⁶⁵⁶

As the only agreement of its kind, establishing inter-governmental cooperation in the energy sector covering the whole value chain, the aim of the ECT was to strengthen the rule of law by creating a level-playing field in the energy sector. By establishing a set of rules to be observed by all participating governments, the ultimate goal was that risks associated with energy-related investment and trade, would be mitigated.⁶⁵⁷ Whilst the Energy Charter was recently updated as a political declaration in The Hague⁶⁵⁸ for the purpose of modernising the Energy Charter Process and broadening the Charter constituency,⁶⁵⁹ the initial focus of

Charter and the Rule of Law in the Global Energy Architecture' in Martha M. Roggenkamp and Catherine Banet (eds), *European Energy Law Report XI* (Intersentia, 2017) 93 – 120

⁶⁵⁴ The ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (Protocol) entered into legal force in April 1998 having been signed in December 1994. To date, the ECT has 54 signatories and contracting parties. Members include all major countries in the Caucasus and Central Asia, many of which are important oil and gas producers, including the former Soviet Republics of Azerbaijan, Georgia, Kazakhstan and Turkmenistan, as well as Turkey, an important transit country. With such geographically strategic countries on board, the ECT has become a significant instrument in the development of the Southern Gas Corridor. Karel Beckman, Interview Urban Rusnak, Secretary-General of the Energy Charter Secretariat (Brussels, 7 June 2012)

⁶⁵⁵ Title 1 (*Objectives*) of the European Energy Charter. See European Energy Charter of 17 December 1991, available at https://energycharter.org/fileadmin/DocumentsMedia/Legal/1991_European_Energy_Charter.pdf accessed 20 October 2018

⁶⁵⁶ *Ibid*

⁶⁵⁷ The ECT is designed to promote energy security through open and competitive energy markets, while upholding the principle of sovereignty over energy resources. The ECT therefore provides a multilateral framework for energy cooperation that is unique under international law. The ECT is unique as a multilateral treaty as it is the only legally binding international agreement specific to the energy sector. The ECT's provisions focus on four broad areas, namely: (i) the protection of foreign investments, based on the extension of national treatment, or most-favoured nation treatment (whichever is more favourable) and protection against key non-commercial risks; (ii) non-discriminatory conditions for trade in energy materials, products and energy-related equipment based on WTO rules, and provisions to ensure reliable cross-border energy transit flows through pipelines, grids and other means of transportation; (iii) the resolution of disputes between participating states, and - in the case of investments - between investors and host states; (iv) the promotion of energy efficiency, and attempts to minimise the environmental impact of energy production and use. See Yulia Selivanova, 'The Energy Charter and the International Energy Governance' in *European Yearbook of International Economic Law (EYIEL)*, Vol. 3 (2012). (Springer Berlin Heidelberg, 2012) 30; 7; see also Ernesto Bonafé and Natasha A. Georgiou, 'The New International Energy Charter and the Rule of Law in the Global Energy Architecture' in Martha M. Roggenkamp and Catherine Banet (eds), *European Energy Law Report XI* (Intersentia, 2017) 93 – 120

⁶⁵⁸ The Ministerial Conference on the International Energy Charter was held on 20 May 2015 in The Hague, the Netherlands and was jointly organized by the Ministry of Economic Affairs and the Energy Charter Secretariat. It is available at http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_Certified_Adopted_Copy.pdf

⁶⁵⁹ As at the beginning of 2017, the International Energy Charter had more than 80 signatories from Asia, Africa, Europe and the Americas. The old European Energy Charter of 1991 has been updated by the new International Energy Charter, clearly demonstrating that the Energy Charter Process remains instrumental in strengthening global energy security and promoting energy cooperation, and that the modernisation efforts are widely embraced. See Ernesto Bonafé and Natasha A. Georgiou, 'The New International Energy Charter and the Rule of Law in the Global Energy Architecture' in Martha M. Roggenkamp and Catherine Banet (eds), *European Energy Law Report XI* (Intersentia, 2017) 93 – 120

the ECT process was East-West energy cooperation. The dissolution of the Soviet Union opened new unprecedented opportunities for economic cooperation within Europe and set the stage for the internationalisation of European energy markets as a natural progression from the widening geographical scope of energy and the international arena more generally.⁶⁶⁰ The ECT largely reflected the approach undertaken in the first EU energy market directive. However, with the second energy market package⁶⁶¹, the once strong correlation between the ECT and EU energy *acquis* started to diverge with the new EU unbundling and third party access rules which were considered to be more intrusive. As such, there was a growing gap in the level of liberalisation envisioned by the ECT and the EU. Furthermore, European enlargement eastward increased the number of countries implementing the energy *acquis* and applying EU energy law with potential conflict between the more liberalised EU energy *acquis* and the ECT standard.⁶⁶²

The increasing gap between the two legal systems has created a rift between the international law ECT standard and the more liberalised energy regulation of the EU. Although the ECT was inspired by the first liberalisation package of the EU, further integration and regulation of the markets under the ECT mechanism became increasingly difficult with resource rich countries such as Russia refusing to compromise on their protectionist powers. As a result, the Energy Community Treaty emerged as a consequential step in the Union's efforts to export the energy *acquis*. It follows that the Union's preferred *modus operandi* of exporting its energy *acquis* appears to have shifted from the once preferred ECT to the Energy Community Treaty as an alternative.⁶⁶³ Whilst both instruments serve to validate the Union's normative behaviour as a mechanism to export the *acquis*, the fact that the EU has a preference for the Energy Community Treaty which is based on internal market rules and energy regulation, suggest a desire to uphold an EU liberalisation model far more progressive than that envisioned by the ECT and international law.

⁶⁶⁰ Kim Talus, *EU Energy Law and Policy: a Critical Account* (Oxford University Press,, 2013) 243

⁶⁶¹ The Second Energy Liberalization Package set the stage for the second unbundling regime introduced in June 2003. Directive 2003/54/EC of 26 June 2003 concerning the common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176/37; Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57 (Second Gas Directive).

⁶⁶² Kim Talus, *EU Energy Law and Policy: a Critical Account* (Oxford University Press,, 2013) 243

⁶⁶³ *Ibid* 244

4.1.4.2.2. Energy Community Treaty

The Energy Community Treaty was signed on 25 October 2005 by the EU and nine contracting parties.⁶⁶⁴ The Energy Community Treaty aims at creating an integrated pan-European energy market between the EU and its neighbours. The key objective being to extend the EU internal energy market rules and principles to countries in South Eastern Europe, the Black Sea region and beyond through a legally binding framework. At its core, the Energy Community Treaty stands as solid grounding for any assertion that the Union is a global normative energy actor given the strong commitment to export the energy *acquis* to the neighbouring region.⁶⁶⁵ Furthermore, the fact that the commitment is undertaken through the legally binding framework of a treaty, serves to validate the normative assertion as the Union displays a clear preference for legal instruments as a mechanism to forward its norm and value-based agenda. However, the Energy Community Treaty is also inspired by a somewhat inter-related objective, namely energy security, which suggests that the Energy Community Treaty is not only driven by a normative dimension of implementing EU energy policy beyond EU borders but also strategic interest dimension with energy security pursued through the export of EU energy law.⁶⁶⁶

In its efforts to expand the geographical scope of the EU energy *acquis*, the EU exports its energy regulation to third countries with the Energy Community Treaty as a prime example. One of the fundamental objectives of the EU's external energy policy which is imperative to its normative power is the export of EU energy norms and regulations to neighbourhood countries and beyond of which the Energy Community Treaty is considered a core legal instrument in this context.⁶⁶⁷ By adopting the Energy Community Treaty, contracting parties make legally-binding commitments to adopt core EU legislation and the *acquis*. Whilst the said treaty and its *acquis* constantly evolve to update and replace older acts, Article 24⁶⁶⁸ and Article 25⁶⁶⁹ of the Treaty facilitate the evolution of EU law with the adaptation of the *acquis* and implementation of amendments. This ensures that all contracting parties

⁶⁶⁴ Presently the Energy Community Treaty has nine Contracting Parties including: Albania, Bosnia and Herzegovina, Kosovo, Former Yugoslav Republic of Macedonia, Georgia, Moldova, Montenegro, Serbia and Ukraine. <https://www.energy-community.org/aboutus/whoweare.html>

⁶⁶⁵ This approach of implementing EU energy policy in non-EU countries is evident and articulated on the Energy Community Treaty website. <https://www.energy-community.org/aboutus/whoweare.html>

⁶⁶⁶ Katja Yafimava, *The Transit Dimension of EU Energy Security: Russian Gas Transit Across Ukraine, Belarus and Moldova* (Oxford University Press, 2011) 50

⁶⁶⁷ Heiko Prange-Gstöhl, 'Enlarging the EU's Internal Energy Market: Why Would Third Countries Accept EU Rule Export?' (2009) 37(12) *Energy Policy* 5296-5303

⁶⁶⁸ Article 24 of the Energy Community Treaty: For the implementation of this Title, the Energy Community shall adopt Measures adapting the *acquis communautaire* described in this Title, taking into account both the institutional framework of this Treaty and the specific situation of each of the Contracting Parties.

⁶⁶⁹ Article 25 of the Energy Community Treaty: The Energy Community may take Measures to implement amendments to the *acquis communautaire* described in this Title, in line with the evolution of European Community law.

remain up-to-speed with Union developments so that their respective regulatory frameworks and architecture in the energy sector can be aligned in conformity with that of the EU.⁶⁷⁰

The said treaty goes far beyond neighbourhood and association policies, in terms of geographical depth, to include countries of the 'far neighbourhood' within the Union's single energy market.⁶⁷¹ The Energy Community Treaty is therefore intended to bring South Eastern European countries within the ambit of the energy *acquis* with potential membership of the organisation expanding further east. As an instrument, the Energy Community Treaty can therefore be seen as a mechanism of the Union's normative agenda through the diffusion of norms to the Union's neighbourhood by bringing such countries within the EU's sphere of influence. The Union uses different methods to expand its *acquis* which are either hard or soft depending on the integration of the anticipated third country.⁶⁷² Hard and more formal legal measures include enlargement and the integration of new countries within the Union. Softer and less formal measures include the Union's neighbourhood policies and memoranda of understanding with the CIS and Caspian states.⁶⁷³ Efforts to adopt a similar approach with Russia have been aborted due to political reasons. As an alternative, the Union also enters into partnerships as a softer mechanism to expand the geographical area of the *acquis* including in the energy realm.

The Energy Community embraces not only EU member states and candidate countries but also third countries with dim prospects of joining the EU.⁶⁷⁴ A recurring question is why third countries with no likelihood of ever joining the Union, would seek integration with the EU's internal energy market? While EU candidate countries are obliged to adopt the *acquis* and comply with EU rules before joining the Union and accessing the internal market, countries with no membership prospects voluntarily agree to incorporate the *acquis* within their legal infrastructure for the sake of deeper integration with the EU. This is predominantly the case with countries where the Union cannot apply any conditionality due to vague membership prospects, such as the ENP countries and Eastern Partnership.⁶⁷⁵ Instead these countries willingly agree to adopt the *acquis* for alternative reasons, either: to demonstrate their ability and potential to become part of the Union; to obtain greater independence from a regional hegemon (as would be the case between the Eastern Neighbourhood countries and

⁶⁷⁰ Article 10 of the Energy Community Treaty: Each Contracting Party shall implement the *acquis communautaire* on energy in compliance with the timetable for the implementation of those measures set out in Annex I.

⁶⁷¹ Heiko Prange-Gstöhl, 'Enlarging the EU's Internal Energy Market: Why Would Third Countries Accept EU Rule Export?' (2009) 37(12) Energy Policy 5296-5303

⁶⁷² As mentioned above, the EU uses the ECT and Energy Community Treaty as harder and more formal methods bringing the ex-Soviet and South Eastern Europe under the umbrella of the EU energy *acquis*. Softer methods include the ENP for the wider neighbourhood including the South Mediterranean countries and Eastern European states.

⁶⁷³ Kim Talus, *EU Energy Law and Policy: a Critical Account* (Oxford University Press, 2013) 244

⁶⁷⁴ Roman Petrov, 'Energy Community as a Promoter of the European Union's Energy *Acquis* to Its Neighbourhood' (2012) 39 (3) Legal Issues of Econ. Integration 331

⁶⁷⁵ Heiko Prange-Gstöhl, 'Enlarging the EU's Internal Energy Market: Why Would Third Countries Accept EU Rule Export?' (2009) 37(12) Energy Policy 5296-5303

Russia); or they seek greater economic exchange and gains with the adoption of common norms, rules and standards.⁶⁷⁶ Again, we can see how the Energy Community Treaty serves as instrument of the Union's normative agenda given that it facilitates the Union exerting its power by setting an example, thereby enabling change through 'contagion' based on an EU model.⁶⁷⁷ As mentioned in Chapter 2,⁶⁷⁸ Manners' referred to the EU's mechanism of spreading norms by example as 'contagion' which is prominent in the EU's regional integration.⁶⁷⁹ Through the ECT and the Energy Community Treaty, the EU can be seen to be bringing the ex-Soviet and South Eastern European states under the umbrella of the EU energy *acquis*. In so doing, the Union depicts itself as model for upholding universal norms with its ability to influence change by way of setting an example, which is a significant form and means of normative power.

Whilst the substantive provisions of the Energy Community Treaty identify EU law instruments that contracting members are required to implement⁶⁸⁰ which in turn serve to strengthen the normative power argument, the geopolitical perspective cannot be ignored. This is evident in the Union's endeavours to include transit countries within the scope of the treaty with the accession of Moldova and Ukraine which serve to bolster EU energy security and the Union's control over gas flow.⁶⁸¹ This suggests an interest on the part of the EU (and in particular the Commission as an active participant in the Energy Community)⁶⁸² to play a more significant role in Ukraine and gas trade with Russia given the ongoing conflict between these two countries.⁶⁸³ The Union's normative agenda is therefore supplemental to a geopolitical endeavour, which the Union has sought to fulfil with the accession of strategic transit states with aspirations of EU membership. In this respect the Union can be said to be using the 'carrot and stick' approach as a method of persuasion with EU membership as the potential reward for partners acceding to the Energy Community Treaty and embracing the EU's energy *acquis* export.⁶⁸⁴ Here the Union sets itself as a model to be emulated with access to its markets the ultimate award.

⁶⁷⁶ *Ibid*

⁶⁷⁷ Ian Manners, Normative Power Europe: A Contradiction in Terms? (2002) 40 *Journal of Common Market Studies* 244

⁶⁷⁸ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

⁶⁷⁹ Tuomas Forsberg, 'Normative Power Europe, Once Again: a Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies (JCMS)* 1183-1204, 1198

⁶⁸⁰ Decision on the of implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty, Ministerial Counsel Decision D/2011/02/MC-EnC, 5.10.2011.

⁶⁸¹ Katja Yafimava, *The Transit Dimension of EU Energy Security: Russian Gas Transit Across Ukraine, Belarus and Moldova* (Oxford University Press, 2011) 51

⁶⁸² The EU acts as the permanent Vice-President of the Energy Community in addition to being party to the Energy Community Treaty. Furthermore, it has bilateral relations with all nine Contracting Parties either in the context of the enlargement process or the ENP.

⁶⁸³ Katja Yafimava, *The Transit Dimension of EU Energy Security: Russian Gas Transit Across Ukraine, Belarus and Moldova* (Oxford University Press, 2011) 51

⁶⁸⁴ Michaël Hunt and Rozeta Karova, 'The Energy *Acquis* Under the Energy Community Treaty and the Integration of South East European Electricity Markets: An Uneasy Relationship?' in Bram Delvaux, Michaël Hunt, and Kim Talus (eds), *EU Energy Law and Policy Issues* (Euroconfidentiel, 2010) 59

As mentioned above, regional integration is a prominent form of power of example and thereby a normative power with the Union using its economic might to set the standard and define the terms of regional cooperation. The Energy Community therefore stands as the perfect example of the 'integration without membership' model which provides a stake in the EU internal market for third countries and promotes the Union's sectoral *acquis* beyond the Union's borders, in particular the EU's eastern neighbouring countries through the application of the EU energy *acquis*.⁶⁸⁵ Whilst the diffusion of norms strengthens any normative power argument, peace and security as an ultimate objective in the Union's neighbourhood cannot be ignored. In this respect, the Energy Community Treaty can be said to be fulfilling a dual purpose: firstly, a normative agenda of exporting the EU *acquis*; and secondly, cooperation in the energy sector in order to inter alia 'safeguard its values, fundamental interests, security' as an objective under Article 21(2) TEU. As mentioned above, whilst security is an objective of the Union, it coincides with the Union's interests, with energy security a 'fundamental interest' and objective of the EU.

There are doubts however being raised as to whether the Energy Community Treaty is an effective mechanism of EU energy *acquis* export.⁶⁸⁶ One of the fundamental shortfalls of the Energy Community Treaty is its actual implementation which was acknowledged by the Commission in its report on the said treaty.⁶⁸⁷ The Commission recognised the existing gap between political commitments and the full implementation of the Energy Community *acquis* through the enforcement of the rules adopted, which remains to be the ultimate challenge of the treaty.⁶⁸⁸ The key question remains how to prompt Contracting Parties to apply and enforce the rules which suggests that the export of an EU model embodied in EU directives and regulation is not an easy task with more complexities than initially envisioned. In this respect, one might ask how the export of the energy *acquis* may be successfully accomplished if as a legal regime it failed to achieve its intended objective.⁶⁸⁹ The Energy Community was initially based on the 2003 Energy Law Package⁶⁹⁰ which was considered insufficient to create a fully functioning competitive energy market.⁶⁹¹ However, the shift from the market-based approach of the first and second energy law packages to a philosophy of more state intervention as envisaged in the Union's second energy law

⁶⁸⁵ Roman Petrov, 'Energy Community as a Promoter of the European Union's Energy *Acquis* to Its Neighbourhood' (2012) 39 (3) *Legal Issues of Econ. Integration* 331

⁶⁸⁶ Report from the Commission to the European Parliament and the Council under Article 7 of Decision 2006/500/EC (COM(2011) 105 final) 10.3.2011.

⁶⁸⁷ *Ibid*

⁶⁸⁸ Report from the Commission to the European Parliament and the Council under Article 7 of Decision 2006/500/EC (COM(2011) 105 final) 10.3.2011

⁶⁸⁹ Kim Talus, *EU Energy Law and Policy: a Critical Account* (Oxford University Press, 2013) 246

⁶⁹⁰ The Second Energy Liberalization Package was introduced in June 2003. See Directive 2003/54/EC of 26 June 2003 concerning the common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176/37; Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57 (Second Gas Directive)

⁶⁹¹ Kim Talus, *EU Energy Law and Policy: a Critical Account* (Oxford University Press, 2013) 247

review⁶⁹² and the subsequent legal and policy instruments makes the successful export of the third energy package appear premature.⁶⁹³

In this respect it is important to note that the second energy law package⁶⁹⁴ was considered problematic given the focus on competitive markets rather than conditions for investment. Subsequently, the Commission's Energy 2020 Strategy called for secure substantial investments for which public intervention was necessary given that the required investments could not be delivered by the market alone.⁶⁹⁵ The EU's transition from a market approach to more state intervention (which is evident in the changes introduced in the third legislative package which came into force in March 2011), make application and enforcement of the third energy legislative package⁶⁹⁶ unclear with the successful export of the energy *acquis* questionable.⁶⁹⁷ It goes without saying that a 'one size fits all' approach based on an EU export model which is being imposed, will not work with all Energy Community members given the fundamental differences between these states and Western Europe. Unlike the EU, Eastern Europe, Central Asia, the Caucasus and Caspian region do not have an efficient and reliable energy infrastructure in place which means that political stability, geopolitical concerns and the relevant developmental differences have not been fully appreciated as yet.⁶⁹⁸ Whether the Union's normative behaviour is capable of achieving normative results therefore remains questionable.

4.1.5. Does the EU Achieve Normative Ends?

A normative power, as already indicated in Chapter 2,⁶⁹⁹ can also be defined as an ability to achieve normative ends. Despite the conceptual ambiguity of a normative power and what it constitutes, if we concede that the notion of a 'power' in broad terms according to

⁶⁹² The Second Energy Liberalization Package was introduced in June 2003. See Directive 2003/54/EC of 26 June 2003 concerning the common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176/37; Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57 (Second Gas Directive)

⁶⁹³ Kim Talus, *EU Energy Law and Policy: a Critical Account* (Oxford University Press, 2013) 247

⁶⁹⁴ Directive 2003/54/EC of 26 June 2003 concerning the common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176/37; Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57 (Second Gas Directive).

⁶⁹⁵ EU Commission, 'Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy' (COM/2010/0639 final)

⁶⁹⁶ The third energy package (TEP) is a legislative package for an internal gas and electricity market in the European Union. Its purpose is to further open up the gas and electricity markets in the European Union. The package was proposed by the European Commission in September 2007, and adopted by the European Parliament and the Council of the European Union in July 2009. The TEP consists of (i) a directive concerning the common rules for the internal market in electricity (2009/72/EC) (the Electricity Directive); (ii) a directive concerning the common rules for the internal market in gas (2009/73/EC) (the Gas Directive); (iii) a regulation on the conditions for access to the natural gas transmission networks ((EC) No 715/2009); (iv) a regulation on the conditions for access to the network for cross-border exchange of electricity ((EC) No 714/2009); and (v) a regulation establishing the Agency for the Cooperation of Energy Regulators ((EC) No 713/2009).

⁶⁹⁷ Kim Talus, *EU Energy Law and Policy: a Critical Account* (Oxford University Press, 2013) 285

⁶⁹⁸ *Ibid* 248

⁶⁹⁹ See Chapter 2 Section 2.2 (*Conceptualising the Union's Normative Power: Manners' Criteria and its Adherents*)

Morriss implies the ability to effect change⁷⁰⁰ then the concept of power implies the ability to achieve results. With the exception of the abolition of capital punishment, the Union's record of achieving normative results has been waning. Tocci argues that the focus on outcomes is important as it inevitably reveals the underlying interests at hand.⁷⁰¹ It is posited, as the analysis has tried to illustrate, that normative goals are seldom achieved⁷⁰² where strategic or economic interests are pushed to the fore.⁷⁰³ Manners advocates that the Union's self-conception as 'force for good' suggests that at its most basic level, the EU strives to achieve good rather than cause harm. In this respect, would the Union's ability to effect change for the greater good ultimately imply the fulfilment of the criteria of achieving normative outcomes? And if so, can one argue that the Union has achieved these normative ends with respect to its neighbourhood if it is widely argued in the literature that the Union has wielded limited results within the ENP?⁷⁰⁴ The prevailing scholarship is explicit in its critique of the Union's ability to produce any substantial diffusion of norms, values and principles to the neighbourhood⁷⁰⁵ with the Union arguably in a decline with respect to its promotion of the rule of law⁷⁰⁶ and its position as a normative hegemon in the immediate eastern neighbourhood.⁷⁰⁷ Whilst the objective of this chapter has been to apply Manners' normative criteria to determine whether the EU entails traits of a normative power, rather than provide a definitive answer to Manner's last criteria, the Union's record of achieving normative ends remains mixed and contested in the literature with the prevailing view that the Union has failed to achieve normative outcomes as illustrated above. In this respect, if we concede that normative impact denotes a traceable path between an international actor's direct or indirect actions on the one hand and reinforcement of an international rule-based environment on the other hand,⁷⁰⁸ then the Union's normative ends leaves much to be desired.

⁷⁰⁰ Peter Morriss, *Power: A Philosophical Analysis*. (Manchester University Press, 1987)

⁷⁰¹ Natalie Tocci, 'The European Union as a Normative Foreign Policy Actor' in Nathalie Tocci (ed), 'Who is a Normative Foreign Policy Actor?.' (Centre for European Policy Studies, 2008)

⁷⁰² Richard Gowan and Franziska Brantner (eds), *A Global Force for Human Rights?: An Audit of European Power at the UN* (European Council on Foreign Relations, 2008)

⁷⁰³ Petr Kratochvíl, 'The Discursive Resistance to EU-Enticement: The Russian Elite and (The Lack Of) Europeanisation' (2008) 60(3) *Europe-Asia Studies* 397-422

⁷⁰⁴ It has been argued in the literature that the

⁷⁰⁵ Richard Gowan and Franziska Brantner, (eds), *A Global Force for Human Rights?: An Audit of European Power at the UN* (European Council on Foreign Relations, 2008)

⁷⁰⁶ Stefania Panebianco, 'The Constraints on EU Action As a 'Norm Exporter' in the Mediterranean' in Ole Elgström and Michael Smith (eds), *The European Union's Roles in International Politics: Concepts and Analysis*. (Routledge, 2006)

⁷⁰⁷ Hiski Haukkala, 'The European Union as a Regional Normative Hegemon: The Case of European Neighbourhood Policy' (2008) 60(9) *Europe-Asia Studies* 1601-1622

⁷⁰⁸ Natalie Tocci, 'The European Union as a Normative Foreign Policy Actor' in Nathalie Tocci (ed), 'Who is a Normative Foreign Policy Actor?.' (Centre for European Policy Studies, 2008) 11

4.2. Normative Mechanisms

On the basis of Manners' seminal article and the related debate regarding Normative Power Europe, as already mentioned in Chapter 2,⁷⁰⁹ there is a distinction of four different mechanisms of normative power through which the Union exercises its influence.⁷¹⁰ These mechanisms include: (i) persuasion which corresponds to information diffusion; (ii) the invocation of norms through the activation of norms and commitments to which third parties have committed themselves; (iii) shaping discourse by what the Union perceives as 'normal'; and (iv) setting an example in the Union setting itself as a model to emulate. Whilst the Union can often be seen to be deploying all four mechanisms undistinguished from each other, as evidenced in the Union's campaign against capital punishment, as far as the Union's neighbourhood is concerned, the most significant and widely used forms of influence entail the invocation of norms and power of example. Taking these relevant mechanisms in the neighbourhood each in turn, the Union can be seen to be invoking norms in its neighbourhood through the conditionality clauses in its PCAs with the Eastern European and Central Asian countries as discussed above. The said clauses and undertakings that require that the respective countries conform their legislation and policies in-line with that of the Union, serve as an example of legislative approximation which is the most prominent form of *acquis* export in the neighbourhood.

Manners claims that the fact that these normative elements exist in the agreements between the Union and third countries, which can be invoked when violated, ultimately indicate the Union's normative interests. In this respect, the Union's preference for institutionalising its relations with its neighbourhood through legally binding frameworks where such normative clauses can be invoked, serve as a clear mechanism of normative power where the Union exerts its influence and its normative agenda in its immediate neighbourhood. Furthermore, with respect to the Union's efforts to export its *acquis* to the neighbourhood, the Union can be said to be engaging in 'model power' or exerting its influence through the mechanism of spreading norms by example. Here the Union can be said to be setting itself up as a model for others to emulate, with the Union inspiring change through its gravitational pull and influence as an ideal. In this respect the Union's power can be measured in its ability to effect change which the Union arguably achieves through incentives. By offering access to its markets, the EU inadvertently defines the terms and standards for inter-regional cooperation. The EU therefore acts as a model for upholding universal norms and standards with access to its markets as the ultimate reward.

⁷⁰⁹ See Chapter 2 Section 2.2 (*Conceptualising the Union's Normative Power: Manners' Criteria and its Adherents*)

⁷¹⁰ Ian Manners, 'Normative power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235-58

4.3. Chapter Conclusion

The sections above have served to illustrate that there is an impetus on the part of the Union to increasingly partake in the development of international law, which the EU contributes towards by advancing particular norms on the global stage. This impetus is predominantly evident in the development of norms which the Union seeks to advance in its bilateral, multilateral and regional interactions with its neighbourhood which alludes to the Union's efforts to Europeanise its outskirts. Beyond geopolitics, the Union can be said to be working consistently towards the development of regional economic integration as well as strengthening multilateral cooperation in political affairs with the establishment of regional and multilateral institutions⁷¹¹ (as assessed in Chapter 3).⁷¹² The EU is therefore seen to have an impact internationally through the values the Union embodies, thereby shaping what it perceives as 'normal' in the international sphere. This ultimately leads back to what Manners claimed was fundamental to the Union qualifying as a normative power – invoking norms, shaping discourse and leading by example (as illustrated in Chapter 2).⁷¹³ It also alludes to the Union's self-perception and self-projection as a different hybrid of international actor that (as mentioned in Chapter 2) ⁷¹⁴shuns away from traditional models of power politics such as military power and rather seeks to promote a rule-based international order which is predominantly normative.⁷¹⁵ Building on what has been depicted in the preceding chapters, the sections above have undertaken to show that the Union seeks to advance its own rule-based agenda beyond its perimeters to address global concerns in its neighbourhood and in turn promote its own normative standards in its periphery.

Applying these findings of the Union's role as a global actor to the energy sector and in turn the Union's normativity as explicitly derived from the normative power framework examined in Chapter 2,⁷¹⁶ the sections above have examined the extent to which the Union seeks to advance its own rule-based agenda in the energy sector, specifically through the export of its *acquis* to the Eastern and Southern fringes of its boundaries. In undertaking this analysis the chapter has assessed to what extent the Union's traits in its neighbourhood, which are typically associated with a normative power (as illustrated in Chapter 2),⁷¹⁷ apply to the

⁷¹¹ Jonatan Thompson, 'The Global Players in the EU's Broader Neighbourhood' in Sieglinde Gstöhl, and Lannon Erwan Lannon (eds), *The Neighbours of the European Union's Neighbours: Diplomatic and Geopolitical Dimensions Beyond the European Neighbourhood Policy* (Ashgate Publishing, 2015) 243

⁷¹² See Chapter 2 Section 2.2 (*Conceptualising the Union's Normative Power: Manners' Criteria and its Adherents*)

⁷¹³ See Chapter 2 Section 2.2 (*Conceptualising the Union's Normative Power: Manners' Criteria and its Adherents*)

⁷¹⁴ See Chapter 1 Section 1.1 (*The EU as a Global Actor*)

⁷¹⁵ Marise Cremona, 'Values in EU Foreign Policy' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Bloomsbury Publishing 2011) 276

⁷¹⁶ See Chapter 2 Section 2.2 (*Conceptualising the Union's Normative Power: Manners' Criteria and its Adherents*)

⁷¹⁷ See Chapter 2 Section 2.2 (*Conceptualising the Union's Normative Power: Manners' Criteria and its Adherents*)

energy sector. In this respect the section has considered to what extent the Union invokes norms and leads by example in its external relations with its energy partners and the mechanisms it uses for this cause. In undertaking this analysis, the section has examined the different bilateral and multilateral legal frameworks that the Union uses as instruments of its external energy policy in its efforts to Europeanise its neighbourhood by exporting its *acquis*. With this insight, the chapter has endeavoured to contribute towards the overall assertion of the thesis, namely that the EU is increasingly becoming an active player in the development of international law and thereby normative in the projection of its values and norms through its *acquis* export to its neighbourhood and in turn on the global stage.

The chapter has therefore served to illustrate how the Union seeks to advance its own rule-based agenda in the energy sector which suggests that the Union has evolved into a global normative energy actor. The entry into force of the Lisbon Treaty which has enhanced the Union's role as a global player worldwide and its capacity to promote its values, in particular that of a market economy to third countries and their respective energy sectors, serve to bolster the argument that the Union has evolved into a global normative energy power. This assertion is particularly evident in the Union's efforts to Europeanise its neighbourhood and in particular its energy corridors through the export of the energy *acquis* and the different legal mechanisms and instruments it employs in its Eastern neighbouring countries. By examining the different legal frameworks that the Union uses to export its *acquis* and by distinguishing the different methods of *acquis* export in the neighbourhood, the chapter has endeavoured to reveal that the Union is consistently working towards the development of regional economic integration and the establishment of regional and multilateral institutions based on the values it embodies. The Union can therefore be seen to behaving in a normative manner by invoking norms, shaping discourse and leading by example through the projection of its rule-based agenda and the export of the energy *acquis*.

In the Union's efforts to Europeanise its neighbourhood through the sectoral application of its *acquis* beyond its borders, the Union displays traits synonymous with a normative power given its influence on third country institutional and legal structures in conformity with an EU model founded on its values and norms. The normative power theory therefore provides some (as opposed to complete) rationale to the Union's behaviour in its external energy relations with its neighbouring countries and suggests that the Union is a global normative energy actor in its engagement with its neighbourhood based on the normative traits and mechanisms it deploys to exert its influence. As noted above, the Union's external action in its periphery appears to be intertwined with interests, albeit in the pursuit of values. The Union's security interests are inevitable where the Union's periphery and strategic sectors of its economy such as the energy sector are concerned. For this purpose, the normative power theory does not provide complete rationale for the Union's actions as there appears to be a clear overlap between values and interests in the Union's foreign policy which means

the EU pursues both values and interests in its external relations with its neighbourhood. Therefore, although the EU has a normative agenda, it is not always normative in its engagement with its energy corridors. The EU can thus be said to be both normative and strategic in its external energy relations with its neighbourhood, despite the Union generally giving preference to its values in its embryonic foreign policy.

Chapter 5: The EU as a Normative Power in its External Energy Relations with Russia (Case-study)

The previous chapter examined the extent to which the normative power theory explains the EU's energy relations with its eastern neighbourhood. For this purpose, as an extension of the theoretical framework, the analysis applied Manners' criteria for a normative power to determine the extent to which the Union is normative in its periphery. Against that backdrop, this chapter focuses on the test case of the thesis, namely the EU's external relations with Russia in the energy sector. The purpose of the case-study is to ascertain to what extent the theoretical framework of Manners' normative power, explains the Union's conduct in its external energy relations with Russia.

The analysis has been undertaken against the normative power framework set-out in Chapter 2⁷¹⁸ and using as a comparator the analysis in Chapter 4 on the EU energy relations with the Eastern neighbourhood. For this purpose, the chapter provides context to the case-study with an analysis of the 2009 gas crisis which was a watershed moment in EU-Russia energy relations and arguably a catalyst in the Union's normativity which set its energy actorness in motion (Section 5.1). The case-study thereafter applies Manners' normative power criteria outlined in Chapter 2⁷¹⁹, namely: (i) whether it has a normative identity; (ii) whether it has normative interests; (iii) whether it has normative means of power or influence; (iv) whether it behaves in a normative way, in accordance with existing rules and norms; and (v) whether it achieves normative outcomes (Section 5.2). The case-study then considers whether the Union uses mechanisms of a normative power outlined in Chapter 2⁷²⁰ as a means of influence in its external energy relations with Russia, namely through persuasion; invoking norms; shaping discourse and setting an example, by way of its internal market rules and regulation that has been externalised beyond its boundaries (Section 5.3). As mentioned in the preceding chapter, normative mechanisms are independent of Manners' normative power criteria and are therefore treated ancillary to the normative criteria analysis.⁷²¹ Reflecting on this analysis, the case-study draws a distinction with the analysis undertaken in the preceding chapter as a benchmark comparator of the Union's normativity in its external relations, with specific reference to the Union's role as a normative power in its neighbourhood and the Union's role as a normative power in its external energy relations with Russia (Section 5.4). Finally, the case-study examines the security nexus to the Unions energy policy and its role in the energy sphere, given the growing security approach the Union is undertaking in its external relations (Section 5.5). In undertaking this assessment, the case-study endeavours to shed light on other aspects of

⁷¹⁸ See Chapter 2 Section 2.1 (*Manners' Normative Power Europe*)

⁷¹⁹ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

⁷²⁰ *Ibid*

⁷²¹ See Chapter 4 Section 4.1 (*Theoretical Framework - Manners Normative Power Criteria*)

the Union's nature which may include an energy security dimension that implies a geopolitical goal over and above (or ancillary to) its normative agenda.

The aim of the case-study is to consider to what extent Manners' normative power theory explains the Union's conduct in its external energy relations with Russia for which the case study reveals a departure from the Union's usual value and rule-based normative approach to its relations with its neighbourhood. The thesis shows that the normative power framework's explanatory value varies depending on whether the analysis is focused on the Union's external relations with its Eastern neighbourhood or with Russia. By using the previous chapter on the Union's external energy relations with its neighbourhood (in particular its Eastern neighbourhood) as a comparator to determine the level of deviation in the Union's conduct in its relations with Russia, the case study sheds light on the extent to which the Union can be said to be normative in its external energy relations with Russia and more specifically, whether in the absence of an effective international legal architecture, the EU has evolved into a normative energy power given its constant efforts at regulatory convergence which it tries to impose on Russia a non-participant of the ENP. As mentioned in the introduction, this thesis does not purport to suggest that the notion of the EU as a normative power entails an entity that pursues values alone with no regard to its strategic interests. Rather, the case study argues that the strong security nexus in the Union's external energy relations with Russia alludes to an additional dimension to the Union's actorness which compels the Union to behave in a manner that is not purely normative but also strategic in nature. In this respect, the case-study sheds light on the extent to which the Union can be said to be a global normative energy power or whether there are other potential elements to the Union's actorness in the global energy sphere.

5.1. Context

The purpose of this section is twofold: first, to provide background to the EU-Russia relations and the simmering issues that have inhibited any constructive engagement; and second, to demonstrate how and why the Union's normative power agenda has flourished in the Union's external energy relations with Russia given the void in the legal architecture and the Union's relentless efforts to institutionalise EU-Russia relations in legally binding multilateral frameworks. For background purposes and to add context to the Union's normative power analysis, the section looks at the recurring issues in bilateral relations which include: (i) supply disruptions that have resulted in energy security concerns, the most prominent of which was the 2009 gas crisis; (ii) lack of coherence in the EU's external relations with Russia that has resulted in bilateralism as the default approach of engagement; (iii) lack of solidarity which has facilitated countries acting in pursuit of national interests rather than Union interests which has fragmented the EU energy markets; and (iv) the novelties of Lisbon that have not been utilised to their full potential to ensure

supranational coordination and integration of energy policy. The aim of this section is to provide context for some of the measures undertaken and initiatives that ensued in the EU's external energy policy after the crisis which are relevant for determining the extent to which the Union is a normative power in its external energy relations with Russia. It is against this backdrop that the Union's normativity vis-à-vis Russia in the energy sector will be tested to determine the extent to which the Union has become a global normative energy actor. The section also serves to illustrate how limitations posed by the legal infrastructure regulating the EU's external energy relations with Russia have resulted in the EU undertaking different measures which are more strategic and geopolitical in nature to ensure conformity to an EU model of values and norms. This would allude to a potential deviation from the Union's usual normative agenda in the interest of strategic objectives and interests such as energy security which the case-study will examine.

5.1.1. The 2009 Gas Crisis

Energy security is an issue of bilateral tension between the EU and Russia and remains to be the ultimate test of the EU-Russia relationship. As mentioned above and in Chapter 1⁷²², the matter was brought to the fore following the January 2009 Gas Crisis when gas supplies to Europe were disrupted following a transit dispute between Russia and the Ukraine. The gas dispute was by far the most serious of its kind with far-reaching consequences for the whole of Europe.⁷²³ The Gas Crisis revealed the EU's vulnerability in its energy dependency on Russia and raised concerns about Russia's reliability as a trading partner. The EU imports substantial amounts of oil and natural gas from Russia. At the same time, the Union serves as significant energy market for Russia. Despite this strong interdependence, a feeling of mistrust emerged as a result of Russia's alleged unpredictable behaviour (albeit provoked by Ukraine's actions), which subsequently pushed energy security to the top of the EU agenda. As a result, energy security emerged as a contentious issue in EU-Russia relations as Brussels attempted to overcome EU dependency on Russia by seeking to diversify its energy supplies.⁷²⁴

⁷²² See Chapter 1 Section 1.2 (*Background: EU External Energy with Russia*)

⁷²³ Russian gas supplies to Ukraine were cut-off on 1st January 2009, which affected exports to 16 EU member states, and Moldova. On 7th January 2009 gas supplies were completely halted to countries in South Eastern Europe, which were entirely dependent on Russian gas imports and partially halted to other countries, for a period of thirteen days. Gas deliveries to Europe and Ukraine resumed on the 29th January 2009 with the most seriously affected countries having encountered a humanitarian crisis and other countries having experienced economic problems of some sort. See Pirani, Simon, Jonathan P. Stern, and Katja Yafimava. *The Russo-Ukrainian gas dispute of January 2009: a comprehensive assessment* (Oxford Institute for Energy Studies, 2009) 4

⁷²⁴ Leal-Arcas, Rafael, *The EU and Russia as Trading Partners: Friends or Foes?*, European Foreign Affairs Review, Volume 14, p.346 (2009)

5.1.2. Lack of Coherence in External Relations

As Russia's biggest trading partner, the EU imports a significant volume of energy, which amounts to approximately 50% of its energy consumption that is expected to rise to 70% by 2030.⁷²⁵ As such, security and diversification of energy supplies are important issues for the EU, as a significant consumer and importer of energy.⁷²⁶ Nonetheless, the EU's policy of diversification of supply is constantly being undermined by the inconsistency between member states in signing bilateral deals with major energy suppliers (such as Gazprom) to pursue national interests. The bilateral pipeline deals with Russia including South Stream with Bulgaria,⁷²⁷ Nord Stream with Germany,⁷²⁸ and the extension of Turkish Stream⁷²⁹ with Greece give credence to this assertion which will be discussed further below. Such deals are predominantly viewed by many countries within the EU – mostly Central and Eastern European states – as a flagrant example of quick bilateral politics with negotiations at an EU level largely absent and thus perceived as lacking any form of coherence and thereby solidarity.⁷³⁰

5.1.3. A Call for Solidarity and Speaking with One Voice

The EU's inability to speak with one voice gives credence to the mantra 'too little Europe, too little union' which is arguably one of the reasons why the EU has thus far failed to develop a coherent strategic approach towards Russia.⁷³¹ Developing a coherent external energy policy depends to a large degree on institutions following general rules rather than Member States cutting individual deals.⁷³² The Commission, which is in favour of pursuing a coherent external energy policy, was keen to express in launching its 2020 Energy Strategy⁷³³ that national initiatives undermine the Union's ability to leverage its size and strength as a market power at the negotiating table with Russia.⁷³⁴ EU Member States that prefer to pursue individual barter deals inadvertently enable supplier countries to pursue their own agenda, thus creating a vicious circle, which is hard to break.⁷³⁵ Inevitably, in order

⁷²⁵ International Energy Agency (2004)

⁷²⁶ Anna Aseeva, 'Re-thinking Europe's Gas Supplies after the 2009 Russia-Ukraine Crisis' (2010) 8(1) *China and Eurasia Quarterly* 127

⁷²⁷ South Stream is an abandoned pipeline project to transport natural gas of the Russian Federation through the Black Sea to Bulgaria and through Serbia, Hungary and Slovenia further to Austria.

⁷²⁸ Nord Stream, an existing 55 bcm/y pipeline that connects Russia to Germany via the Baltic Sea, which is to be extended to double its capacity following an agreement between Gazprom, Royal Dutch Shell, E.ON and OMV.

⁷²⁹ Turkish Stream aims to transport gas from Azerbaijan's Shah Deniz II field in the Caspian Sea, one of the world's largest gas fields, by the end of the decade.

⁷³⁰ Sijbren De Jong and Jan Wouters, 'European Energy Security Governance: Key-Challenges and Opportunities in EU-Russia Energy Relations' (*Leuven Centre for Global Governance Studies*, 2011) 38

⁷³¹ Rafael Leal-Arcas, 'The EU and Russia as Energy Trading Partners: Friends or Foes?' (2009) 14(3) *European Foreign Affairs Review* 351

⁷³² European Commission, *Energy 2020 A Strategy for Competitive, Sustainable and Secure Energy*, COM (2010) 639, 10 November 2010.

⁷³³ Commission Communication, *Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy*, Brussels, 10 November 2010, COM (2010) 639 final, p.2

⁷³⁴ European Commission, *Energy 2020 A Strategy for Competitive, Sustainable and Secure Energy*, COM (2010) 639, 10 November 2010

⁷³⁵ Richard Youngs, *Energy Security: Europe's New Foreign Policy Challenge* (Routledge 2009) 82.

to overcome this practice, it is important that Member States act to the benefit of a collective whole in their bilateral relations with Russia rather than pursuing what is to their exclusive benefit.⁷³⁶ The lack of coherence and unified stance within the EU was apparent in a series of high profile cases, the deal between Gazprom and Germany E.ON Ruhrgas arguably being the most prominent. The deal for the construction of the Nord Stream⁷³⁷ pipeline was seen by some as a deliberate move to bypass traditional transit countries, on a bilateral commercial basis, lacking any form of solidarity.⁷³⁸ Today, these controversial pipelines are still eminent with the Nord Stream 2 a case in point. Other controversial pipeline deals have included the aborted South Stream and Turkish Stream.⁷³⁹ The pipelines are considered controversial by the EU because they are in direct competition with EU-backed pipelines⁷⁴⁰ and may therefore lead to overcapacity.⁷⁴¹ Furthermore, the pipelines need to comply with European legislation which remains questionable given the South Stream project was aborted due to inconsistencies with EU law.⁷⁴² The Union's inability to form a united front and speak with one voice in its dealings with Russia in addition to the Union's lack of coherence in its external energy policy (evidenced by the bilateral pipeline deals struck with Russia) are said to have initiated a call for greater EU competence in the energy sphere.⁷⁴³

⁷³⁶ European Commission, Energy 2020 A Strategy for Competitive, Sustainable and Secure Energy, COM (2010) 639, 10 November 2010.

⁷³⁷ Nord Stream is an existing 55 bcm/y pipeline that connects Russia to Germany via the Baltic Sea, which is to be extended to double its capacity following an agreement between Gazprom, Royal Dutch Shell, E.ON and OMV announced on 18 June 2015. Reuters, 'Russia's Gazprom to Expand Nord Stream Gas Pipeline with E.ON, Shell, OMV', 18 June 2015 <<http://uk.reuters.com/article/2015/06/18/energy-gazprom-pipeline-idUKL5N0Z42OB20150618>> accessed 25 June 2015

⁷³⁸ Ariel Cohen, 'The North European Gas Pipeline Threatens Europe's Energy Security' (2006) 1980 Background (Heritage Foundation); Gordon Feller, 'Nord Stream Pipeline Project Stokes Controversy' (2007) 234(3) Pipeline & Gas Journal 92.

⁷³⁹ Turkish Stream is a 63 bcm/y pipeline connecting Russia to Turkey via the Black Sea which is intended to carry Russian gas to South East Europe. EurActiv, 'Commission Unimpressed by Russia's Pipeline Offensive', 19 June 2015

⁷⁴⁰ Turkish Stream is considered a rival to the Western-backed Trans Adriatic Pipeline (TAP) pipeline project which will carry Azeri gas to European markets. The pipeline aims to transport gas from Azerbaijan's Shah Deniz II field in the Caspian Sea, one of the world's largest gas fields, by the end of the decade. TAP is part of the Southern Gas Corridor and is seen as Europe's alternative to its reliance on Russia. See Slawomir Raszewski, 'A Perfect Storm? Energy Union, Energy Security and the EU-Russia Energy Politics' (*EUCERS Newsletter*, Issue 45, 2015) <<http://www.kcl.ac.uk/sspp/departments/warstudies/research/groups/eucers/newsletter45.pdf>> accessed 15 July 2015

⁷⁴¹ Overcapacity as far as pipelines are concerned means that there is more gas produced than needed thereby making the industry less profitable.

⁷⁴² Inconsistencies between the EU's TEP and Russia's unfavourable foreign investment climate were brought to the fore by the case of South Stream. The case related to a joint venture between Russia and Bulgaria regarding the South Stream gas pipeline, which was incompatible with EU law. The agreement violated EU ownership unbundling rules in that it provided exclusive gas transportation to the shareholders of South Stream. An amendment to the agreement was subsequently made making such exclusivity subject to the Commission's approval. The problem however related to six intergovernmental agreements, which breached EU law. In particular the agreement between Russia and Bulgaria, which provided for unrestricted transit of Russian gas through Bulgaria, that violated the EU's third party access rules. Bulgaria assured the Commission it would revise the agreement, which prompted criticism from Putin regarding EU legislation and the ownership unbundling rules. The Commission's objections to South Stream ensued, citing breach to EU law, which eventually resulted in Russia aborting the project. See EUobserver, 'EU and Russia to Sign Trade Memo Amid US Mockery' (2010) <<http://euobserver.com/9/31442>> accessed 10 September 2016; Euractiv, 'EU Backs Russia's WTO Bid at 'Best Ever Summit'' <<http://www.euractiv.com/en/global-europe/eu-backs-russias-wto-bid-best-ever-summit-news-500397>> accessed 10 March 2016.

⁷⁴³ Commission Communication, Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy, Brussels, 10 November 2010, COM (2010) 639 final, 17

As such the Treaty of Lisbon came into force creating a platform for the Union's normative agenda in its external relations and the inception of the Union's role as an energy actor.⁷⁴⁴

5.1.4. The Novelties of Lisbon and the 2009 Gas Crisis

The Lisbon Treaty's creation of a specific legal basis for energy was intended to prompt impetus for greater coherence in external energy relations,⁷⁴⁵ however the fact that energy remained an area of shared competence meant that Member States were at liberty to decide their own energy mix and ultimately this made room for contradictive actions amongst Member States with no apparent synergy between them. This was undoubtedly the case with many Central and Eastern European Member States with few gas pipeline interconnections. Lisbon's creation of a specific legal basis for energy with detailed objectives and new actors such as the High Representative and EEAS set the stage for greater coherence in the EU's external energy policy. The European Commission and the majority of Central and Eastern European Member States were in favour of greater 'Europeanisation' of energy policy and an end to the pipeline politics and bilateral deals that had created a rift between old and new member states. Central and Eastern European Members were in favour of a more active role undertaken by the Commission which larger Member States such as Germany and France considered an impingement of their sovereignty. Different energy exposures have largely been the reason for the lack of coherence in the Union's external energy policy which ultimately undermined the EU's energy security initiatives and their implementation.

For this reason, the Commission has advocated that the Lisbon Treaty be utilised to its full potential through the consistent implementation of the solidarity principle by all member states, to avoid any further fragmentation in the EU's energy market.⁷⁴⁶ This will also ensure coherence in external energy relations rather than the 'call for solidarity' being reduced to an empty phrase that is continuously repeated with little consequence. Inevitably, the EU's committed quest for security of supply and a fully integrated internal energy market have been buttressed by the announced plans for the creation of an Energy Union which would facilitate the Commission's calls for further coordination at a national level to speak with one voice in the EU's external energy policy. This inevitably shows the EU's commitment to changing the status quo of dealing with third country suppliers (in particular Russia) largely on a bilateral basis to engage more strongly with enhanced cooperation between member states as a collective whole, on matters pertaining to energy. Nevertheless, despite the Commission's calls for supranational coordination and integration in energy policy which

⁷⁴⁴ Sijbren De Jong and Jan Wouters, 'European Energy Security Governance: Key-Challenges and Opportunities in EU-Russia Energy Relations' (2011) Leuven Centre for Global Governance Studies 40.

⁷⁴⁵ Commission Communication, Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy, Brussels, 10 November 2010, COM (2010) 639 final, 17

⁷⁴⁶ *Ibid*

have been bolstered by the formation of an Energy Union⁷⁴⁷ (to be examined later in this chapter), the aims of the Union's energy policy cannot be implemented in a manner which impinges on the sovereign rights of member states to exploit their energy resources as they see fit.⁷⁴⁸ Whilst the 2006 and 2009 gas crises prompted member states heavily dependent on Russian gas to call for greater integration in the form of an Energy Union, it is inevitably the case that member states less reliant on Russia's natural resources have been reluctant to agree to this further integration in energy policy. Therefore, while the Energy Union stands as testament to the EU's vision of member states acting in true solidarity and trust in the security of EU energy supply, the likelihood of this initiative, is something that remains to be seen.

The purpose of this section has been to provide context to the Union's normative agenda and engagement with Russia following the 2009 Gas Crisis. The analysis has revealed that the crisis was a watershed moment in the EU's external relations with Russia as it brought the Union's energy dependency on Russia to the fore and subsequently prompted changes introduced in the Lisbon Treaty that were aimed at bolstering European energy security. This is significant for the assessment of the Union's normative power status because it sets the scene and establishes a backdrop against which the Union's manoeuvres can be analysed in its efforts to ensure its security of supply and the extent to which these actions are normative. The section has also endeavoured to highlight simmering issues in EU-Russia energy relations such as the lack of coherence and solidarity which have strengthened Russia's position in the European market and in-turn politicised Gazprom's activities in the gas industry. Again, this is significant for the normative power argument as the Union's persistent efforts to address these issues through legal instruments reveal aspects of its identity which allude to a normative power.

In an effort to address these recurring challenges that have been fuelled by energy policy competences retained at a Member State level rather than a Union level which is dependent on voluntary cooperation of Member States, there has been a more assertive stance on the part of the Union to facilitate a progressive shift of competences from Member States to the EU to facilitate supranational coordination and integration of European energy policy. The announced plan of the Energy Union Strategy (which will be assessed later in this chapter) is an effort on the part of the Commission to coordinate energy supply with the aim of providing secure, sustainable, competitive and affordable energy for the purpose of curbing Russia's leverage over EU energy dependency. In so doing, we can see the Union

⁷⁴⁷ The Energy Union Strategy is a project of the European Commission to coordinate the transformation of European energy supply, which was launched in February 2015 with the aim of providing secure, sustainable, competitive, affordable energy supply.

⁷⁴⁸ Article 194(2) TFEU states that energy policy measures undertaken 'shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply'.

undertaking a more active role in the energy realm which strengthens the view that the EU is increasingly becoming a global energy power and in its use of legal frameworks to entrench energy relations with Russia, fundamentally normative. The EU can therefore, as this thesis will show, be said to be evolving into a global normative energy actor given its increased competence in the energy realm and use of legal frameworks to push its normative agenda in its external energy relations.

5.2. Theoretical Framework – Manners’ Normative Power Criteria

The section to follow applies Manners’ normative power criteria to determine and assess to what extent the Union can be said to be a normative power in its external energy relations with Russia. As mentioned from the outset in Chapter 2⁷⁴⁹, the thesis question regarding the extent to which the Union qualifies as a normative power has been difficult to determine given (as mentioned in Chapter 2⁷⁵⁰) that the parameters have not been clearly defined.⁷⁵¹ The analysis to follow will apply Manners’ criteria as a means of deciphering the extent to which the Union has any normative aspects to its nature and engagement to its external energy relations with Russia, relative to the concept as determined in Manners’ seminal article which coined the phrase.⁷⁵² In so doing the analysis will endeavour to complement the Normative Power Europe literature by revealing additional dimensions to the Union’s nature and in turn its normative agenda which is an overall objective of this thesis.

5.2.1. Does the EU have a Normative Identity in its External Energy Relations with Russia?

As mentioned in the preceding chapter and as illustrated in Chapter 2,⁷⁵³ the main assertion which Manners makes in relation to the Union’s normative identity is that it is derived from its historical context, hybrid polity and political-legal constitution.⁷⁵⁴ In Manners’ view, the normative constitution of Europe predisposes it to act in a normative way.⁷⁵⁵ According to Manners, the EU does not only promote norms but it does so in a normative manner. Manners argues that the most important factor shaping the role of the Union is not what it says or does but what it is,⁷⁵⁶ which according to Manners (as illustrated above) is normative. Therefore, in concurrence with the preceding chapter, Manners first criteria

⁷⁴⁹ See Chapter 2 Section 2.1 (*Manners’ Normative Power Europe*)

⁷⁵⁰ *Ibid*

⁷⁵¹ The literature has often advocated that in order to succeed in applying the normative power argument, a firmer theoretical basis with clear analytical concepts and critical standards is required. See Helene Sjursen, ‘Values or Rights? Alternative Conceptions of the EU’s “Normative Role”’ in Ole Elgström, and Michael Smith (eds) *The European Union’s Roles in International Politics: Concepts and Analysis* (Routledge, 2006) 105-120, 98

⁷⁵² Ian Manners, ‘Normative power Europe: A Contradiction in Terms?’ (2002) 40(2) *Journal of Common Market Studies* 235-58

⁷⁵³ See Chapter 2 Section 2.1 (*Manners’ Normative Power Europe*)

⁷⁵⁴ Ian Manners, ‘Normative power Europe: A Contradiction in Terms?’ (2002) 40(2) *Journal of Common Market Studies* 235-58, 252

⁷⁵⁵ *Ibid*

⁷⁵⁶ *Ibid*

suggests that the Union constitutes a normative identity by virtue of its hybrid polity and *sui generis* nature. This fulfilment is independent of the Union's external relations with its neighbourhood or Russia, given that it relates to its polity and political-legal constitution.

As a counter-argument however, it is important to recall the 2009 Gas Crisis which triggered a challenge for the Union that required immediate attention and swift resolution. It is against this backdrop that the Union's normative agenda needs to be tried and tested to determine the extent to which the EU is a normative power in its external energy relations with Russia. For the purpose of determining whether the Union has a normative identity, the novelties of Lisbon that transpired following the 2009 Gas Crisis and to what extent these developments helped buttress the Union's normative agenda and role as an energy actor (already considered in chapter 3)⁷⁵⁷ are significant if we concede that the Union's normativity is derived from its treaty-based legal order and predisposition to act in a normative way (as posited by Manners). By way of example, the Lisbon Treaty's solidarity provision of Article 122(1) TFEU which extends beyond a security of supply mechanism can arguably be said to be facilitating an effort on the part of the Union to remedy the lack of coherence in its external relations (in particular with major energy suppliers such as Russia). Since the crisis, the EU appears to have been on a quest to bolster its energy security in terms of diversification of its supplies and reducing the number of member states exclusively dependent on a single energy supplier. It is in this vein that the Union's energy policy and growing competence should be critically assessed and the implications of Lisbon in the energy field analysed to determine whether the Union has evolved into a global normative energy actor in its external energy relations with Russia and whether Manners' criteria regarding the Union's normative identity is sufficiently nuanced enough to account for the Union's normative agenda in the energy sector which includes a security dimension that inadvertently would entail strategic considerations in the Union's external action and engagement.

5.2.2. Does the EU have Normative Interests in its External Energy Relations with Russia?

As mentioned in Chapter 2⁷⁵⁸ and echoed in Chapter 4⁷⁵⁹, there appears to be a fairly widely shared assumption that a normative power has normative interests which are different to that of a strategic power which has strategic or self-regarding interests.⁷⁶⁰ In other words, a normative power engages in foreign policy goals that are not means/end oriented but rather

⁷⁵⁷ See Chapter 3 Section 3.2.2 (*Further Novelties Introduced by Lisbon*)

⁷⁵⁸ See Chapter 2 Section 2.1 (*Manners' Normative Power Europe*)

⁷⁵⁹ See Chapter 4 Section 4.1.2 (*Does the EU have Normative Interests in the Neighbourhood?*)

⁷⁶⁰ See Chapter 1 Section 1.1 (*The EU as Global Actor*) and Chapter 2 Section 2.1 (*Manners' Normative Power Europe*)

a statement of values that distinguishes the EU from other foreign policy actors.⁷⁶¹ Normative interests therefore refer to the wider milieu goals (i.e. values) than possession goals (i.e. interests)⁷⁶² as already mentioned in Chapter 4.⁷⁶³ Although the EU is said to be riddled by an interests vs. values dilemma⁷⁶⁴ in its external energy relations with Russia and its neighbourhood, there is consensus in the literature that the Union generally gives prominence to values in its foreign policy agenda in its neighbourhood.⁷⁶⁵ More specifically, drawing from the extensive analysis of Chapter 4⁷⁶⁶ which scrutinised the role of values in the Union's external relations, the EU gives preference to its milieu goals as a foreign policy objective in its neighbourhood in its efforts to transform its outskirts and Europeanise its periphery, with the ENP being a prime example. Nevertheless, the study endeavours to provide a counterpoint, that whilst the EU suffers from an interest vs values dilemma in the neighbourhood and Russia, there is often an overlap with both values and interests applying in the Union's foreign policy agenda. However, with respect to the EU's energy security and its external relations with Russia, the Union gives preference to its strategic interests with the said dilemma less pronounced or even a moot point. Therefore, while the general view and theory regarding the EU's external relations with the ENP is that values prevail, in the energy context in both its external relations with the Eastern neighbourhood and Russia the analysis has found (as illustrated in Section 4.1.2 generally and 4.1.2.1 specifically vis-à-vis the energy sector) that the EU gives priority to its possession goals and strategic objectives such as energy security which are ancillary to the Union's normative agenda.⁷⁶⁷

If we consider, as indicated by the analysis in the context section of this chapter (Section 5.1), that energy security is an issue of bilateral tension given the Union's strong dependence on Russian energy supplies, the Union's manoeuvres in the interest of securing its energy supply would seem to be the prevailing goal. Therefore whilst the EU is considered to be a 'community of values' that seeks to promote its rules and values both within and beyond its borders as evidenced in the ENP, in its relations with Russia the EU largely pursues economic or security interests. As mentioned elsewhere,⁷⁶⁸ it would be unrealistic to expect a global actor like the EU to pursue foreign policy goals devoid of economic and security interests. Notwithstanding, the question remains (which this thesis will aim to answer) whether in its external energy relations with Russia, in contrast to its

⁷⁶¹ Asle Toje, 'The Consensus—Expectations Gap: Explaining Europe's Ineffective Foreign Policy' (2008) 39(1) Security Dialogue 121-141, 127

⁷⁶² Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Johns Hopkins University Press, 1965) 67-80

⁷⁶³ See Chapter 4 Section 4.1.2.2 (*Values, Principles and Objectives in the Union's External Relations*)

⁷⁶⁴ See Chapter 4 Section 4.1.2.1 (*The Interests vs Values Dilemma in the Union's Neighborhood*)

⁷⁶⁵ Stefan Lehne, *Time to Reset the European Neighborhood Policy* (Carnegie Endowment for International Peace, 2014) 221

⁷⁶⁶ See Chapter 4 Section 4.1. 2 (*Does the EU have Normative Interests in the Neighbourhood?*)

⁷⁶⁷ Kristian L. Nielsen and Maili Vilson, 'The Eastern Partnership: Soft Power Strategy or Policy Failure?' (2014) *European Foreign Affairs Review* 19(2) 235

⁷⁶⁸ See Chapter 1 Section 1.1 (*The EU as Global Actor*)

neighbourhood, the Union behaves in a manner which would suggest a strong preference for strategic interests (energy security) over normative interests (the promotion of norms and values).

5.2.3. Does the EU Engage in Normative Behaviour in its External Energy Relations with Russia?

As was illustrated in Chapter 2,⁷⁶⁹ one of the fundamental ways of defining a normative power is ascertaining whether it behaves according to international norms. Even though there are many ways in which an entity may not comply with international law, for the purpose of Manners' criteria and testing the normative power theory, here we are referring to the Union's preference for upholding international law and what is perceived to be universal norms and standards. In this respect, the answer to the question as to whether the EU exhibits normative behaviour in its external energy relations with Russia, would be in the affirmative given the Union's adherence and commitment to international norms (as indicated in the preceding chapter⁷⁷⁰ and as will be explored further below). Manners claims that a normative power obeys norms such as international law and promotes universal rules and principles such as multilateralism. In this respect, the EU's preference for institutionalising its relations with Russia within shared multilateral frameworks, upholding international law, universal norms and principles, serve to entrench the Union's normative agenda and fulfil Manners' criteria with regard to the exercise of normative behaviour in the EU's external relations with its strategic partner.

For the purpose of illustrating the Union's normative behaviour through the commitment to international law and legally binding frameworks, the section to follow outlines the background to EU-Russia legal relations by considering the legal frameworks in place which regulate their bilateral relations and energy trade. For this purpose the section focuses on the instruments of international law, at both a bilateral and multilateral level and consider to what extent these frameworks provide an effective⁷⁷¹ legal infrastructure in the context of energy trade following Russia's withdrawal from the ECT which sets the stage for the Union's subsequent manoeuvres in the energy sphere. Russia's withdrawal effectively called the legal basis of EU-Russia energy relations into question given the void in the legal architecture. It is against this backdrop that the scope of the Union's normativity was brought to the fore setting a platform for the Union's normative agenda in its persistent efforts to keep EU-Russia relations ingrained within legally binding instruments. As mentioned

⁷⁶⁹ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

⁷⁷⁰ See Chapter 4 Section 4.1.4 (*Does the EU Engage in Normative Behaviour in the Neighbourhood and their Energy Sectors?*)

⁷⁷¹ In the context of legal frameworks, 'effective' refers to the extent to which the said legal frameworks have been successful in producing a desired or intended results such as constructive engagement and energy relations between the EU and Russia founded on international norms and standards.

elsewhere,⁷⁷² the Union predominantly pursues a market-based approach in its external relations in particular in its external energy relations with Russia. It is considered that a market-based approach entails decisions based on economic and commercial considerations, formulated within a regulatory environment which is driven by the rule of law and stable regulatory conditions which foster a climate of foreign investment.⁷⁷³ Whilst promoting a market economy reflects the underlying goals of the internal energy market, in the external dimension it correlates to policy with the overarching aim of creating international legal frameworks that reflect market principles which facilitate secure energy supplies.⁷⁷⁴ The Energy Charter of the 1990s and the Energy Community in the early 2000s are prime examples of these legal frameworks, however as suggested above and as will be illustrated below, the Union's law-based market oriented approach does not entail a universal *modus* that is embraced by all states which would explain the rationale for Russia's withdrawal from the ECT and its reluctance to join the ENP.

Through an analysis of the prevailing instruments in place, the chapter illustrates that there are significant gaps in the legal infrastructure following Russia's withdrawal from the ECT that has called the legal basis of EU-Russia energy relations into question and subsequently created a platform for the Union's normative agenda in its efforts to keep Russia entrenched in legally binding frameworks. The purpose of the analysis is to illustrate the Union's efforts to entrench EU-Russia relations in international legal frameworks given the prevailing legal challenges and deficiencies that exist in the legal architecture. The section highlights the strong linkages between the fragmented legal architecture and the Union's subsequent manoeuvres in its external energy policy vis-à-vis Russia which is fundamentally normative and ties back to the normative power framework.

The Union's continuous efforts to institutionalise its relations with Russia in legally binding frameworks despite the recurring challenges and Russia's resistance, serves to illustrate the Union's preference for legally binding frameworks which validate its normative power argument and Manners criteria regarding normative behaviour. However, in Russia's reluctance to conform to these legally binding frameworks and given the deficiencies in the legal architecture itself, the Union's manoeuvrings (rather than Member State reactions) reveals other dimensions to its nature which suggest strategic considerations when dealing with partners such as Russia. The aim of this section is to reveal the legal void in the architecture regulating EU-Russia energy relations which has effectively created scope for the Union's normative power through the use of legally binding frameworks. However in

⁷⁷² See Chapter 3 (*The Internal Energy Market and External Relations – the CCP Analogy*)

⁷⁷³ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 450

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⁷⁷⁴ Commission Communication, *External Energy Relations – From Principles to Action*, Brussels, 12 October 2006, COM (2006) 590 final.

Russia's reluctance to conform to these instruments, the EU has had to resort to alternative measures, which are not strictly normative which suggest other dimensions to its nature and role as a global actor.

5.2.3.1. Limitations of International Legal Frameworks Regulating EU-Russia Energy Relations

The legal framework regulating EU-Russia relations is predominantly based on the PCA, which entered into force in 1997. Since the PCA's conclusion in 1994, much has changed – Russia evolved into a market economy and the EU enlarged to 28 member states. As a result of these developments, the PCA has become out-dated, as several provisions of the agreement (which will be examined below) are incongruous rendering the PCA as a legal instrument obsolete.⁷⁷⁵ In this context, it is argued that a modernisation of EU-Russia legal relations is urgently needed to ensure regional stability and economic integration between the EU and post-Soviet space.⁷⁷⁶ The general consensus within the EU and Russia is that the legal framework regulating their bilateral relations needs updating given that the PCA, which reflects the spirit of the nineties, is not well equipped to deal with the current challenges of the 21st century.⁷⁷⁷ A weak dispute settlement mechanism; an inability on the part of the Union and Russia to adopt legally binding decisions; and the lack of any legal provisions addressing energy, are some of the deficiencies that need to be rectified in a revised legal framework.⁷⁷⁸ Despite Russia's WTO accession, which may have resolved some of the PCA's shortcomings, a modernisation of bilateral legal relations remains imperative for the purpose of achieving a solid Strategic Partnership and the legal certainty of an updated legal infrastructure.⁷⁷⁹ The limitations to the international legal frameworks have spurred the Union's normative presence given its commitment to international law and its constant efforts to institutionalise EU-Russia energy relations in legally binding frameworks. It follows that Union's efforts to modernise the legal architecture through: (i) its negotiations with Russia regarding a revised bilateral legal framework to replace the outdated PCA; (ii) efforts to lure Russia back to the ECT through the Energy Dialogue; and (iii) its active involvement in Russia's WTO accession to keep Russia firmly entrenched in the multilateral trading system, all serve to illustrate the Union's normative behaviour.

Nevertheless, despite the Union's normative behaviour, the current political climate has taken its toll on the EU–Russia energy partnership which will inevitably affect the need for

⁷⁷⁵ Emerson, Michael, Fabrizio Tassinari, and Marius Vahl. 'A New Agreement between the EU and Russia: Why, what and when?' *CEPS Policy Briefs* 1-12 (2006) 1

⁷⁷⁶ Van Elsuwege, Peter, 'Towards a Modernisation of EU-Russia Legal Relations?' *EU-RUSSIA PAPERS* 5 (2012) 1

⁷⁷⁷ Van Elsuwege, Peter, 'Towards a New Strategic Partnership Agreement: EU-Russia Relations at the Crossroads' *Russia and the EU in World Politics* (2009) Moscow State Institute of International Relations 10 (37) 23

⁷⁷⁸ *Ibid*

⁷⁷⁹ *Ibid*

legal and institutional reform. Bilateral ties have been hindered by the Crimea crisis and sanctions, which have effectively resulted in the EU and Russia entering a period of stalemate. Russia has subsequently gone from being described as a 'strategic partner' to being labelled as a 'strategic challenge' which was revealed in the new EU Global Strategy on Foreign and Security Policy at the end of June 2016.⁷⁸⁰ Nevertheless, a solid bilateral legal framework is required to foster cooperation and in turn facilitate trade and investment in the energy sphere. As one of the EU's largest trading partners and a major supplier of energy exports, there is no justifiable alternative to Russian energy sources in the short to medium term.⁷⁸¹ It is therefore imperative (from an EU perspective) that the current basis for cooperation is revised and that negotiations regarding the new PA are resumed so that a more comprehensive framework can be put in place. Notwithstanding, given the current political climate, the likelihood thereof remains to be seen which explains the Union's normative agenda and other strategic endeavours to ensure cooperation in the energy sphere with its strategic energy partner on which the EU is heavily dependent.

It is important to note that whilst a revised framework will facilitate cooperation and thereby security of energy supply through legal certainty and stability, this will not provide a blanket solution to all issues in EU-Russia relations which are in essence geopolitical at heart. It is in the absence of a solution to the prevailing issues in EU-Russia energy relations that we see the Union pushing its normative agenda and in the deficiencies of the legal frameworks in place, resorting to more geopolitical and strategic means of engagement. The analysis above on the incompatibilities between the ENP and Russia's initiatives serve to illustrate this point. Here we can see Russia setting itself up as an ideological alternative to the EU and the ENP with the formation of a customs union for the post-Soviet space. It also explains the reasons for Russia's objections to participating in the ENP which advocates legal approximation and consistency with Union norms and values. In this respect, the question which ultimately remains (which will be explored in detail below) is whether, in the absence of an effective international legal architecture, the EU has reinforced its normative power status in its unabated efforts to fix EU-Russia energy relations in legally binding multilateral frameworks for the purpose of ensuring regulatory coherence in favour of an EU model which the EU has imposed on Russia as a non-participant of the ENP.

⁷⁸⁰ Euractiv, 'EU to Label Russia a 'Strategic Challenge'', 31 May 2016 <<http://www.euractiv.com/section/global-europa/news/eu-to-label-russia-a-strategic-challenge/>> accessed 31 May 2016

⁷⁸¹ Maïté de Boncourt, 'The New Geopolitics of European Energy' (Ahtisaari Symposium: The New Geopolitics of European Energy, Wilson Center Global Europe Program, Washington D.C., 5 May 2014) <http://www.wilsoncenter.org/sites/default/files/Energy%20Geopolitics%20Transcript_formatted.pdf> accessed 8 March 2015

5.2.3.2. The Main Instruments in the Union's External Energy Relations with Russia

5.2.3.2.1. Partnership and Cooperation Agreement (PCA)

The PCA and its Common Strategy (its partner document from 1999) committed the EU to fostering close ties with Russia by strengthening their strategic trade relationship. Recognising the need to promote stability in Eastern Europe and the USSR, the EU launched programmes providing funding for restructuring and growth to promote stability on the continent. The PCA was initiated at the 1991 EC Summit whereby it was decided that an agreement beyond donor aid was required extending relations between the EU and Soviet Union from economic into the political and social realm.⁷⁸² The PCA entered into force on 1 December 1997 for an initial period of ten years, which pursuant to Article 106 is automatically extended each year unless either party denounces at least six months before the termination date.⁷⁸³ The PCA therefore continues to apply despite bilateral relations having extended beyond the tenure of the PCA.⁷⁸⁴ However, the asymmetrical nature of the PCA is incongruous with Russia's desire for an equal partnership, as the PCA presupposes a unilateral adaptation of Russian legislation and conformity to EU values and norms.⁷⁸⁵ The PCA therefore serves to strengthen any normative power argument given the PCA's objective of legislative approximation to an EU model. If we concede, as shown in Chapter 4,⁷⁸⁶ that the PCA is an instrument that the Union predominantly uses to influence its periphery in conformity to market economy norms and values with the gradual integration and gravitation towards European markets, then the PCA is undoubtedly an instrument that confirms the EU's normative agenda.

The PCA's clear objective is the legislative approximation of Russia's legislation to that of the EU in order to facilitate Russia's political and economic transition. The EU considers respect for the rule of law, democracy and human rights as important values, which will expedite Russia's integration in a world economy which is articulated from the outset in the PCA: 'CONVINCED of the paramount importance of the rule of law and respect for human rights, particularly those of minorities, the establishment of a multi-party system with free and democratic elections and economic liberalization aimed at setting up a market economy.'⁷⁸⁷ From the above, we can see how the Union's normative power and trends

⁷⁸² Timmins, Graham, 'Strategic or pragmatic partnership? The European union's policy towards Russia since the end of the Cold War' *European Security* 11.4 (2002): p.80.

⁷⁸³ Emerson, Michael, Fabrizio Tassinari, and Marius Vahl. 'A New Agreement between the EU and Russia: Why, what and when?.' *CEPS Policy Briefs* 1-12 (2006) 1

⁷⁸⁴ *Ibid*

⁷⁸⁵ Van Elsuwege, Peter. "Towards a modernisation of EU-Russia legal relations?." *EU-RUSSIA PAPERS* 5 (2012) 2

⁷⁸⁶ See Chapter 4 (*Legislative Approximation as the Method of Acquis Export in the Neighbourhood*)

⁷⁸⁷ There are several provisions that are outdated in the PCA, for example the preamble and Article 1, which refers to Russia as an economy in transition, despite Russia's market economy status and WTO accession. See PCA Preamble: 'RECOGNIZING that Russia is no longer a state trading country, that it is now a country with an economy in transition and that continued progress towards a market economy will be fostered by cooperation between the Parties in the forms set out in this Agreement'. See also Article 1 PCA: 'A Partnership is hereby

filter through given the impetus to facilitate Russia's transition to a market economy in a manner consistent with EU values and alignment with European legislation. Despite this clear objective and precondition to strengthening economic ties with the EU, Article 55(1)⁷⁸⁸ of the PCA imposes a 'soft law' obligation rather than a formal legal commitment - that Russia shall endeavour to ensure that its legislation is compatible with EU legislation – which is ambiguous and open-ended, leaving Russian authorities with much room for manoeuvre with no obligation of implementation. Whilst a 'soft law' obligation would ordinarily imply an obligation that is not legally binding, the PCAs are often described as 'soft law' instruments given the nature of the provisions that they entail. These kinds of provisions are often rather referred to as obligations of conduct as opposed to obligations of result (with Russia's obligation to 'endeavour to ensure that its legislation will be gradually made compatible with that of the Community', rather than undertaking to do so, a case in point). Although there is an obligation, the obligation is complied with in good faith.

The significance of the so-called 'soft-law' obligation with respect to the legislative approximation⁷⁸⁹ undertaking is significant when we consider the Union's normative behaviour and efforts to institutionalise its bilateral trade relations with Russia in legally binding frameworks with definitive undertakings and obligations which will ensure alignment with EU norms and values. This is particularly relevant to the PCA's handling of energy, the most significant area of cooperation in EU-Russia relations. Article 65(1) states that: 'Cooperation shall take place within the principles of the market economy and the European Energy Charter, against a background of the progressive integration of the energy markets in Europe.' Once again, this clause alludes to conformity to an EU model based on the principles of a market economy. Notwithstanding, the clause is rendered redundant following Russia's non-ratification of the ECT and eventual withdrawal of signature in 2009. The legal approximation clause therefore stands as testament to the Union's normative behaviour given its intention as a tool to influence institutional and legal structures through the adoption of norms and values in conformity to an EU model. However, as an obligation of conduct, it might be seen as 'less normative' than an obligation of result, given that there is no definitive undertaking or legal commitment involved which arguably questions whether the undertaking holds any bearing.

established between the Community and its Member States, of the one part, and Russia, of the other part. The objectives of this Partnership are: - to support Russian efforts to consolidate its democracy and to develop its economy and to complete the transition into a market economy.'

⁷⁸⁸ Article 55 PCA: Legislative Cooperation - 1. The Parties recognize that an important condition for strengthening the economic links between Russia and the Community is the approximation of legislation. Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.

⁷⁸⁹ Article 55 PCA: Legislative Cooperation - 2. The approximation of laws shall extend to the following areas in particular: company law, banking law, company accounts and taxes, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, customs law, technical rules and standards, nuclear laws and regulations, transport.

5.2.3.2.2. Energy Dialogue

The EU-Russia Energy Dialogue, proposed by the European Commission, was launched at the sixth EU-Russia Summit in Paris on 30 October 2000, the primary goal of which was to resolve issues of common interest relevant to the energy sector.⁷⁹⁰ The overall objective of the Energy Dialogue was to foster a partnership, which would enhance energy security within the EU by binding Russia and Europe in closer bilateral relations whereby all issues of mutual interest could be addressed whilst policies of integrated energy markets could be pursued.⁷⁹¹ Although the common objective for both parties was energy security, the EU Commission's ambitions extended further in stating that commitments achieved through the Energy Dialogue, could then serve as a model for other sectors.⁷⁹² For the EU, the underlying purpose of the Energy Dialogue, was fostering a platform for dialogue that would facilitate ratification of the ECT and progress on the definition and arrangement of an Energy Partnership, which would be seen as a step towards closer energy cooperation within the framework of a partnership and cooperation agreement.⁷⁹³ Therefore, as far as the EU's immediate expectations for the Energy Dialogue were concerned, these were centred on Russian ratification of the ECT, for the purpose of fostering an energy partnership under the auspices of the PCA. However, the EU and Russia's consistent inability to communicate within the Dialogue as an open forum, inevitably revealed signs of likely failure that manifested from the outset. It therefore comes as no surprise that more than a decade later, the Energy Dialogue remains largely inconsequential with no clearly defined mandate or overt accomplishments to its name.⁷⁹⁴ The main reasons that could be attributed to this

⁷⁹⁰ EU-Russia Summit (ERS) (2000). Joint Declaration of the President of the European Council, J. CHIRAC, assisted by the Secretary-General of the Council/High Representative for the Common Foreign and Security Policy of the EU, J. SOLANA, of the President of the Commission of the European Communities, R. PRODI, and of the President of the Russian Federation, V. V. PUTIN, available at <http://ec.europa.eu/energy/publications/doc/2011_eu-russia_energy_relations.pdf>

⁷⁹¹ Ferran Tarradellas Espuny, 'EU-Russia Energy Dialogue at the Origins of the European Foreign Energy Policy' in Andrei Piebalgs (ed) *EU-Russia Energy Relations, The EU-Russia Centre Review* 9 (2009) 16

⁷⁹² Energy, which was the underlying factor in the European Coal and Steel Community (ECSC), had immense potential for integration. Therefore, early aspirations of the Energy Dialogue were the evolution of a blueprint for further economic cooperation and political integration, given that relations in the energy sphere would lay the groundwork for other sectors. It was intended that the dialogue 'should be extended to all matters of common interest' with mutual benefit being the key to the structure of the Energy Dialogue. See European Commission (2001). COMMUNICATION FROM PRESIDENT PRODI, VICE PRESIDENT DE PALACIO AND COMMISSIONER PATTEN TO THE COMMISSION

Available at <http://ec.europa.eu/energy/russia/reference_texts/doc/comm-final-en.pdf>

⁷⁹³ Ferran Tarradellas Espuny, 'EU-Russia Energy Dialogue at the Origins of the European Foreign Energy Policy' in Andrei Piebalgs (ed) *EU-Russia Energy Relations, The EU-Russia Centre Review* 9 (2009) 16

⁷⁹⁴ Notwithstanding, the Dialogue was successful in contributing towards the abrogation of 'destination clauses' in Gazprom's long-term contracts with European gas companies, which prevented importing countries from re-exporting Russian gas.⁷⁹⁴ This was despite on-going antitrust probes by the Commission to uncover whether these clauses were still surreptitiously being incorporated into Gazprom's supply contracts as revealed by the raids on the energy giant's European offices by the antitrust authorities in 2011.⁷⁹⁴ Furthermore, an 'Early Warning Mechanism' was established in November 2009 shortly after the gas crises as a safeguard towards any further gas cut-offs. Both the EU and Russia welcomed the mechanism, which aimed to prevent supply interruptions through rapid communication. See Romanova, Tatyana. 'Energy Partnership—A Dialogue in Different Languages' *Russia in Global Affairs* 5.1 (2007)

Talseth, Lars-Christian. "The EU-Russia Energy Dialogue: Travelling Without Moving" SWP Working Paper FG 5, 2012/01, April 2012, p.7

failure are historical, institutional⁷⁹⁵ and political in nature, all of which were interrelated.⁷⁹⁶

However, although the dialogue failed to fulfil its task of defining a legal framework for energy trade which inevitably brought its credibility into question, the significance of the Energy Dialogue as has been illustrated in the analysis undertaken and part of the findings of this thesis relevant to the normative power framework, is the fact that it showed an unfaltering commitment on the part of the Union to facilitate Russian ratification of the ECT, a framework founded on European values. If we consider the view (as advocated by the findings of this research) that the Union's main objective of the Dialogue, albeit through a soft-law mechanism, was institutionalising EU-Russia energy relations within the ECT as a legally binding multilateral framework founded on EU market-based economy values and principles, then the Dialogue as a forum for further political integration and economic cooperation with Russia, serves to bolster the Union's normative agenda. Once again, we can see the Union driving a market-based approach in its external relations through the use of legal bilateral and multilateral instruments which is fundamentally normative and in turn indicative of normative behaviour vis-à-vis the Union's external relations with Russia.

⁷⁹⁵ As far as the institutional factors were concerned, the Energy Dialogue was not the first attempt at institutionalising EU-Russia energy trade. As mentioned above, the PCA that came into force in 1997, three years before the inception of the Energy Dialogue, included a section on energy drawn from the ECT which formed the legal basis for trade, investment and transit in the energy sector. The EU and all its member states were subject to the ECT and its legal framework, however Russia, which had signed, but not yet ratified the ECT, was not. Russia, which had long objected to the provisions of the ECT, only followed the ECT on a provisional basis and therefore did not consider itself bound by the charter, nor the ECT's obligatory third party access to Russia's state-controlled pipeline monopoly. Given the provisional application of the ECT, there was no real legal basis for energy trade between these two parties, which the Energy Dialogue was intended to remedy. Rather than a forum for open dialogue, the Energy Dialogue became a stage for dual monologue – an exchange of empty rhetoric in a forum failing to accomplish any tangible results. This fuelled the widening gap in both Brussels and Moscow's conceptual approaches towards energy cooperation, which in turn provoked further confrontation. This schism in EU-Russia relations meant severe ramifications within the energy sphere, which revealed the prevailing problem in EU-Russia relations, namely the lack of a legal framework fostering bilateral cooperation. See Talseth, Lars-Christian. "The EU-Russia Energy Dialogue: Travelling Without Moving" SWP Working Paper FG 5, 2012/01, April 2012, 7

⁷⁹⁵ European Union and Russian Federation (EURF) (1997). Partnership and Cooperation Agreement (PCA) with Russia, Official Journal L327, L/CE/RU/en, Brussels: European Commission. Available at <<http://eur-lex.europa.eu/legalcontent/EN/ALL/?uri=CELEX:31997D0800>>

⁷⁹⁶ From the historical, institutional and political factors mentioned above, it is clear to see what kind of challenges the Energy Dialogue had to overcome which inevitably brought its credibility into question. Over and above these factors, the Energy Dialogue was burdened with the formidable task of reconciling issues accumulated over a decade between two fundamentally different powers, which had transformed over this period of time. The EU today is a very different political player to the one at the outset of the Energy Dialogue in 2000. Having expanded in 2004 and 2007 with former Soviet states heavily dependent on Russian gas and closely integrated to Russia's energy infrastructure, meant that the Energy Dialogue had by default become extremely politicised. Therefore, despite Moscow's energy diplomacy and priority of promoting efficient energy cooperation in the post-Soviet space, consensus between Brussels and Moscow became increasingly difficult, with new member states like Poland and the Baltic States seeking closer ties with the EU in an attempt to curb Russian influence. Energy therefore morphed into a source of discord, rather than cooperation as initially intended with the Energy Dialogue. See Talseth, Lars-Christian. "The EU-Russia Energy Dialogue: Travelling Without Moving" SWP Working Paper FG 5, 2012/01, April 2012, 7

5.2.3.2.3. Energy Charter Treaty (ECT)

The Energy Charter ⁷⁹⁷ was initially signed by fifty-eight states, but seven of those countries (including the US and Canada) failed to sign the legally binding ECT. Furthermore five countries (including Norway and Russia) signed the ECT but subsequently neglected to ratify it. Instead, Russia opted for provisional application under Article 45 ECT⁷⁹⁸ and finally announced 20 August 2009 that it would terminate its provisional application.⁷⁹⁹ As such, the ECT was deprived of one of its fundamental tasks, to establish a legal nexus between Europe and former Soviet Republic, for the purpose of ensuring investment protection and transit guarantees for western companies wanting to engage with Russia.⁸⁰⁰

For several years the ECT has been criticised⁸⁰¹ for not accurately reflecting the status quo of the energy sphere with key stakeholders such as Russia, most notably, expressing such disappointment.⁸⁰² Some of the criticism may seem justified given the ever-evolving state

⁷⁹⁷ The Energy Charter Process is to be understood as all activities directed to the correct implementation of the Energy Charter Treaty (ECT or Treaty) rules and IEC principles as well as its geographical expansion across the world. The governing body is the ministerial Energy Charter Conference, which meets once a year and is assisted by a small Secretariat in Brussels. ECT signatories are contracting parties, while IEC signatories are observer members to the Conference.

⁷⁹⁸ Art. 45 of the ECT states that despite non-ratification, the ECT is provisionally applicable provided that it is not inconsistent with existing domestic legislation.

⁷⁹⁹ Marin F. Carlson and Joshua M. Robbins, Sidley Austin LLP, 'Russia Withdrawing from Energy Charter Treaty' (*Practical Law*, 3 September 2009) <<http://uk.practicallaw.com/7-422-4842?service=dispute>> accessed 8 March 2015

⁸⁰⁰ Urban Rusnak, 'The Energy Charter Treaty is Entering a Crucial Phase' (Energy Charter, 7 June 2012) <http://www.encharter.org/fileadmin/user_upload/document/SG_EER_interview_7_June_2012.pdf> accessed 3 April 2014

⁸⁰¹ With regard to the criticism towards the ECT, firstly, it has been argued that the ECT is unbalanced in that it prioritises the interests of energy consuming states over the interests of energy producing and transit states. Admittedly, the ECT was negotiated in the early nineties when countries like Russia were in a weak-negotiating position. The interests and clout of energy producing countries have subsequently changed but this fact did not however result in an unbalanced set of disciplines, as many would argue. Secondly, as another contentious issue for the Russians was the misperception that the ECT imposes mandatory third-party access on its member states, which could be detrimental to Russian 'national champions' like Gazprom. However, the opposite is true of the ECT as its provisions do not oblige contracting parties to provide such access. Thirdly, stagnating negotiations of the Transit Protocol means that issues such as transit tariffs, congestion management and new infrastructure construction lacked the necessary elaboration which the Transit Protocol sought to provide which were not adequately addressed by the general rules applicable to transit under Article 7 of the ECT. The negotiations of the Transit Protocol, which were initiated by Russia, were a precondition for Russia's ratification of the ECT. However a lack of political will meant that the decade long negotiations dwindled with the outstanding issues left unresolved. Fourthly, the pre-investment stage and the lack of a legally binding commitment regarding non-discrimination at the stage of making investment was a contentious issue to which it was practically impossible to reach any consensus. Finally, the ECT has been criticised for lacking an adequate enforcement mechanism against its member states to uphold its provisions and in turn prevent emergency situations in the energy field. The ECT entails a comprehensive set of dispute settlement mechanisms for energy disputes both between states and states and individual investors, with such dispute settlement proceedings usually incurring substantial delays, making it inefficient for resolving emergency situations. Despite the proven track record of investor-state arbitration under Article 26, state-to-state disputes under Article 27 have resorted to other means of resolving matters, mostly through negotiations. It needs to be stated from the outset that most of the criticism towards the ECT has emanated from Russia, the major producer which signed the treaty but failed to ratify it due to objections from major stakeholders such as Gazprom. The significance of this critique of the ECT is relevant for the research question which will become evident later in the chapter when we see how, in the absence of Russia being party to the ECT and bound by its provisions, the EU has developed internal market regulation with extraterritorial effects and implications for Russia / Gazprom which are synonymous with the ECT provisions. This affirms the Union's normative power and alludes to the Union arguably becoming a global normative energy actor. See Yulia Selivanova, 'The Energy Charter and International Energy Governance' (2012) 3 *European Yearbook of International Economic Law* 278 - 327

⁸⁰² Yulia Selivanova 'The Energy Charter and the international energy governance.' *European Yearbook of International Economic Law* (Springer Berlin Heidelberg, 2012) 327

of the energy markets and the fact that the ECT was negotiated over two decades ago. On the other hand, some of the criticism is unfounded. Whilst exploring some of the critique, would provide insight to the contentious issues for which Russia eventually withdrew from the ECT, this falls beyond the ambit of the thesis. Rather, this section shows how the EU has behaved in a normative way in its tenacious efforts to steer Russia towards an EU model based on the ECT despite Russia's criticism of the instrument. In undertaking this analysis, the section sheds light on the Union's manoeuvres and normative agenda in its efforts to address the legal void in the architecture following Russia's withdrawal from the ECT. By shedding light on the contentious issues that ultimately drove Russia to withdraw from the ECT which the Union has tried to remedy through legally binding frameworks, the Union's normative agenda becomes clear. The chapter reveals the Union's strong normative agenda in its external energy relations with Russia given its unfaltering quest to maintain free trade in energy based on an EU model of open and competitive markets through the ECT, its preferred instrument in the energy sector. The Union's preference was made vividly clear at the EU-Russia Summits⁸⁰³ and the Commission's rhetoric⁸⁰⁴ at the time, in particular with respect to Russia's Conceptual Approach⁸⁰⁵ which was rejected as an instrument proposed in the alternative to the ECT.

Following the 2009 Gas Crisis, the then Russian President Dimitry Medvedev, blamed the ECT for not preventing and in turn resolving the gas crisis. Medvedev therefore put forward proposals to create a new legal framework of international energy governance as a replacement to the ECT. Medvedev's Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles) (hereinafter Conceptual Approach) was launched with the aim of efficiently improving the legal framework in relation to world trade in energy resources.⁸⁰⁶ According to Medvedev, a new system of energy governance was required which would be broad enough to encompass all aspects of energy cooperation and effective in including an enforcement mechanism. Significantly however, the

⁸⁰³ EU/Russia Summit (2010), Joint statement. St. Petersburg, 31 May 2010. Press release no. 0234/10; EU/Russia Summit (2003), Joint statement. St. Petersburg, 31 May 2003. Press release no. 9937/03; EU/Russia Summit (2003), Joint Statement. Rome, 6 November 2003. Press release no. 13990/03; EU/Russia Summit (2000), Joint statement. Moscow, 29 May 2000. Press release no. 8976/00; EU/Russia Summit (2000b), Joint statement. Paris, 30 October 2000. Press release no. 12779/00

⁸⁰⁴ The issues concerning an out-dated/obsolete PCA and Russia withdrawal from the ECT are interrelated given that from an EU perspective, the new bilateral agreement between the EU and Russia should be strongly based on the principles of the Energy Charter and other principles fundamental to EU values such as reciprocity, transparency and non-discrimination. See European Commission, 'Review of EU-Russia Relations' COM(2008) 740 final; European Commission. (2006); European Commission, 'External Energy Relations – from Principles to Action' COM(2006) 590 final; See also José Manuel Barroso, 'Statement of President Barroso on the Resolution of the Ukraine-Russia Gas Dispute, Press Point, Doc. SPEECH/09/12, Brussels, 20 January 2009 <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/12&format=HTML&aged=0&language=EN&guiLanguage=en>

⁸⁰⁵ Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles), President of Russia, Official Web Portal, 21st April, 2009 available at <http://archive.kremlin.ru/eng/text/docs/2009/04/215305.shtml>

⁸⁰⁶ *Ibid*

Conceptual Approach failed to uphold the significance of fundamental EU values such as open and competitive energy markets, which reflects a Russian preference towards governmental control over energy markets in an attempt to curb free trade in energy.⁸⁰⁷

On 20 August 2009, Russia officially informed the depositary that it did not intend on becoming a contracting party to the ECT. In accordance with Article 45(3(a)) such notification resulted in the termination of provisional application following sixty calendar days from the date on which notification was received. Russia's provisional application therefore effectively ended on 19 October 2009. Following Russia's withdrawal, the question emerged as to what the ECT rules stood for now that a major stakeholder had dismissed adherence of such norms. Whilst the ECT members recognise the need to improve the legally binding rules governing international trade and investment in energy relations, it is understood that the principles and rules of the ECT remain valid and binding in its application within the energy sector. This stance was reiterated at the May 2009 Summit, when Barroso declared that the EU was open to discuss the proposals put forward by Russia but only by building on the existing agreements given that the EU would not abandon the Energy Charter rejected by Russia.⁸⁰⁸ This illustrated a strong commitment on the part of the Union to keep EU-Russia energy relations enshrined within principles of international law, which is fundamentally normative.

Russia's withdrawal from the ECT did not have immediate consequences for investment protection given that an Arbitral tribunal of the Yukos case⁸⁰⁹ held that Russia was bound by the ECT for investment pre-dating its withdrawal on the 19 October 2009.⁸¹⁰ The broader implications of the panel ruling was that Russia is bound by Article 45(1) of the ECT which

⁸⁰⁷ Yulia Selivanova 'The Energy Charter and the international energy governance.' *European Yearbook of International Economic Law* (Springer Berlin Heidelberg, 2012) 334

⁸⁰⁸ EU Business. 'EU Will Not Abandon Energy Charter Rejected by Russia: Barroso' (22nd May, 2009) <http://www.eubusiness.com/news-eu/1242973023.48/>

⁸⁰⁹ Although this ruling in favour of the Yukos shareholders was on jurisdiction and not the merits of the case, it was considered to be a victory for the investment community which will have significant impact on the investment climate in Russia. Following the bankruptcy of Yukos in 2004 for alleged tax evasion, the majority shareholders, Group Menatep Limited (GML) filed an arbitration suit against the Russian Federation under the ECT. GML relied on the investment protection provisions of the ECT, the only multilateral investment treaty specific to energy, for the expropriation and subsequent loss suffered by the oil giant Yukos. Russia, which had signed but not ratified the treaty claimed that the ECT was not applicable, however the arbitrators held otherwise on the basis that Russia had accepted provisional application from the date of signing. See Alan Riley, 'The Yukos Decision: Profound implications for the EU-Russia energy relationship?' (CEPS Commentaries, 2009) 2

⁸¹⁰ Former private investors in the Russian energy company Yukos have been pursuing cases against the Russian State through various international and national courts, claiming illegal expropriation of their assets. In 2005 an ECT arbitration tribunal, set up under the Permanent Court of Arbitration in The Hague, began to hear three cases brought on the grounds that Russia had provisionally applied the ECT during the period in which these events took place between 2003 and 2007. After long and complex litigation proceedings, an interim award was rendered in November 2009. The interim award meant that all investments prior to the withdrawal date would be protected for an additional 20 years.

provides for provisional application⁸¹¹ of the treaty from the date of signature.⁸¹² Although this ruling in favour of the Yukos shareholders was on jurisdiction and not the merits of the case, it was considered to be a victory for the investment community which will have significant impact on the investment climate in Russia.

Regardless of the outcome of the Yukos case, Russia's decision to withdraw from the ECT was alleged to be strategically planned in advance of the expected Yukos arbitral ruling. Although it has been posited that it would be in Russia's best interest to ratify the treaty, there is no sign of Moscow changing course on its decision regarding the Energy Charter. The purpose of this section has been to show the extent to which the Union displays normative behaviour in its efforts to lure Russia back to the ECT and uphold principles of international law. It also sets the stage for the analysis that will examine further in the chapter why in the absence of a comprehensive and reliable legal framework vis-à-vis energy regulation with Russia, the EU has resorted to alternative measures to drive its normative agenda (see Section 5.2.4). The analysis above has endeavoured to show how Russia's withdrawal from the ECT which has resulted in gaps in the legal architecture regulating energy trade has pushed the Union to behave in a normative manner in its efforts to entrench its relations with Russia in bilateral and multilateral frameworks which facilitates trade imbedded in market economy rules and values. What has been illustrated above (in the analysis of the Energy Dialogue (Section 5.2.3.2.2) and the ECT (Section 5.2.3.2.3)) and will be shown in the section to follow, is the extent to which the Union has been successful in its normative agenda given the limitations to the legal architecture in place and the Union's subsequent efforts to keep its strategic partner bound by legally binding frameworks and the multilateral trading system. The case-study considers to what extent the Union has succeeded in its normative agenda and whether its normative power has had limitations in its external relations with Russia, for which the EU has resorted to and undertaken a more strategic approach.

⁸¹¹ Provisional application enables immediate legal effect of treaties without waiting for the completion of the lengthy and protracted ratification process. The Russian Federation withdrawal from the provisional application of the ECT means that it is no longer bound by the provisional application rules of the Charter for any new energy investments made after its formal withdrawal came into effect on 19 October 2009.⁸¹¹ However Russia's withdrawal has no legal effect on all investments made prior to the 19 October 2009 pursuant to the legacy provision which maintains the binding effect of the Charter for an additional twenty years from the date of Russia's withdrawal.

⁸¹² The significance of the Yukos decision on 30 November 2009 is that as a consequence of the GML v Russian Federation case, the legal protection of several European companies with energy investments in Russia have subsequently been strengthened. Nevertheless, after long and complex litigation proceedings, a final award was rendered in July 2014 of US\$50 billion against the Russian state however Russia appealed to the District Court of The Hague. The Hague District Court set aside all six awards on grounds of lack of jurisdiction. This judgment could have a significant impact on the Yukos shareholders' attempts to enforce the US\$50 billion Final Awards which are underway in several jurisdictions. This judgement has subsequently suspended any enforcement of Yukos-related fines, pending a final appeal by investors to the Supreme Court of the Netherlands. The view of non-applicability of the arbitration clause and thereby the ECT to Russia is contentious. It therefore remains to be seen whether this view is maintained in the appeal to the Supreme Court of the Netherlands.

5.2.3.2.4. The World Trade Organization (WTO)

In view of the fragmented legal framework regulating energy trade between the EU and Russia, Russia's WTO membership after twenty years of protracted negotiations, was perceived as a break-through for EU-Russia trade relations. The WTO accession was significant not only as a legal infrastructure supplemental to the outdated PCA but also as an opportunity for a revised legal framework agreement.⁸¹³ The Commission and European Parliament had concurred that Russia's accession to the world trade system would prove an imminent stepping stone for deepening bilateral economic integration and the conclusion of a new Partnership Agreement (PA).⁸¹⁴ The new PA which was under negotiation, following Russia's WTO membership, was expected to provide a comprehensive framework for bilateral trade and investment relations, with a view to improving the regulatory environment by building upon the WTO rules and going beyond the PCA provisions.⁸¹⁵ Both parties have advocated the inclusion of an energy chapter as a substantive element of the PA. However, the form in which this chapter will appear and whence it will draw its inspiration is yet to be agreed upon. The EU has been partial to a chapter strongly based on the provisions of the ECT, but given Moscow's strong criticism of the Charter following the 2009 Gas Crisis, it is unlikely that Russia will concede on ECT provisions through the back-door of a new PA.⁸¹⁶ For now, however these deliberations seem futile given that in response to Russia's annexation of Crimea and the continuing destabilisation of Ukraine through Russian armed forces on Ukrainian soil, the EU has suspended all talks on the new PA and sanctions have been imposed.⁸¹⁷ This is significant given that Russia is the EU's third biggest trading partner with supplies of oil and gas making up a large proportion of the country's exports to Europe.⁸¹⁸

Some academics have therefore argued that Russia's WTO accession will have a limited impact on EU-Russia energy relations given the few energy specific provisions within the WTO, which will neither broaden, nor deepen, the bilateral legal framework between these two powers.⁸¹⁹ Notwithstanding, Russia's WTO accession has opened a window of

⁸¹³ Rafael Leal-Arcas, 'The EU and Russia as Energy Trading Partners: Friends or Foes?' (2009) 14(3) *European Foreign Affairs Review* 346

⁸¹⁴ European Commission, 'The EU and the WTO. EU welcomes three new member to the WTO', *Press Release*, Dec. 15, 2011 and European Parliament, 'Resolution of 14 December 2011 on the upcoming EU-Russia Summit on 15 December 2011 and the outcome of the Duma elections on 4 December 2011', P7_TA-PROV(2011)0575, para. 4

⁸¹⁵ European Commission, 'Trade – Russia' (*EUROPA*, 9 September 2014) <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia/>> accessed 8 March 2015

⁸¹⁶ Rafael Leal-Arcas, 'The EU and Russia as Energy Trading Partners: Friends or Foes?' (2009) 14(3) *European Foreign Affairs Review* 359

⁸¹⁷ European Union, 'External Action: EU Relations with Russia' (*EUROPA*) <http://eeas.europa.eu/russia/index_en.htm> accessed 8 March 2015

⁸¹⁸ European Union, 'External Action: EU Relations with Russia' <http://eeas.europa.eu/russia/index_en.htm> accessed 8 March 2015

⁸¹⁹ The EU's inability to negotiate WTO-plus commitments with Russia prior to acceding the WTO and the limited concessions on Russia's dual pricing seem to validate this argument. WTO-plus commitments are obligations imposed on acceding countries that go beyond the multilateral framework requirements. Russia refused to buckle to political pressure to liberalise its domestic energy market and eliminate its dual-pricing practices, as a

opportunity to the potential trigger of a WTO ruling on the TEP⁸²⁰ and compatibility of the Gazprom clause⁸²¹ with the WTO.⁸²² Russia, having threatened to use the WTO instruments as a means of protecting its interests,⁸²³ submitted a request for consultation on 30 April 2014 regarding the TEP which it views as inconsistent with several obligations of the EU under the WTO.⁸²⁴ However in a recent ruling published on 10 August 2018, the WTO rejected most of Russia's claims regarding the alleged incompatibility of the EU's energy policy measures with the multilateral trade rules stating that there was no basis to the claim concerning the alleged discrimination of the TEP against Russian natural gas, pipeline transport services and service suppliers.⁸²⁵

Whilst the effectiveness of the WTO as a legal framework regulating EU-Russia energy relations, is something that remains to be seen given the void in the legal infrastructure, Russia's WTO accession and its significance to the Union's normative agenda, cannot be overlooked. With the likelihood of a revised bilateral framework unlikely following the EU's suspension of all talks in response to Russia's illegal annexation of Crimea, the basis of legal ties between these two powers has been brought into question. Russia's withdrawal from the ECT effectively rendered energy cooperation based on political dialogues and commitments that lack legally binding norms regarding investment protection, transit and dispute resolution. With the EU heavily dependent on Russian energy resources, the EU

condition to WTO membership. The EU finally dropped its demand and in turn Russia agreed to gradually increase gas prices to industrial users, which was not considered as much of a concession, seeing that this was already foreseen and anticipated in Russia's own energy strategy. Furthermore, Gazprom's export monopoly remained intact despite EU efforts to negotiate otherwise, which was a non-negotiable point for Russia. See Guillaume Van der Loo, 'EU-Russia Trade Relations: It Takes WTO to Tango?' (2013) 40.1 *Legal Issues of Economic Integration* 22

⁸²⁰ See Chapter 5 Section 5.2.4.1 (*Does the EU Exhibit Normative Means of Power in its External Energy Relations with Russia? – The TEP and Unbundling Regime*)

⁸²¹ The TEP's Gazprom Clause (Article 11 of Directive 2009/73 of 13 July 2009) is an unbundling requirement imposed on foreign operators which are required to comply with the same conditions of EU operators under Article 9. The unbundling requirements of the TEP are aimed at separating the production and distribution operations of gas pipelines and electricity networks of vertically integrated energy companies. As such, foreign operators such as Gazprom are legally obliged within EU territory to separate the operation of their gas pipelines from the business of providing gas, in compliance with the TEP's unbundling requirement, to allow other energy companies' access to its pipelines. The purpose and aim of unbundling is that it would in effect be increasing competition within the European market and facilitating the separation of grids. However, the unbundling requirements under the TEP are difficult to reconcile with the Gazprom model of vertically integrated national gas champions. For Russia, security of demand is a priority and therefore the Gazprom strategy of delivering gas through pipelines on long-term contracts with no freedom of access are fundamental to Russian energy policy. Whereas, the Commission's TEP and its unbundling rules would in effect be loosening Russia's energy grip within Europe, by preventing downstream movement into the EU's energy market. Moscow wants access to EU markets and downstream activities but is not prepared to reciprocate with similar arrangements for European companies.

⁸²² Guillaume Van der Loo, 'EU-Russia Trade Relations: It Takes WTO to Tango?' (2013) 40.1 *Legal Issues of Economic Integration* 22

⁸²³ Euractiv, 'Russia Takes EU Energy Rules to WTO Arbitration', 2 May 2014. <<http://www.euractiv.com/sections/energy/russia-takes-eu-energy-rules-wto-arbitration-301876>> accessed 15 June 2014

⁸²⁴ WTO, European Union and its Member States - Certain Measures Relating to the Energy Sector - Request for consultations by the Russian Federation, [WT/DS476/1, S/L/409; G/L/1067, G/SCM/D102/1; G/TRIMS/D/40], [Dispute DS476], 30 April 2014

⁸²⁵ European Commission, 'Commission welcomes WTO ruling confirming lawfulness of core principles of the EU third energy package' Press Release IP/18/4942, 10 August 2018 http://europa.eu/rapid/press-release_IP-18-4942_en.htm

has a vested interest in resolving any conflict from simmering trade disputes for the purpose of keeping Russia firmly entrenched in the global trading system. In this respect the Union has been actively engaged in Russia's WTO accession⁸²⁶ and there has been an active drive on the part of the Union to get Russia encompassed in the world trading system to potentially address the gaps in the legal infrastructure regulating international trade. It was perceived that EU-Russia legal relations would benefit from Russia's WTO accession, to the extent that Russia would be bound by enforceable international trade rules despite the perception that areas of energy trade were considered to fall beyond the scope of the WTO Agreements and thereby not specifically addressed in this broad trade framework.⁸²⁷ Nevertheless, the recent WTO ruling on the TEP suggests that the WTO has a significant role to play in the Union's normative agenda in upholding the EU's TEP and rejecting Russia's claims that the Unions energy policy measures (such as its unbundling regime and competition rules) are discriminatory towards Russia and thereby inconsistent with the multilateral trade framework. This seems to bolster the Union's normative agenda with respect to the extraterritorial reach and application of its internal market rules which will be explored in the following section. It also serves to show that EU behaves in a normative way which is evident in its efforts to draw Russia into a rule-based system albeit by way of the broad trade framework of the WTO.

5.2.3.2.5. The New Partnership Agreement (PA) and Bilateral Investment Treaties (BITs)

The EU and Russia have fundamentally different views of what the new PCA should entail with many scholars arguing that it is obsolete and no longer reflective of the current bilateral climate.⁸²⁸ The EU seems to be in favour of a new agreement with clearly defined terms on energy and security based on the ECT and the Union's *acquis* which it hopes to export.⁸²⁹ In so doing, the new legal framework agreement would be ensured of containing provisions of transparency, fair mutual investment conditions, equal access, which would foster a rule-based market rather than facilitating the use of energy as a foreign policy tool.⁸³⁰ This once again serves to validate the Union's commitment to a revised legal framework that facilitates

⁸²⁶ European Commission, 'EU Welcomes Russia's WTO Accession after 18 Years of Negotiation' Press Release IP/11/1334, 10 November 2011 <http://europa.eu/rapid/press-release_IP-12-906_en.htm>

⁸²⁷ Energy related issues were not specifically addressed during GATT negotiations even though trade in commodities was generally addressed in preceding talks regarding the creation of the International Trade Organization. This is arguably due to the fact that the major energy exporting countries at the time were not founding members of the GATT. Yulia Selivanova, 'Challenges for Multilateral Energy Trade Regulation: WTO and Energy Charter' (2010) (Society of International Economic Law (SIEL) Second Biennial Global Conference, University of Barcelona, 8-10 July 2010) <<http://ssrn.com/abstract=1632557>> accessed 8 March 2015

⁸²⁸ N. Arbatova, T. Bordachev & A.S. Makarychev, (2006), in M. Emerson (ed.), *The Elephant and the Bear Try Again: Options for a New Agreement between the EU and Russia*, (Brussels: Centre For European Policy Studies)

⁸²⁹ Andrei Konoplyanik, 'A Common Russia-EU Energy Space: The New EU-Russia Partnership Agreement, *Acquis Communautaire* and the Energy Charter' (2009) 27(2) *Oil Gas and Energy Law Journal* 261.

⁸³⁰ European Parliament Resolution of 17 June 2010 on the conclusion of the EU/Russia summit (31 May-1 June 2010, P7_TA-PROV(2010)0234, point 10

a market-based economy founded on EU norms and values (through the backdoor of the *acquis*) which in turn serves to strengthen the normative power argument. Again, we can see the Union trying to lure Russia back to the Union's preferred instrument of choice and its market-based principles despite Russia's express disappointment and reluctance to be bound by the ECT. These efforts to institutionalise EU-Russia energy relations within the legal architecture of the ECT are fundamentally normative and serve to confirm the Union's normative behaviour. Notwithstanding the Union's ongoing attempts, Russia will not agree to provisions of the ECT through the backdoor of a revised PCA. Through a new PA, the EU aspires to establishing market-based principles inspired by the internal market that are formulated within a regulatory environment and driven by the rule of law. The Union's efforts to bind its external energy relations with Russia through legal frameworks that upholds this market-based approach which promotes fundamental EU values such as open and competitive energy markets, are incongruous with Russia's preference to maintain government control over a strategic sector of the economy for the purpose of curbing free trade in energy.⁸³¹ These manifestly inconsistent views have subsequently reduced negotiations on a revised bilateral framework to a piecemeal manner. Furthermore, following Russia annexation of Crimea and the continued destabilisation of Ukraine, the EU has suspended all bilateral talks and sanctions have been imposed.⁸³² The EU and Russia can therefore be said to be at an impasse,⁸³³ with any revision of the bilateral legal framework, a matter that remains suspended until further notice.⁸³⁴

In the absence of a revised bilateral agreement and as a result of the gaps in the legal architecture as illustrated above which have served to bolster the Union's normative agenda, bilateral investment treaties (BITs) have emerged as the default international law instrument in EU–Russia energy relations. Although BITs are not specifically drafted for energy, their provisions apply to a broad range of investments, which inevitably include investments in the energy sector.⁸³⁵ BITs therefore provide a legal framework for EU–Russia energy relations from an investment perspective given that Russia has concluded

⁸³¹ Tatyana Romanova, 'Energy Partnership—A Dialogue in Different Languages' (2007) 5(1) *Russia in Global Affairs* 10

⁸³² In response to the illegal annexation of Crimea and deliberate destabilisation of a neighbouring sovereign country, the EU has imposed restrictive measures against Russia. The EU-Russia summit was cancelled and EU Member States decided not to hold regular bilateral summits. Bilateral talks with Russia on visa matters as well as on the new PCA between the EU and Russia were suspended. The implementation of EU-Russia bilateral and regional cooperation programmes were also largely suspended. Projects dealing exclusively with cross-border cooperation and civil society have been maintained. See Measures targeting sectoral cooperation and exchanges with Russia ('Economic Sanctions') <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/144158.pdf>

⁸³³ Christian Nitoiu, 'Is Meaningful Cooperation Between the EU and Russia Still Possible?' in Christian Nitoiu, *Avoiding a 'Cold War': The Future of EU-Russia Relations in the Context of the Ukraine Crisis* (LSE IDEAS 2016) 94

⁸³⁵ Amnon Lehavi and Amir N. Licht, 'BITs and Pieces of Property' (2011) 36 *The Yale Journal of International Law* 115

BITs with approximately 24 EU member states.⁸³⁶ However, by virtue of the Lisbon Treaty⁸³⁷ and Article 207 (1) and Article 206 of the TFEU, the scope of the common commercial policy has been extended to FDI bringing this within the realm of the EU's exclusive competence.⁸³⁸ Although the change in the EU's competence will not have an immediate effect on existing BITs pursuant to Regulation 1219/2012⁸³⁹ which establishes a transitional regime, it is anticipated that all existing BITs (including those signed with Russia) will eventually be replaced by new agreements with the EU pursuant to Article 207 TFEU.⁸⁴⁰ Therefore, despite BITs playing a significant role in EU–Russia energy investments in the absence of a comprehensive and reliable legal framework, the fact that the entire BIT regime between Russia and the EU member states is expected to be replaced following the extended competence of the EU, means that the current BITs do not provide an adequate investment framework for EU–Russia relations in the future which has further spurred the Union's normative agenda in its efforts to institutionalise energy relations within legally binding multilateral frameworks.

5.2.3.3. Conclusion

The EU behaves in a normative way which is evidenced by the Union's persistent efforts to bring EU-Russia energy relations under a rule-based system, given the void in the legal infrastructure. As evidenced above, the PCA is outdated and the effectiveness of the ECT in EU–Russia energy relations, despite its potential as a legal instrument to regulate energy, is limited given Russia's termination of its provisional application. However, the ECT still has an important role to play in the investment protection architecture, given its provisions are still applicable for 20 years from the date of Russia's withdrawal as a result of the legacy provision.⁸⁴¹ The Energy Dialogue as a forum for discussion does not result in any legally binding norms and at best can be described as an institutional mechanism of political cooperation. Such instruments are at best described as 'soft law' mechanisms, which lack legal force in matters of investment protection, transit and dispute resolution.⁸⁴²

⁸³⁶ UNCTAD Full List of Bilateral Investment Agreements concluded with Russian Federation, 1 June 2013, available at <http://unctad.org/sections/dite_pcbb/docs/bits_russia.pdf> accessed March 2014

⁸³⁷ The Treaty of Lisbon entered into force on 1 December 2009 as the latest landmark in the Union's evolved constitutional architecture. It amended the EU treaties and renamed them into the current Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)

⁸³⁸ Philip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Bloomsbury Publishing, 2014) 2

⁸³⁹ Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJL 351/40.

⁸⁴⁰ Marc Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon' (2010) *European Yearbook of International Economic Law*, 143

⁸⁴¹ Under the legacy provision of the ECT contained in art 45.3.b, the Charter remains legally binding for twenty years from the date of withdrawal from provisional application. See Alan Riley, 'The EU-Russia Energy Relationship: Will the Yukos Decision Trigger a Fundamental Reassessment in Moscow?' (2010) 2 *International Energy Law Review* 37

⁸⁴² Peter Van Elsuwege, 'Towards a Modernisation of EU-Russia Legal Relations?' (2012) *EU-Russia Papers* 5, Centre for EU-Russia Studies, University of Tartu 6 <<http://hdl.handle.net/1854/LU-2134081>> accessed 8 March 2015

International trade and investment requires solid legal foundations – multilateral trade regimes and bilateral rules are necessary to provide an efficient regulatory framework for cross-border trade and investment. This is particularly important for the EU as Russia's most important investor.⁸⁴³ According to the European Commission, it is estimated that up to 75% of Foreign Direct Investment stocks in Russia come from EU member states.⁸⁴⁴ The EU therefore has a contingent interest in ensuring its investment protection rights are not fettered and any potential risks mitigated in its dealings with Russia.

European investors have generally erred on the side of caution with Russia following incidents such as the Sakhalin⁸⁴⁵ and Shtokman⁸⁴⁶ dispute and the Yukos⁸⁴⁷ case. This has made investment protection a thorny issue that needs to be addressed as the investment provisions of the ECT (Part III) will eventually lapse in 2029.⁸⁴⁸ Despite there being no immediate urgency, this is significant given that the regulation of investment has largely been absent in the WTO. The WTO does not deal with investment policy except to a limited extent through the GATS,⁸⁴⁹ whereas the ECT has deeply enshrined investment protection provisions in place, which are bolstered by the dispute settlement mechanism that includes both state-to-state and investor-to-state arbitration.⁸⁵⁰ The GATT/WTO focus on traditional issues of market access has meant that prevailing issues such as investment protection

⁸⁴³ European Commission, 'Trade – Russia' (*EUROPA*, 9 September 2014) <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia/>> accessed 8 March 2015

⁸⁴⁴ *Ibid*

⁸⁴⁵ Sakhalin II, an oil and gas development project on Sakhalin Island in Russia, was governed by a Partnership Sharing Agreement (PSA) which meant that the Russian state could not receive any profit until all costs incurred by the foreign company had been recovered. Shell was criticised for the high cost overruns which had subsequently brought about massive losses to the state, including serious environmental damages to the region. All environmental concerns and issues regarding the project were swiftly resolved when Shell agreed to sell a majority stake in the project to Gazprom. See *The New York Times*, 'Shell Cedes Control of Sakhalin-2 to Gazprom' December 2006 <<http://www.nytimes.com/2006/12/21/business/worldbusiness/21iht-shell.3981718.html>> accessed 8 March 2015

⁸⁴⁶ Shtokman is one of the world's largest gas fields, for which Gazprom was in need of a partner as it lacked the necessary advanced technology to extract gas from this field. A short list of candidates was announced in September 2005, which included Norwegian Statoil, Norsk Hydro; American ChevronTexaco and ConocoPhillips; and French Total. Lengthy negotiations ensued until Gazprom finally declared that it no longer needed a partner, which was due to the fact that the candidates had not made a substantial enough offer of a stake in exchange for Shtokman. A decision was finally made in 2007 when Total, Statoil and Norsk Hydro finally agreed to become partners with Gazprom. See Tatiana Romanova (2008) 'The Russian Perspective on the Energy Dialogue' (2008) 6(2) *Journal of Contemporary European Studies* 219-230, 244

⁸⁴⁷ The Yukos case, which was believed to be politically motivated, is arguably the most controversial investment arbitration case of all time. As CEO of Russia's largest oil firm, Mikhail Khodorkovsky was arrested for alleged tax fraud and Yukos was subsequently dismantled and auctioned off. See also Richard Youngs, *Energy Security: Europe's New Foreign Policy Challenge* (Routledge 2009) 61

⁸⁴⁸ ECT provisions on arbitration and investment protection remain valid for twenty years from the date of Russia's withdrawal until 2029. This follows from Art. 45(3)b ECT. See PCA Case no. AA 227 between Yukos Universal and the Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 339

⁸⁴⁹ WTO Agreements prohibit investment measures that are inconsistent with obligations of national treatment and the prohibition of quantitative restrictions. Yulia Selivanova, 'Challenges for Multilateral Energy Trade Regulation: WTO and Energy Charter' (2010) (Society of International Economic Law (SIEL) Second Biennial Global Conference, University of Barcelona, 8-10 July 2010) <<http://ssrn.com/abstract=1632557>> accessed 8 March 2015. See also Yulia Selivanova, *The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector* (International Centre for Trade and Sustainable Development, Geneva)

⁸⁵⁰ Under Art. 26 ECT an investor can litigate directly against a government. See Andrei Konoplyanik and Thomas Walde 'Energy Charter Treaty and its Role in International Energy' (2006) 24 *Journal of Energy and Natural Resources* 523

have largely been left unaddressed. The WTO regime therefore seems to entail deficiencies in its ability to effectively regulate trade and investment in energy, when compared to the ECT.⁸⁵¹

This section has tried to illustrate the Union's normative behaviour in its continuous efforts to institutionalise EU-Russia energy relations in legally binding frameworks. One of the predominant problems and ever-prevailing issues in EU-Russia energy relations is the fact that there is no solid over-arching international legal framework regulating energy in international trade and investment between these two powers which has subsequently resulted in a void in the legal infrastructure. Despite the Union's normative behaviour and efforts to promote international law, there is a deficiency in the legal framework in terms of an effective legal solution for recurring disputes and security of European energy supply.⁸⁵² This may shed light on the Union's subsequent measures and initiatives instigated in the energy sphere including the extraterritorial reach of the Union's internal market rules.⁸⁵³ The research has revealed in the analysis undertaken above, that in the Union's consistent efforts to regulate its energy relations with Russia through legally binding frameworks, the Union can be seen to be behaving in a manner which is quintessentially normative. However, Russia has been a reluctant partner with respect to signing-up to instruments founded on an EU model which reflect Union values with an alleged disregard to Russian interests. It is against this backdrop that we see the Union resorting to measures that are not strictly normative but geopolitical and strategic⁸⁵⁴ in nature given the limitations of the Union's normative agenda with non-confirming partners like Russia, which will be examined below.⁸⁵⁵

5.2.4. Does the EU Exhibit Normative Means of Power or Influence in its External Energy Relations with Russia?

Chapter 2⁸⁵⁶ states that one of the definitive characteristics of a normative power is the use of normative means of power as opposed to economic or military means. Whilst it would be unfathomable to suggest that the EU relies exclusively on normative means, in the Union's external relations with Russia the research has found and illustrates in the analysis undertaken below that the EU seldom relies on economic instruments in any direct way but

⁸⁵¹ Yulia Selivanova, *The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector* (International Centre for Trade and Sustainable Development, 2007)

⁸⁵² Anna 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) *Oil, Gas & Energy Law Journal* (OGEL) 9(3)

⁸⁵³ See Chapter 5 (*The External Dimension of the Internal Market: The Third Country Clause and Gazprom*)

⁸⁵⁴ See Chapter 5 Section 5.2.4. (*Does the EU Exhibit Normative Means of Power in its External Energy Relations with Russia? - The External Dimension of the Internal Market: The Third Country Clause and Gazprom*)

⁸⁵⁵ *Ibid*

⁸⁵⁶ See Chapter 2 Section 2.2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*)

rather uses normative means of influence.⁸⁵⁷ The EU does so by activating existing commitments and persuading through reference to general rules and practices and future mutual gains by way of cooperation.⁸⁵⁸ In so doing, the Union uses its normative power as a vehicle of influence in its external energy relations with Russia.⁸⁵⁹ In this respect, the Union can be said to be exercising normative means of influence in its efforts to promote general rules and practices by externalising its internal market regulation beyond its boundaries.

The extra-territorial reach of the Union's market rules ultimately constitute a means of normative power given the inextricable link to EU market access which acts as a channel of persuasion and thereby influence in conformity to EU rules and practices. Whilst the section above served to illustrate how the Union behaves in a normative manner by upholding international law and adhering to universal rules and principles, if we concede, as the analysis has indicated, that the Union has not thus far been successful in institutionalising its external energy relations with Russia (given the fragmented international legal architecture), then the section to follow serves to reveal how in the absence of a legally binding infrastructure, the EU has resorted to alternative means of normative power through the extraterritorial reach of its internal energy regulation and competition rules (which will be examined below). If normative means of power as advocated by Manners is to be understood as the promotion of general rules and practices and subsequent gains through cooperation, then we can see why the Union is keen to export its energy liberalisation model beyond its borders which it considers universal in value given the subsequent gains of European market access.

Here it is important to note the distinction with the preceding section – the previous section showed how the Union exhibits normative behaviour in its efforts to institutionalise EU-Russia energy relations in legally binding frameworks. However, the section to follow shows how the EU resorts to other normative means of power by externalising its internal market rules which entail implications for Russia and Gazprom. Whilst the Union's means are normative given the extraterritorial reach of its liberalisation model and conformity to its energy regulation and competition rules, the manner in which it is applied is strategic. According to Manners' criteria, normative behaviour entails a preference for committing relations to shared multilateral frameworks and upholding international law, whereas the Union's strategic approach (i.e. cross-border reach of its energy liberalisation model) is unilaterally imposed EU regulation on a non-EU entity which has not willingly undertaken to

⁸⁵⁷ Tuomas Forsberg, 'Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type' (2011) 49(6) *Journal of Common Market Studies* 1183-1204, 1194

⁸⁵⁸ See Chapter 4 Chapter 4 Section 4.1.3.1 (*Does the EU have Normative Interests in in the Neighbourhood? - Acquis Export in the Neighbourhood*) and Section 4.1.3.2 (*Does the EU have Normative Interests in in the Neighbourhood? - Legislative Approximation as a Method of Acquis Export in the Neighbourhood*)

⁸⁵⁹ Petr Kratochvil, 'The Discursive Resistance to EU-Enticement: The Russian Elite and (the Lack of Europeanisation)' (2008) 60(3) 397-422

conform to the EU's energy *acquis*. This falls beyond the criteria of shared international and multilateral frameworks which shows the deviation from *normative behaviour* (i.e. institutionalising relations within legally binding frameworks) to *normative means of power* (i.e. normative power as a means of influence) which is more strategic.

More specifically, the section assesses the internal dimension of the EU's energy policy which is predominantly focused on promoting a fully liberalised gas market and the extent to which it has been externalised with its implications for Gazprom further examined. In undertaking this analysis it will be shown that at the core of the EU's rule-based market approach, is the belief that a fully liberalised and competitive EU market can facilitate energy security by way of enhancing diversification of suppliers; boosting infrastructure investment; which will diminish the impact of any supply disruptions and in turn build energy solidarity at a Community level. In this respect the section reveals the Union's efforts to fulfil its objectives in the energy sector by way of a market-based approach heavily embedded in regulation which suggests that the Union has evolved into a global normative energy actor.

Furthermore, with respect to the Union's energy objectives, the section shows that there is a strategic dimension to the Union's normative agenda. Against this backdrop, the section investigates the exercise and control of EU regulatory power beyond its boundaries and its implications for Gazprom and Russia's interests on the European energy market. For this purpose the section examines: (i) the TEP's ownership unbundling rules (which require the separation of networks from production and supply activities of vertically integrated energy companies); (ii) the Third Country Clause (which requires that undertakings from third countries which intend to acquire control over an electricity or gas network, need to comply with the same unbundling requirements as EU undertakings); and (iii) the increasingly important role that Competition law plays in the EU's energy market and to what extent the Union's competition rules have become a significant mechanism in its toolbox of instruments to further its rule-based approach and market-based agenda given the recent decision of the EU Competition investigation of Gazprom's sales in Central and Eastern Europe.

The aim of the section is to illustrate how in the absence of a comprehensive international legal framework, the EU promotes the export of its own values and norms on the basis of a rule-based market approach. In this respect we see the Union's sectoral application of the *acquis* beyond its borders in its endeavours to Europeanise its energy corridors and ensure energy security. This suggests an external dimension of the European internal energy market whereby the Union's market mechanisms and liberal market-based energy regulations are being imposed on third countries (in particular Russia) in a strategic

manner.⁸⁶⁰ Hence, the section contributes towards the overall examination of the case-study, as to whether the Union can be said to be a normative power in its external relations with Russia, given its manoeuvres in the energy domain which is not exclusively normative. In revealing a strategic dimension to the Union's role as a global actor, the thesis emphasises a more nuanced approach to the normative power framework. The intention is not to undermine the normative power theory but rather to enhance it by revealing additional facets to the Union role as a normative energy power and the Union's role on the global stage.

5.2.4.1. The TEP and the Unbundling Regime: Ownership Unbundling and the Third Country Clause

The Third Energy Package (TEP)⁸⁶¹ represents the third bundle of legislation that was adopted with the aim of creating an integrated European energy market.⁸⁶² In the analysis to follow, the section focuses on the Gas Directive of the TEP which is relevant for the EU's external relations with Russia and the assessment regarding the Union's normativity vis-à-vis its strategic energy partner. By analysing the key provisions of the TEP, the analysis assesses to what extent the Union's manoeuvres in the energy sphere constitute normative means of power given its cross-border influence through its internal market rules. The key provisions of the TEP include: (i) the effective unbundling of energy generation and supply from transmission network ownership and operation; (ii) bolstering the powers and duties of national energy regulators; (iii) establishing an EU energy agency; and (iv) the introduction of separate certification procedures for transmission system operators (TSOs) controlled by non-EU legal entities.⁸⁶³ The provisions are significant in their contribution towards creating an integrated energy market, however, the analysis focuses on the

⁸⁶⁰ See analysis undertaken in Chapter 4 Section 4.1.2. (*Does the EU Have Normative Interests in the Neighbourhood?*) whereby strategic interests are deemed to be self-regarding as opposed to normative interests which reflect a common good. Strategic interests are means/end orientated and are synonymous with possession goals rather than milieu goals.

⁸⁶¹ The TEP is a legislative package for an internal gas and electricity market in the European Union. Its purpose is to further open up the gas and electricity markets in the European Union. The package was proposed by the European Commission in September 2007, and adopted by the European Parliament and the Council of the European Union in July 2009.

⁸⁶² The TEP consists of (i) a directive concerning the common rules for the internal market in electricity (2009/72/EC) (the Electricity Directive); (ii) a directive concerning the common rules for the internal market in gas (2009/73/EC) (the Gas Directive); (iii) a regulation on the conditions for access to the natural gas transmission networks ((EC) No 715/2009); (iv) a regulation on the conditions for access to the network for cross-border exchange of electricity ((EC) No 714/2009); and (v) a regulation establishing the Agency for the Cooperation of Energy Regulators ((EC) No 713/2009)

⁸⁶³ Anna Stanic, 'New EU Rules on the Internal Energy Market and Energy Policy' (2011) *Oil, Gas & Energy Law Journal (OGEL)* 9(5) 1.

unbundling regime⁸⁶⁴ and ownership unbundling.⁸⁶⁵ Full ownership unbundling requires vertically integrated energy companies to dispose of their gas networks and electricity grids. Under the third model, supply and production companies are forbidden a majority share in a TSO or from exercising rights such as voting or board member appointment.⁸⁶⁶ Article 9⁸⁶⁷ of the Gas Directive prescribes the details regarding ownership unbundling. Unbundling is a fundamental tool in the Union's liberalization movement generally and the EU energy market specifically. With liberalization as its core objective, it is not surprising that the ownership unbundling model is often met with much resistance from third countries, given its impact on their interests in the European market.

The TEP's separation requirement is applicable to any company active within the European market and is imposed by the relevant unbundling models under the Gas Directive.⁸⁶⁸ Significantly Article 11 of the Gas Directive, the so-called 'Third Country Clause', applies to third country operators on the continent which by implication places them under a specific regime. The Third Country Regime is largely an effort on the part of EU legislators to eliminate any threat posed to the Union's security of energy supply through the control of a

⁸⁶⁴ Besides the novelties noted above, the TEP is best known for its unbundling rules, albeit controversial. The unbundling rules aim to prevent companies that are involved in both the transmission of energy and production or supply of energy from using their position as a TSO to prevent competitors from using the transmission network. The Commission found that the legal and functional unbundling of energy supply and production from transmission networks under the Second Energy Liberalization Package did not suffice for the purpose of ensuring a fully functional liberalized energy market. See EU Commission, *The Sector Inquiry pursuant to Article 17 of Regulation (EC) 1/2003 in to the European gas and electricity sectors*, 10 January 2007, available at http://ec.europa.eu/competition/sectors/energy/inquiry/communication_en.pdf. See also Anna Stanic, 'New EU Rules on the Internal Energy Market and Energy Policy' (2011) *Oil, Gas & Energy Law Journal (OGEL)* 9(5) 2

⁸⁶⁵ Ownership unbundling was therefore included by the Commission as the fundamental foundation of the TEP. Ownership unbundling entailed the separation of energy generation and supply from transmission network ownership and operation which was considered controversial amongst vertically integrated energy companies. Significantly, the Commission's TEP which was adopted on 13 July 2009, introduced a choice of three unbundling options at the discretion of Member States. See Anna Stanic, 'New EU Rules on the Internal Energy Market and Energy Policy' (2011) *Oil, Gas & Energy Law Journal (OGEL)* 9(5) 2

⁸⁶⁶ Anna Stanic, 'New EU Rules on the Internal Energy Market and Energy Policy' (2011) *Oil, Gas & Energy Law Journal (OGEL)* 9(5) 2

⁸⁶⁷ Article 9 of the Gas Directive states that: '1. Member States shall ensure that ... : (a) each undertaking which owns a transmission system acts as a transmission system operator; (b) the same person or persons are entitled neither: (i) directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor (ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply; (c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply; and (d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system. 2. The rights referred to in points (b) and (c) of paragraph 1 shall include, in particular: (a) the power to exercise voting rights; (b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or (c) the holding of a majority share.' See Article 9 of the Gas Directive 2009/73/EC adopted July 13, 2009, OJ L 211/96 14.8.2009

⁸⁶⁸ In particular, Art. 9 (which relates to Ownership Unbundling); Art. 14 and 15 (which relates to ISO) and Art. 17 to 23 (which relates to ITO).

transmission system or transmission system operator by third countries.⁸⁶⁹ Recital 22 of the Directive brings this concern to the fore.⁸⁷⁰

The third energy liberalization package puts forward provisions which prevent transmission systems or transmission system operators from being controlled by companies of non-EU member states until they satisfy certain requirements.⁸⁷¹ Article 11 establishes the certification requirements for a transmission system operator from third countries, which is largely aimed at regulating the open gas markets and ensuring security of supply.⁸⁷² Article 11 thereby addresses any concerns that ownership unbundling would facilitate the acquisition of strategic EU energy transmission assets by foreign entities.⁸⁷³ As a consequence, national regulators now have the obligation to refuse certification of a transmission system operator under the control of a company by a third country state if the said foreign entity fails to comply with the requirements of Article 11. Article 11 of the Gas Directive deals with certification in relation to third countries. Article 11(3)(a) states that certification can be refused where the entity has not complied with Article 9. This incidentally extends the unbundling regime to third country undertakings.⁸⁷⁴

Significantly, Article 11 therefore requires that undertakings from third countries which intend to acquire control over an electricity or gas network, need to comply with the same unbundling requirements as EU undertakings. Failure to do so will entail refusal of the

⁸⁶⁹ Thomas Cottier, Sofya Matteotti-Berkutova, and Olga Nartova, 'Third Country Relations in EU Unbundling of Natural Gas Markets: the "Gazprom Clause" of Directive 2009/73 EC and WTO Law' *Swiss National Centre of Competence in Research, Working Paper, 2010*) 3

⁸⁷⁰ Recital 22 of the Gas Directive states that: 'The security of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in gas and the integration of the isolated gas markets of Member States. Gas can reach the citizens of the Union only through the network. Functioning open gas markets and, in particular, the networks and other assets associated with gas supply are essential for public security, for the competitiveness of the economy and for the well-being of the citizens of the Union. Persons from third countries should therefore only be allowed to control a transmission system or a transmission system operator if they comply with the requirements of effective separation that apply inside the Community... The security of supply of energy to the Community requires, in particular, an assessment of the independence of network operation, the level of the Community's and individual Member States' dependence on energy supply from third countries, and the treatment of both domestic and foreign trade and investment in energy in a particular third country. Security of supply should therefore be assessed in the light of the factual circumstances of each case as well as the rights and obligations arising under international law, in particular the international agreements between the Community and the third country concerned.' See Recital 22 of the Gas Directive 2009/73/EC adopted July 13, 2009, OJ L 211/96 14.8.2009

⁸⁷¹ Thomas Cottier, Sofya Matteotti-Berkutova, and Olga Nartova, 'Third Country Relations in EU Unbundling of Natural Gas Markets: the "Gazprom Clause" of Directive 2009/73 EC and WTO Law' *Swiss National Centre of Competence in Research, Working Paper, 2010*) 4

⁸⁷² Thomas Cottier, Sofya Matteotti-Berkutova, and Olga Nartova, 'Third Country Relations in EU Unbundling of Natural Gas Markets: the "Gazprom Clause" of Directive 2009/73 EC and WTO Law' *Swiss National Centre of Competence in Research, Working Paper, 2010*) 4

⁸⁷³ Europa press release, *Energising Europe: A real market with secure supply*, reference: MEMO/07/361, Date: 19/09/2007

⁸⁷⁴ Here it is important to note that the provision is specifically addressed to third country undertakings and not their respective governments, which means that the unbundling obligation is restricted to the operations of the said undertakings within the European market. The Third Country Clause therefore does not propose any reciprocity and as such, any reference to a 'reciprocity clause' in relation to the Third Country Clause is erroneous given the adopted version which has deviated from that initially proposed. See Thomas Cottier, Sofya Matteotti-Berkutova and Olga Nartova, *Third Country Relations in EU Unbundling of Natural Gas Markets: the 'Gazprom clause' of Directive 2009/73/EC and WTO Law*, Swiss National Centre of Competence in Research, May 2010, <http://www.nccr-trade.org/publication/third-country-relations-in-eu-unbundling-of-natural-gas-markets-the-gazprom-clause-of-directi>, 5-6.

necessary certification which will have severe ramifications on energy incumbents, in particular Russia's energy giant Gazprom that has an active presence within the European market.⁸⁷⁵ The TEP requires 'effective unbundling' which means Gazprom has a legal obligation to unbundle the ownership and operation of its gas pipelines on EU territory and allow third party access to its pipelines. It therefore comes as no surprise that the TEP is a highly contentious issue for Russia, given its implications for Russian interests in the European market. In particular, the Third Country Clause⁸⁷⁶ which is perceived by Russia as the Commission's attempt to specifically target Gazprom, Russia's largest vertically integrated state-owned energy incumbent.⁸⁷⁷ It follows that the TEP's ownership unbundling and Third Country Clause has been famously dubbed the 'Gazprom Clause' after the entity allegedly targeted by the Commission's unbundling rules as an attempt to curb its strategic purchasing of EU liberalized assets.⁸⁷⁸ Whilst the allegation by Russia is simply conjecture, it does suggest a strategic element (i.e. means/end oriented) to the Union's actions and normative means of power in compelling Gazprom to comply with the ownership unbundling requirement.

5.2.4.2. The External Dimension of the Internal Market: The Third Country Clause and Gazprom

Gazprom is a textbook example of a vertically integrated energy undertaking which is indisputably acknowledged as the largest in the world.⁸⁷⁹ Gazprom has established a significant presence within the European market given the fact that Gazprom has a monopoly on the export of Russian gas to Europe to which it is bound by its pipeline network and the fact that it is the only entity that manages the transmission pipelines.⁸⁸⁰ Gazprom's

⁸⁷⁵ Peter Van Elsuwege, 'Towards a Modernisation of EU-Russia Relations?' (CEURUS EU-Russia Papers, 2012(5)) 13.

⁸⁷⁶ The Third Country Clause is controversial as it is deemed to specifically target Gazprom as an entity active on the European energy market.

⁸⁷⁷ Article 11 of the Gas Directive

⁸⁷⁸ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 451

⁸⁷⁹ Gazprom is Russia's largest oil and gas company. Although the company was initially Government owned, it was later converted into a joint-stock company in 1993. The Russian Government held 40% of the shares which was later increased to 51% in 2003. With the state as the majority owner, Gazprom operates much like a quasi-governmental agency given the significant control the Russian Government exercises.⁸⁷⁹ Russia's natural gas production and distribution is run by Gazprom for which the revenues from the company are a substantial contribution to the Russian state budget.⁸⁷⁹ By way of example, Gazprom is among Russia's largest taxpayers with approximately 2 trillion rubbles contributed to the budget in taxes and customs duties every year.⁸⁷⁹ Gazprom's core activities in the gas market include production, exploration, transportation, storage, processing and marketing. In addition thereto, the energy giant is a major operator of pipelines with its infrastructure deeply imbedded within the European market. The fact that Gazprom has a monopoly on the export of Russian gas to Europe to which it is bound by its pipeline network and the fact that it is the only entity that manages the transmission pipelines, Gazprom has established a significant presence within the European market.⁸⁷⁹ See Daniel Yergin, *The Quest: Energy, Security and the Remaking of the Modern World* (2011) London: Penguin Books 335. Yuli Girgoryev, 'The Russian gas Industry, its legal structure, and its influence on world markets', *Energy Law Journal* 2007, (125) 132; Andrey Kruglov, Deputy Chairman of the Management Committee, Gazprom's Financial and Economic Policy (Press Conference: 29 June 2016)

⁸⁸⁰ Yuli Girgoryev, 'The Russian gas Industry, its legal structure, and its influence on world markets', *Energy Law Journal* 2007, (125) 132

monopoly and global ambitions to become a world leading energy company⁸⁸¹ set the agenda and pace at which the Company undertook its activities in the energy sphere.⁸⁸² In its efforts to improve its global presence, Gazprom has tried to move in the downstream sector in Europe.⁸⁸³ Gazprom's downstream diversification has entailed Gazprom moving into EU Member States to reap the benefits of the liberalisation and privatisation of the markets.⁸⁸⁴ This has resulted in opposition from EU Member States who have objected to Gazprom's increasing presence and power in the European energy market.⁸⁸⁵ In an effort to curb Gazprom's growing dominance within the European market, the Gazprom clause emerged which subjects companies from third countries to the same unbundling rules as EU entities.

The Gazprom clause imposes a restriction on third country incumbents, namely that they cannot control transmission systems or transmission system operators unless (i) an agreement exists between the Union and the said third country within which the incumbent is based; and (ii) the incumbent can demonstrate that it is not influenced by a third country or an operator active in the production or supply of gas or electricity. The clause was included in the text of the Commission's third energy liberalization package as a response to concerns that ownership unbundling would inadvertently lead to the indiscriminate acquisition of EU energy assets by third countries. The rationale that was provided at the time by the then Commission President, José Manuel Barroso, was (inter alia) to protect the openness of the European market and the expected benefits that the unbundling

⁸⁸¹ Gazprom. 2012. Annual Report 2011. Moscow.

⁸⁸² Gazprom's prominent position within the European market, raised some concerns within the Union, in particular the Commission, as it suggested a strategic relevance that energy resources hold where resource nationalism has an important part to play in developing Russia's energy industry.⁸⁸² This appears to be inconsistent with the Union's outlook of energy which is driven by an economic-based view which is less focused on strategic relevance.⁸⁸² In this respect, Gazprom's monopoly plays a key role and is often perceived to be a lever of the state given its ties to the Russian Government and the directions it takes from President Putin.⁸⁸² There therefore appear to be conflicting interests and objectives - the EU wants Russia to reform its energy markets and partake in the liberalisation movement, whereas Russia is reluctant to do so as this would ultimately end Gazprom's monopoly and thereby eliminate any leverage that the Russian Government would be able to use as a policy tool to pursue its political agenda. It is no secret that Gazprom is of significant economic and strategic political importance which has made full liberalisation of the Russian gas sector unlikely.⁸⁸² The Union has therefore increasingly become wary of the incongruousness of the Union's liberalisation paradigm and Russia's resource nationalism.⁸⁸² See Mert Bilgin, 'Energy Security and Russia's Gas Strategy: The Symbiotic Relationship Between the State and Firms' (2011) *Communist and Post-Communist Studies* 44 (2) 119-127, 120; Jakub M. Godzimirski, 'Energy Security and the Politics of Identity' in Gunnar Fermann (ed.) *Political Economy of Energy in Europe: Forces of Integration and Fragmentation* (Berliner Wissenschafts-Verlag 2009) 178; Frank Umbach, 'Global Energy Security and the Implications for the EU' *Energy Policy* (2010) 38(3): 1229-1240, 1230; Frank Umbach, 'Europe's Next Cold War: the European Union Needs a Plan to Secure its Energy Supply' (2006) *International Politik*, 1: 64-71, 64; Simon Pirani, Jonathan Stern and Katja Yafimava. 2009. The Russo-Ukrainian Gas Dispute of January 2009: a Comprehensive Assessment (Oxford Institute for Energy Studies, 2009) 31; Pami Aalto and Kirsten Westphal, 'Introduction' in Pami Aalto (ed.) *The EU-Russian Energy Dialogue: Europe's Future Energy Security* (Ashgate Publishing Limited, 2008) 13

⁸⁸³ Jonathan Stern, 'The Future of Russian Gas and Gazprom' (Oxford University Press, 2005) 112

⁸⁸⁴ Dominique Finon and Catherine Locatelli, 'Russian and European Gas Interdependence: Could Contractual Trade Channel Geopolitics?' *Energy Policy*, (2008) 36(1): 423-442, 434

⁸⁸⁵ *Ibid*

regulation would bring by implementing strict conditions on the ownership of assets and making sure all non-EU companies play by the same rules.⁸⁸⁶

The Commission's law-based approach to energy policy which endeavours to implement market principles as the foundation for international energy trade appears to be at odds with Russia's approach to energy policy which is largely driven by a divide-and-rule strategy.⁸⁸⁷ With this in mind, the fact that non-EU companies are required to ensure effective unbundling of transmission from supply and production activities means that the third legislative package has acquired an external dimension. By implication, third countries are required to unbundle and thereby comply with the same rules otherwise applicable to their European counterparts which affirms the Union's normative power. Here we can see how the Union is engaging with Russia in a normative manner by passing legislation which effectively requires Russia to abide by internal market rules and the Union's unbundling requirements in the energy sector despite being a third country. The Union's internal energy market regulation therefore obtains a cross-border reach which affirms the Union's regulatory power beyond its borders which bolsters any normative power argument.

According to the Commission, the extension of the TEP's unbundling rules to non-EU entities, was intended to prevent any discrimination between non-EU and EU undertakings.⁸⁸⁸ If we concede, as the research has shown, that the main objective of the ECT was to create a level-playing-field, in the absence of the ECT regulating EU-Russia energy trade, the Union's focus appears to have shifted to the TEP as an alternative instrument to fill the void of the legal architecture following Russia's withdrawal from the ECT. More specifically, the Commission's restriction that non-EU individuals and third countries do not acquire control over an EU transmission system or operator unless permitted by an agreement between the EU and said third country, was aimed at guaranteeing that non-EU undertakings respect the same rules applicable to EU based companies. Again, this reflects the Union's endeavours to create a level-playing field in the absence of fundamental ECT principles applying such as non-discriminatory access to international markets, upholding open competitive markets and non-discriminatory investment promotion and protection. Whilst this conduct alludes to normative behaviour in the Union's endeavours to regulate its energy trade relations with Russia through its regulation with extra-territorial reach, it also shows that the Union is engaging in a strategic

⁸⁸⁶ European Commission, press release, Energising Europe: A Real Market with Secure Supply, 19 September 2007 http://europa.eu/rapid/press-release_MEMO-07-361_en.htm?locale=en

⁸⁸⁷ A divide and rule strategy is a concept predominantly referred to in politics which is understood to mean the gaining and maintaining of power by breaking up larger concentrations of power into pieces that individually have less clout than the one implementing the said strategy. Russia is generally perceived to pursue a divide and rule strategy in its external energy relations with states heavily dependent on its energy resources.

⁸⁸⁸ Communication from the Commission (COM(2006) 851 final): 'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)' and its Technical Annex SEC (2006) 1724. See also Philip Lowe, Ingrida Pucinskaite and Patrick Lindberg, 'Effective Unbundling of Energy Transmission Networks: Lessons from the Energy Sector Inquiry' (Competition Policy Newsletter, Spring 2007) http://ec.europa.eu/competition/publications/cpn/2007_1_23.pdf

manner with its reluctant partner in its efforts to ensure its energy security. It also shows that the Union is using EU regulation as a mechanism to curb Moscow's strategy of collecting key energy assets and pipelines in Central and Eastern Europe which have subsequently politicised Russia's downward movement in the European gas market given Gazprom's expanding presence on the continent. It is often the case that grid infrastructure will be controlled by a company in third country state and gas equally traded by a non-national operator. However, given European gas supplies largely depend on imports, particularly from Russia, the relationship between the Union and such third countries and the grids and gas supplies controlled by these non-EU states, is of crucial importance for the Union's energy security.⁸⁸⁹ If we consider the Union's concerns regarding Russia's renationalisation trends and its efforts to collect significant energy infrastructure on the European energy market whilst retaining state control over its energy sector, the Union's actions appear to be manoeuvres aimed at bolstering its energy security and minimising the risk of a partnership typically driven by geopolitics. Moscow's tactic of seizing control of strategic energy assets on the European market as leverage in its negotiations with individual Member States, as part of an apparent divide-and-rule strategy,⁸⁹⁰ would inevitably hinder the Union's aim of a fully integrated energy market and in turn ensuring its security of energy supply.

5.2.4.3. The Gazprom Clause and Reciprocity

Reciprocity is a political instrument used to moderate market opening in strategic sectors of the economy.⁸⁹¹ Reciprocity essentially makes the granting of particular rights contingent on the receipt of similar or comparable rights. It was first applied between EU member states, whereby one state granted access to its markets to another state provided that it equally opened its own market. The reciprocity principle is one of the major instruments used in exporting the EU *acquis*.⁸⁹² The principle of reciprocity therefore protects markets against states that have not liberalised their energy sectors to the same degree.⁸⁹³ It was intended to protect European markets against 'free riders' who had opted not to liberalise

⁸⁸⁹ Thomas Cottier, Sofya Matteotti-Berkutova, and Olga Nartova, 'Third Country Relations in EU Unbundling of Natural Gas Markets: the "Gazprom Clause" of Directive 2009/73 EC and WTO Law' *Swiss National Centre of Competence in Research, Working Paper, 2010*) 1

⁸⁹⁰ See Fraser Cameron, *The Politics of EU-Russia Energy Relations*, EU-Russia Energy Relations. OGEL Collection, Euroconfidential (2010) 26

⁸⁹¹ Andrey Belyi, 'Reciprocity as a factor of the energy investment regimes in the EU-Russia energy relations' (2009) 2(2) *Journal of World Energy Law & Business* 117

⁸⁹² The Community *acquis* is the body of common rights and obligations which bind all the Member States together within the Union including inter alia the legislation adopted in application of the treaties and the case law of the Court of Justice and measures relating to the common foreign and security policy. The principle of reciprocity therefore protects markets against states that have not liberalised their energy sectors to the same degree.

⁸⁹³ Andrey Belyi, 'Reciprocity as a factor of the energy investment regimes in the EU-Russia energy relations' (2009) 2(2) *Journal of World Energy Law & Business* 117

their markets to a similar extent.⁸⁹⁴As such, reciprocity can be seen as a political tool to facilitate market opening.⁸⁹⁵ In this respect, reciprocity can be considered a mechanism to push the EU's liberalisation model to ensure open and competitive markets amongst trading partners such as Russia that want to retain state control over their energy sector. The reciprocity principle therefore stands as testament to the Union's normative means of power and impact in its external energy relations with Russia given the reciprocal market access which facilitates the export of the Union's liberalization model.

The TEP's so-called 'Gazprom Clause' (famously dubbed for its implications⁸⁹⁶ on Gazprom's state-owned energy champion whose conduct on the European markets has been controversial due to its growing interests in pipeline networks linking Russia to Europe and thereby expanding Russia's control over Western customers and the Union's energy security)⁸⁹⁷ is only one of the requirements imposed on third country service providers. Article 11 sets out two main criteria of certification which include: (i) unbundling of transmission systems and transmission system operators; and (ii) the security of supply risk assessment. Through Article 11(a), the TEP appears to extend the principle of reciprocity to third countries which (as already mentioned) requires a foreign operator to comply with the same unbundling requirements as EU operators under Article 9. However, as stipulated above, the provision is addressed to the foreign entity rather than its Government and as such, the undertaking that Member States establish a regime compatible with ownership

⁸⁹⁴ Thomas Cottier, Sofya Matteotti-Berkutova, and Olga Nartova, 'Third Country Relations in EU Unbundling of Natural Gas Markets: the "Gazprom Clause" of Directive 2009/73 EC and WTO Law' *Swiss National Centre of Competence in Research, Working Paper, 2010*) 6

⁸⁹⁵ By way of example, foreign banks were allowed to operate subsidiaries to the extent only that domestic banks were able to obtain licenses in the partner country. In this respect, see the 1934 Swiss Banking Act which states that permission to operate a foreign bank is made dependent upon the grant of reciprocal rights, subject to international obligations to the contrary ("*Gewährleistung des Gegenrechts durch Staaten, in denen die Ausländern mit qualifizierten Bedingungen ihren Wohnsitz oder Sitz haben, sofern keine anderslautenden internationalen Verpflichtungen entgegenstehen*"), SR 952.0, see Thomas Cottier & Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, The European Union and Switzerland* (Cameron May & Staempfli, Berne, London 2005) 367

⁸⁹⁶ Russia has expressed its dissatisfaction towards the unbundling requirements which it has proclaimed amounts to a 'robbery' of Russian property. This would inevitably be the case in a situation where Russia was forced to sell its assets in its efforts to unbundle which would result in asset value losses. Notwithstanding, even where Gazprom would not need to unbundle its ownership and thereby retain its transmission assets, the TEP would still restrict Gazprom from managing the said assets. As such, Gazprom's investments in its pipelines would be devalued which would impact its activities in the European market. Apart from the direct financial losses incurred from the obligatory divestment and subsequent loss of control over its transmission network, there are additional implications for Gazprom which may pose a threat to its operations. In particular in relation to Gazprom's long-term supply contracts under which Gazprom supplies gas to its European consumers.⁸⁹⁶ Pursuant to the new unbundling regime and TPA rules, Gazprom would risk losing control over its pipelines and thereby the necessary capacity to deliver on its supply commitments.⁸⁹⁶ With a loss of control over its existing transmission network, Gazprom may not be in a position to ensure sufficient transportation capacity which could lead to supply disruptions and therefore financial and reputational damage. See ⁸⁹⁶ Alexander Y. Jouravlev, *The Effect of the European Union's Unbundling Provisions on the EU-Russian Natural Gas Relationship and Russia's Accession to the World Trade Organization*, December 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969502, 18-19; Sergei Komlev, *Third Energy Package and Impact on Gazprom Activities in Europe*, Essen, 18 March 2011

⁸⁹⁷ Marshall I. Goldman, *Petrostate: Putin, Power and the New Russia* (Oxford University Press, 2008) 152

unbundling, does not apply to non-EU states.⁸⁹⁸ The provision is therefore incongruous with the usual obligations of reciprocity that exist in other regulatory areas, such as the reciprocity requirements found among Member States in relation to access to electricity within the EU.⁸⁹⁹ Here the Union has refrained from formally imposing the full reciprocity unbundling requirements to third countries. Instead the conditions merely affect operations within the EU. As such, the regime is often mistakenly called a ‘reciprocity clause’ as it simply requires that non-EU companies comply with domestic unbundling rules applicable to EU countries. Therefore, in order for a foreign entity to operate within the EU, it needs to discard its monopolistic composition and structurally separate its grid and trading operations.⁹⁰⁰ While the unbundling of foreign controlled companies within the EU can be monitored on the basis of competition rules, it is unclear how such unbundling will be enforced or exercised independent of mutual cooperation in matters of competition control.⁹⁰¹

The second certification requirement for non-EU entities entails entry into the European market without hindering security of supply of the Member State involved or the Union as a whole.⁹⁰² There is a wide range of considerations that the Member State and Commission can take into account in undertaking their assessment to allow the non-EU entity within their territory. Inevitably the concerned Member State will provide certification once it has been ascertained that the third country company does not pose a threat to its security of supply or that of the Union. In undertaking its assessment, rights and obligations under international agreements will be taken into account. This enables the EU to make certification conditional upon secure supplies and transit rights. It also provides the EU with leverage to secure energy supplies in exchange for operational right of grids within the EU. These open-ended conditions which the EU may impose on third country incumbents extend beyond the commitments of Member States, which has raised objections from major supply partners, in particular the Russian Federation.

The significance of this section lies in the Union’s manoeuvres to address simmering issues in EU-Russia energy relations that was alluded to in the context section of the case-study (Section 5.1), which the Union has tried to address through normative means (rules and regulations) in the absence of a legally binding framework (namely, the ECT) in a strategic manner (imposed conditions on third-country incumbents) for strategic objectives (energy security) against the backdrop of a fragmented legal architecture and patchwork of legal

⁸⁹⁸ Thomas Cottier, Sofya Matteotti-Berkutova, and Olga Nartova, ‘Third Country Relations in EU Unbundling of Natural Gas Markets: the “Gazprom Clause” of Directive 2009/73 EC and WTO Law’ *Swiss National Centre of Competence in Research, Working Paper, 2010*) 6

⁸⁹⁹ *Ibid*

⁹⁰⁰ *Ibid* 7

⁹⁰¹ *Ibid*

⁹⁰² Recital 22 of the Gas Directive, OJ L 211/96 14.8.2009

instruments.⁹⁰³ The Union is normative in its external energy relations with Russia because it relies on its internal market regulation to pursue its open competitive market agenda and energy liberalisation model with its relevant partner Russia, a third-country state. However, the Union is strategic in its pursuit of energy security through normative means which are unilaterally imposed. The Union's efforts to impose a market-based approach based on EU values and norms on non-EU states and entities through the extraterritorial reach of its internal market rules affirms the Union's normative means of power and its normative agenda vis-à-vis Russia.

If we concede, as suggested above, that the Union's efforts with the TEP entailed ensuring entities such as Gazprom refrained from taking advantage of the Union's liberalization model without due regard to applying the same unbundling rules applicable to EU entities, to its own activities on the European market, then we can see how the Union has strategically endeavoured to use its internal market rules and regulations as a tactical mechanism to push its normative agenda (i.e. that the EU is using normative means – its internal rules – to achieve strategic ends – energy security). In the absence of a legally binding framework regulating EU-Russia energy relation, the Union's regulation has obtained a cross-border reach and application to non-EU commitments.

The 'Gazprom Clause' certification requirement prescribes that non-EU entities comply with EU unbundling rules. The Third Country Clause therefore extends the certification requirement to third-country incumbents but entails a broader regulatory intervention as Gazprom is a state-owned Russian entity. If we concede that Gazprom as a vertically integrated national gas champion, constitutes a lever of the Russian state, then the EU's regulatory intervention can be seen to extend beyond a single third-party incumbent with Gazprom being the main player in the Russian energy sector and fundamental to the Federation's energy power status.⁹⁰⁴

This serves to bolster the normative power framework given the Union's evolution into a global normative energy actor albeit in a strategic manner given the external reach of its internal market rules which have been imposed unilaterally. One of the Union's strategic instruments in its normative agenda which has gained traction in the level of significance it plays with respect to the energy sector and Russia, is EU competition rules. As will be illustrated below, competition law has played an increasingly important role in the Union's

⁹⁰³ Yulia Selivanova, 'Managing the Patchwork of Agreements in Trade and Investment' in Andreas Goldthau and Jan Martin Witte (eds.) in *Global Energy Governance: the New Rules of the Game* (Global Public Policy Institute, 2010) 49

⁹⁰⁴ Whilst the recent proposed changes to the Gas Directive (which extend EU rules and the energy *acquis* to pipelines from non-EU countries) are said *not* to be 'extraterritorial' by the Commission because they only apply to pipelines carrying gas within the EU, the fact that it covers pipelines owned by third country incumbents which are obliged to unbundle ownership of their networks from supply and product activities would suggest 'territorial extension'. The directive changes apply to all pipelines carrying gas to the EU within the EU and therefore is not considered an extraterritorial obligation to abide by EU law.

role as an energy actor, in particular in its relations with Russia. Through EU competition law, the Union appears to be bolstering its normative agenda by using competition rules to address recurring issues in the EU's external energy relations with Russia which will be examined below.

5.2.4.4. EU Competition Law and the Energy Markets: The EU Competition Investigation of Gazprom's Sales in Central and Eastern Europe

Tackling the anti-competitive behaviour of vertically integrated energy undertakings and ensuring free access to the transportation infrastructure was at the fore of establishing competition in the European energy market. Today competition law appears to be a powerful tool in the Commission's Liberalisation artillery. EU competition law is found in Articles 101 TFEU, which prohibits agreements between undertakings, which may affect trade between Member States and distort competition in the internal market and Article 102 TFEU, which prohibits the abuse of a dominant position by an undertaking within the internal market or in a substantial part of it. The EU Merger Regulation (EC) No. 139/2004 is also powerful tool. Under article 2(3) of the Merger Regulation,⁹⁰⁵ the Commission is entitled to declare a concentration that causes significant impediments to effective competition incompatible with the internal market, particularly if it concerns the strengthening of a dominant position in the market.⁹⁰⁶ Where energy undertakings are reluctant to abide by the applicable unbundling rules, the Commission encourages them to do so by virtue of Competition law under Article 102 TFEU.⁹⁰⁷ In many ways, the Commission can be said to be achieving more through resorting to general competition rules, than it did before through its energy specific regulatory measures.⁹⁰⁸ It follows that the Commission has been using Article 102 TFEU to further its agenda and secure further commitments from undertakings that extend beyond the ambit of the unbundling requirements.⁹⁰⁹ The Commission's use of Competition law has therefore proved to be a persuasive instrument in ensuring compliance with the prevailing unbundling regime.⁹¹⁰ These developments have also affected Gazprom. Where the transmission of gas to the EU by Gazprom was not previously affected by competition law, today the situation has completely changed.⁹¹¹

⁹⁰⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/1

⁹⁰⁶ A recent case concerns the proposed acquisition of the only Greek gas transmission system operator DESFA by SOCAR, the State Oil Company of Azerbaijan Republic which is pending approval by the European Commission on account of the Commission's concerns that the proposed merged entity 'may have the ability and the incentive to hinder competitive upstream gas suppliers from accessing the Greek transmission system, in order to reduce competition on the upstream wholesale gas market in Greece. See Commission Press Release, 'Commission opens in-depth investigation into proposed acquisition of Greek gas transmission system operator DESFA by SOCAR' IP/14/1442, 5.11.14

⁹⁰⁷ Kim Talus, *EU Energy Law and Policy: A Critical Account*, New York, Oxford, 2013, 67

⁹⁰⁸ *Ibid* 83

⁹⁰⁹ *Ibid* 241

⁹¹⁰ *Ibid*

⁹¹¹ *Ibid*

The full extent of the influence of competition on Gazprom is best illustrated in the Baltic energy market where the Commission was asked to investigate potential market abuse on account of the politically motivated price discrimination of Lithuania's gas.⁹¹² In September 2011, the Commission launched a series of raids on Gazprom offices in Central and Eastern Europe to accumulate sufficient evidence on suspicions that Gazprom was abusing its dominant position in its upstream gas supply markets. The Commission alleged that some of Gazprom's business practices in Central and Eastern gas markets constituted an abuse of its dominant position in breach of Article 102 TFEU. In particular, the Commission alleged that by imposing territorial restrictions in its supply contracts, Gazprom was effectively segregating Central and Eastern gas markets which is inconsistent with internal market rules. The territorial restrictions included measures inhibiting the cross-border flow of gas such as export ban clauses and destination clauses which facilitated Gazprom to pursue a strategy of market partitioning, thereby enabling Gazprom to charge unfair prices in five eastern EU member states, namely Bulgaria, Estonia, Latvia, Lithuania, and Poland, by charging prices significantly higher compared to Gazprom's costs or to benchmark prices.⁹¹³ These activities are manifestly inconsistent with the Union's energy liberalisation model and its endeavours to maintain open and competitive energy markets. The fact that the Union has resorted to using its competition laws to ensure compliance by Gazprom of EU market-based rules and values, serves to bolster the Union's normative agenda with the EU using competition law to ensure its security of energy supply.

Formal proceedings were brought against Gazprom on 4 September 2012 for market abuse in Central and Eastern Europe contrary to Art. 102 TFEU.⁹¹⁴ According to the Commission's preliminary findings, Gazprom may have been leveraging its dominant market position by making the supply of gas to Bulgaria and Poland dependent on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure. By way of example, gas supplies were contingent on investments in pipeline projects promoted by Gazprom (i.e. the South Stream project in Bulgaria) or conceding on Gazprom's reinforced control over a pipeline (i.e. the Yamal-Europe pipeline in Poland). Such behaviour, if confirmed, impedes the cross-border sale of gas within the single market thus lowering the liquidity and efficiency of gas markets. It raises artificial barriers to trade between Member States and results in higher gas prices. The hefty fines imposed for antitrust violations, which may reach

⁹¹² *OAQ Gazprom v. Republic of Lithuania*, Stockholm Chamber of Commerce (2012) V 125/2011, para. 155
⁹¹³ Commission Press Release, 'Commission sends statement of objections to Gazprom for alleged abuse of dominance on Central and Eastern European Gas Supply Markets IP/15/4828, 22.4.2015. See further, A Riley, "Gazprom versus Commission: The Antitrust Clash of the Decade?" (CEPS Policy Brief No. 285, 31 October 2012) available at: <https://www.ceps.eu/publications/commission-v-gazprom-antitrust-clash-decade>

⁹¹⁴ Commission Press Release, 'Commission sends statement of objections to Gazprom for alleged abuse of dominance on Central and Eastern European Gas Supply Markets IP/15/4828, 22.4.2015. See further, A Riley, "Gazprom versus Commission: The Antitrust Clash of the Decade?" (CEPS Policy Brief No. 285, 31 October 2012) available at: <https://www.ceps.eu/publications/commission-v-gazprom-antitrust-clash-decade>

up to 10 per cent of the dominant undertaking's total turnover in the preceding year,⁹¹⁵ may explain Gazprom willingness to offer commitments⁹¹⁶ so as to alleviate the Commission's concerns.⁹¹⁷ Introduced into EU competition law by Article 9 of Regulation 1/2003, commitment decisions allow the Commission to terminate the investigation without the finding of infringement and the subsequent imposition of a fine. The standard of proof is thus significantly low. The parties may propose remedies to remove the Commission's concerns embodied into legally binding commitment decisions. In essence, 'commitment decisions are a bargain between the Commission and the undertaking concerned'.⁹¹⁸ By contrast, antitrust procedures under Article 7 of the same regulation may lead to the establishment of an infringement and levy significant fines. Damages before national courts may also be triggered.

In particular, Gazprom's proposed measures to remedy competition concerns relate to the removal of restrictions to re-sell gas cross-border, to ensuring competitive gas prices in Central and Eastern European gas markets and removing demands in relation to gas infrastructure projects obtained through its dominant market position.⁹¹⁹ The Commission's market testing of Gazprom's concessions, if satisfactory, would mean it could adopt a decision making the commitments legally binding on Gazprom. In the event that Gazprom breaks such commitments, the Commission may then impose a fine up to 10% of the company's worldwide turnover, without having to prove an infringement of the EU antitrust rules.⁹²⁰

Although these proceedings only reached fruition in May 2018, on account of the market testing, they have no doubt nudged Gazprom towards ownership unbundling on the Lithuanian market, as well as other affected Eastern European states where Gazprom may fall privy to EU Competition rules. The fact that the Commission has secured the commitments from Gazprom that extend beyond the usual unbundling provisions, makes it clear that the Commission's use of Competition law has proved to be a persuasive instrument in obtaining Gazprom's compliance with the prevailing unbundling regime.⁹²¹ In this respect, we can see how the Union's competition rules and in turn its unbundling regime have become significant mechanisms to pursue the Union's normative agenda by upholding

⁹¹⁵ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1/1, art 23(2)

⁹¹⁶ *Ibid* art 9

⁹¹⁷ See Case AT 39816, Commitment Proposal, 14 February 2017 last accessed 14 July 2017 at http://ec.europa.eu/competition/antitrust/cases/g2/gazprom_commitments.pdf

⁹¹⁸ Hubertus Von Rosenberg, 'Unbundling through the Back Door . . . The Case of Network Divestiture as Remedy in the Energy Sector' (2009) 30 E.C.L.R. 245

⁹¹⁹ Press Release: 'Antitrust: Commission invites comments on Gazprom commitments concerning Central and European gas markets' Brussels (13 March 2017) last accessed at 14 July 2017 <http://europa.eu/rapid/press-release_IP-17-555_en.htm

⁹²⁰ *Ibid*

⁹²¹ Kim Talus, *EU Energy Law and Policy: A Critical Account*, New York, Oxford, 2013, 137

fundamental EU values such open and competitive energy markets free from cross-border restrictions and distortive business practices.

5.2.4.5. EU Competition Law and Gazprom

The EU market is too large and significant to abandon, therefore EU competition law has become the *de facto* global standard to which less stringent laws must yield if Gazprom does not want to abandon the European market or fall privy to EU competition rules. The Commission's investigation into Gazprom's alleged antitrust violations and the commitments secured thereafter give credence to this assertion. The EU has often extracted commitments that require entities to restructure their assets in foreign countries and modify their behaviour globally.⁹²² The EU's extraterritorial regulatory capacity is evident in the Union's ability to apply competition law to foreign companies where their anti-competitive behaviour and 'effects' are felt on the European market.⁹²³ Whilst critics may condemn this alleged overreach, the EU is entitled to defend its right to regulate the internal market whenever competition in that market is affected or distorted albeit by conduct beyond the European periphery.⁹²⁴

Whilst the enactment of extraterritorial legislation by the EU is rare, the EU frequently defers to a legislative technique which Scott has termed as 'territorial extension'. As mentioned in Chapter 1, territorial extension arises where the EU uses the existence of a territorial connection with the EU (notably, and specifically to this thesis, market access) to influence conduct that takes place beyond EU boundaries. Scott argues that there are specific triggers (i.e. conduct, presence, nationality) that launch the application of EU law which serve to extend the global reach of EU law by imposing cross-border obligations to non-EU entities in relation to their conduct abroad. Whilst these legislative triggers act as mechanisms to spark the extraterritorial application of EU law, this thesis focuses on a novel trigger most relevant to Russia and pertinent to competition law. According to the European Commission, any anti-competitive practices which have an impact or effect within the EU, will fall susceptible to EU competition rules. This novel trigger has been bolstered by the ECJ's preferred 'implementation' test which enables the EU to exercise jurisdiction where an anti-competitive agreement, decision or practice has been implemented within the EU⁹²⁵ or undertaken outside the EU with direct substantial and foreseeable effects within the EU.⁹²⁶

⁹²² See Commission's investigation into Gazprom's alleged breach of dominant position in Centrale and Eastern Europe and Lithuania.

⁹²³ Anu Bradford, 'The Brussels Effect' (2013) 107 Northwestern University Law Review 22

⁹²⁴ Anu Bradford, 'The Brussels Effect' (2013) 107 Northwestern University Law Review 22

⁹²⁵ *Ahlström Osakeyhtiö and Others v. Commission* (Woodpulp I), [1988] ECR 5193, paras. 16–18

⁹²⁶ Joanne Scott, 'The New EU "Extraterritoriality"' (2014) 51 Common Market Law Review 1357

Claims that the EU is therefore imperialistic or exercises regulatory imperialism in its efforts to exert its global regulatory clout are misguided as the EU is primarily driven by internal considerations which stem from its need to uphold and preserve the single market, without hindering the competitiveness of European companies. Notwithstanding, the EU is often accused of deferring to economic means of influence over countries that are dependent on access to its large domestic market. While critics claim that the EU's externalization of the single market and the exporting of its standards without the consent of others amounts to coercion, the EU maintains that it is simply enforcing norms of the single market equally on domestic and foreign players and setting a level-playing field. The EU is therefore considered an influential global player with the ability to shape the international order with international norms that reflect its values and interests.⁹²⁷ Here, it is important to note that international norms are not limited to EU values that entail human rights alone but also an open and competitive market economy to ensure that fair rules are applied to worldwide trade and investment with the single market the launchpad for an ambitious global agenda.⁹²⁸

In describing its global role in the development of rules and standards in worldwide trade and international standard setting, the EU legitimises its strategies by positing that its values and policies are normatively desirable and universally applicable. Here it is important to note that Article 3(5) TEU states that in its relations with wider world, the Union shall uphold and promote its values and interests which include free and fair trade. In this light, the EU's externalization of its regulatory preferences can be seen as reflecting purposes of a benign hegemon⁹²⁹ and champion of norms that serve global welfare. In this respect, the EU's rule-based market approach that is heavily imbedded in regulation cannot be seen as independent of the EU's normative agenda and role as a value-driven actor as free and fair trade is fundamentally part of its values and intrinsic to the universal benefits of its regulatory agenda that serve global welfare. The EU is therefore considered to be normative because it promotes a series of normative principles that are generally perceived to be universally applicable.⁹³⁰ This thesis will therefore consider the Union's commitment to upholding free and fair, competitive markets and a market-based economy as fundamentally part of the Union's values and thereby its normative agenda.

If 'power' is defined in terms of influence, then the EU can arguably be said to be a regulatory power if it wields its influence in the world through global commerce and its ability to regulate

⁹²⁷ Anu Bradford and Eric A. Posner, 'Universal Exceptionalism in International Law' (2011) 52 *Harvard International Law Journal* 53

⁹²⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A Single Market for Citizens, at 7 COM (2007) 60 final (Feb. 21, 2007)

⁹²⁹ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235

⁹³⁰ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84 *International Affairs* 46

the internal market. Here the Union's regulatory power is evident in the Union's ability to generate leverage simply by requiring countries to subscribe to EU rules (in particular competition law) as the price of trading with Europe.⁹³¹ Although this regulatory clout may arguably straddle between cooperation and coercion, trade is a less controversial way of pursuing foreign policy objectives especially when countries subscribe to complying with EU rules by choice.⁹³² However, acknowledging this regulatory might of the Union serves to challenge Manners' 'normative power' narrative which relies on 'leading by example' and the ability to affect change 'through persuasion'. Whilst this thesis does not deny that the EU has a propensity to rely on such mechanisms of influence, the thesis focuses on more controversial aspects of the Union's role as a global actor and impact on the global stage, namely the Union's use of unilateral tools of coercion with trading partners where the Union is unable to promulgate the EU's norms and values through the Union's institutional structures and legal frameworks. Therefore, although the EU projects itself as a champion of multilateralism, the EU resorts to unilateral regulatory measures where partners (like Russia) are reluctant to sign-up to the Union's multilateral institutional cooperation and integration. While the Union's recourse to unilateral regulatory power in the absence of an adequate legal infrastructure may dilute any normative argument, this thesis posits that the fact that regulation is law based, still serves to validate any normative impact given the Union's reliance on legal instruments to push its agenda.

The EU's exercise of global regulatory clout through competition law emanates from both internal and external motivations. Externally, as mentioned above, the Union seeks to shape the legal order by promoting its values and interests beyond its borders on the grounds that they are universally applicable and normatively desirable.⁹³³ Internally however, the EU is quite simply seeking to uphold and protect the internal market by seeking to level the playing field.⁹³⁴ Maintaining competitiveness of the European market and industry is the overriding rationale for the EU's global regulatory agenda.⁹³⁵ Yet, failure to export the Union's regulations and standards abroad would place European firms at a competitive disadvantage.⁹³⁶ This is true of the EU's ownership unbundling rules which raised concerns of indiscriminate acquisitions of EU energy assets by third countries. In order to protect the openness of the European market, the Third Country Clause was introduced which extends the unbundling regime to third country incumbents that plan to acquire control of gas networks in Europe. As a result, they must comply with the same unbundling requirement,

⁹³¹ Anu Bradford, 'The Brussels Effect' (2013) 107 *Northwestern University Law Review* 65

⁹³² *Ibid* 66

⁹³³ Article 3(5) TEU

⁹³⁴ Anu Bradford, 'The Brussels Effect' (2013) 107 *Northwestern University Law Review* 39

⁹³⁵ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A Strategic Vision for European Standards: Moving Forward to Enhance and Accelerate the Sustainable Growth of the European Economy by 2020, at 2-3, COM (2011) 311 final (June 1, 2011)

⁹³⁶ Emma Tucker, 'Plastic Toy Quandary that EU Cannot Duck' (1998) *Financial Times*, 9 December 1998.

namely the strict conditions of ownership of the assets, to ensure non-EU entities play by the same rules.

The EU's external influence can therefore be seen as a by-product of its internal motivations which are focused on an integrated, liberalized and competitive market in Europe. The EU's external power subsequently flows directly from the EU's internal goals which is to maintain the internal market.⁹³⁷ In this respect, we can see why the Commission is most active in its engagement with Russia in matters pertinent to the internal energy market and competition where it can exercise its competence and power/influence as opposed to sanctions where so-called Russian 'Trojan Horses' such as Greece and Cyprus often exercise veto rights to curb collective EU action.

As an identifiable avenue in the Union's regulatory globalization, in the absence of political harmonization with Russia, the EU pursues market driven harmonization and unilateral spread of norms. Unilateral market-driven harmonization has its distinct advantages over political harmonization towards countries reluctant to join a treaty or institution. Given Russia's reluctance to join the ENP, Eastern Partnership, Energy Community Treaty and its withdrawal from the ECT, the EU's unilateral market-driven harmonization appears to be a logical next step for regulatory conformity.⁹³⁸ While the WTO bans any discrimination between importers and domestic producers, EU regulations are not considered discriminatory in their nature as the same rules apply to EU companies. The EU's energy regulation and competition rules therefore appear to reflect a legitimate exercise of regulatory authority given that is intended to ensure a level-playing field.⁹³⁹ However, if we consider that the Union's regulations are also intended to prevent market partitioning and segregation and discriminatory practices which threaten a fully functioning internal market, then the EU's regulatory pursuits appear to serve protectionist goals which may arguably constitute an impediment to international trade. Notwithstanding, competition law has indisputably become a strategic tool in the Union's legal and regulatory framework and intrinsically part of the EU's normative agenda.

5.2.4.6. Conclusion

This section has tried to illustrate how the EU exercises normative means of power through the external application of internal market rules and regulation on Russia, the Union's reluctant yet strategic partner. The TEP's unbundling regime therefore seems to have become another contentious point given the inadvertent application of EU law vis-à-vis Russia, a strategic partner, that has been reluctant to participate in the Union's integration mechanisms but inevitably has fallen privy to EU rules and regulations without the confines

⁹³⁷ Anu Bradford, 'The Brussels Effect' (2013) 107 *Northwestern University Law Review* 41

⁹³⁸ Anu Bradford, 'The Brussels Effect' (2013) 107 *Northwestern University Law Review* 44

⁹³⁹ *Ibid* 56

of legally binding frameworks.⁹⁴⁰ If anything, it has brought the differences between these strategic partners to the fore. This is not surprising given that unbundling hinges on control of the gas transmission network which is of strategic relevance to both the EU and Russia. Whilst the EU's unbundling regulation is limited to its own territory and does not specifically address Gazprom, Gazprom's presence on the European energy market means that it falls within the scope of its application. Perhaps the application of EU energy regulation concerning ownership and management of Russian pipelines on EU soil, would have best been addressed within the realm of a bilateral or multilateral legal agreement, rather than unilaterally imposed obligations pursuant to EU directives. Whilst the externalisation of EU internal market rules can be said to be normative, the fact that such rules target Gazprom suggest a strategic dimension to the cross-border reach of the Union's energy regulation vis-à-vis Russia.

With that in mind, the fact that Russia has been reluctant to institutionalise EU-Russia relations within a legally binding framework or the multilateral global architecture, may well justify the Union's manoeuvres in pursuing its agenda (albeit unilaterally) beyond the ambit of a revised legal framework. The ever-prevailing delays in negotiating a new partnership agreement and Russia's withdrawal from the ECT, give credence to this assertion and to some degree allude to a somewhat strategic Union which has pursued its energy security agenda through its internal regulation which has been externalised, in the absence of international legal instruments that could regulate energy relations between these strategic partners. In so doing, as the sections above have tried to illustrate, the Union has endeavoured to address the void in the legal architecture regulating EU-Russia energy relations through the use of internal energy regulation and competition law to address simmering issues that are ultimately a threat to the Union's energy security.

If we tie this back to the purpose of the section and whether the EU engages in normative means of power, the section has endeavoured to show that the Union promotes general rules and practices through its internal market rules and energy regulation that has been externalised. In this respect the EU can be said to have normative means of power through the extraterritorial reach of its energy regulation and competition rules however its objectives are strategic (i.e. in pursuit of energy security). Therefore, whilst its means are normative through the use of legal frameworks and EU norms and regulations, the manner in which the EU exercises its means of normative power are arguably strategic and geopolitical as its internal market rules are externalised and unilaterally imposed on Russia to curb Gazprom's downstream movement within the European energy market. This arguably constitutes a form of EU energy *acquis* export if we consider (as the analysis above has illustrated) that Russia, as a non-participant of the ENP and Eastern Partnership, is

⁹⁴⁰ Kim Talus, *EU Energy Law and Policy: A Critical Account*, New York, Oxford, 2013, 84

bound by EU energy regulation, beyond the confines of a legally binding framework. Therefore, whilst the EU can be said to be bolstering its normative agenda through the extraterritorial effect of its internal market regulation and competition law which constitutes normative means of power, the manner in which the EU exercises this power is strategic given it is unilaterally imposed. The EU can therefore be said to have normative means of power which it exercises in a strategic manner.

5.2.5. Does the EU Achieve Normative Outcomes in its External Energy Relations with Russia?

The final variable of a normative power as indicated in Chapter 2,⁹⁴¹ is normative impact or the ability to achieve normative results. Normative impact stems from what the EU as a foreign policy actor does or does not do, which is equally as important as the internal aims and instruments employed for its normative purpose. Simply put, results serve to validate what the Union's foreign policy objectives really are (i.e. normative results reflect normative goals).⁹⁴² If we consider the Union's normative goals vis-à-vis Russia and its tenacious quest to entrench energy relations within legally binding frameworks, does the fragmented legal architecture and Russia's reluctance to bind itself to instruments that reflect EU norms and values amount to normative outcomes? Arguably not, if we consider that the Union has wielded limited results in its ability to modernise the legal architecture in place with a revised bilateral agreement and Russia's reluctance to ratify the ECT. Of course the EU cannot be held accountable for the aborted negotiations following Crimea, however the fact that the EU and Russia have reached an impasse and arguably a stalemate with the activation of suspended talks and a bilateral framework unlikely, the Union's normative impact regarding the 'patchwork'⁹⁴³ of legal instruments remains questionable. That said, the Union has been instrumental in Russia's accession to the WTO and whilst the multilateral framework remains broad with respect to trade and not specific to energy trade, it arguably can be considered a normative outcome given it has institutionalised relations within a shared multilateral framework albeit non-specific to the energy sector.

Despite the fragmented legal architecture in place, the EU's ability to externalise its internal market rules and energy liberalisation model on its strategic partner Russia, a non-participant of the ENP and Eastern Partnership, may arguably be considered a normative outcome if we acknowledge that the EU has successfully promoted general rules and practices through its unbundling rules and Gazprom clause. However, the question remains whether the EU's liberalisation model and energy market regulation constitutes a normative

⁹⁴¹ Chapter 2 (*Conceptualising Manners' Normative Power: Manners' Criteria and its Adherents*)

⁹⁴² Natalie Tocci, 'The European Union as a Normative Foreign Policy Actor' in Nathalie Tocci (ed) '*Who is a Normative Foreign Policy Actor?*' (Centre for European Policy Studies, 2008) 11

⁹⁴³ Yulia Selivanova, 'Managing the Patchwork of Agreements in Trade and Investment' in *Global Energy Governance: The New Rules of the Game* (Berlin: Global Public Policy Institute (Brookings Institution Press, 2010) 49

result if it has been unilaterally imposed without consent from Russia? Furthermore, can the EU be said to have a normative impact where its end-goal is self-regarding and the manner in which is pursued strategic? In this respect, if the declared objectives of the Union vis-à-vis external energy relations with Russia are the promotion of a rule-based market approach founded on European norms and values (milieu goals), but the ensuing energy policy action prioritises strategic interests such as energy security (possession goals), can the impact be considered normative? Arguably not, as declared objectives cannot simply be taken at face-value if what the Union says and does is arguably different.⁹⁴⁴ In this respect, the Union's declared normative objectives do not satisfy the normative outcomes where the objectives and results are manifestly inconsistent. A normative power would therefore pursue normative goals through normative means in the interest of fulfilling its normative intent.⁹⁴⁵ This would imply that where the Union's intentions are not normative, namely in pursuit of possession goals rather than milieu goals, its impact and results cannot be deemed normative. The normative power theory is therefore not an exhaustive explanatory theory as far as the Union's strategic interests are concerned, in particular with respect to the EU's energy security.

With this in mind, one could argue that despite the Union fulfilling some of Manners criteria in its ability to behave in a normative manner (upholding international law and universal principles such as multilateralism) by deploying normative means of power (promoting general rules and practices through its internal energy market regulation and competition rules), its ends are self-regarding and strategic in its pursuit (energy security) and therefore arguably not normative outcomes. However if normative impact can be measured by a traceable path between the Union's actions / inactions on the one hand and the establishment of an effective rule-bound environment on the other as advocated by Tocci,⁹⁴⁶ then this thesis has inevitably shown that the Union's extraterritorial effects of its energy unbundling and competition rules that have subsequently curbed market fragmentation and abuse by Russian state-owned incumbents such as Gazprom, arguably suggest that the Union may have achieved normative ends albeit in the interest of its security of energy supply. Similarly to Tocci's assertions, the thesis has taken a view that suggest a slight deviation from Manners' criteria and a more nuanced approach to ascertaining normative outcomes where a discernible link can be established between actions and effective rules, with the end result (as alluded to above) fundamentally normative.

Therefore, in determining whether the Union achieves normative outcomes, as the last variable of Manners' normative criteria, the thesis has posited that where the Union gives

⁹⁴⁴ Natalie Tocci, 'The European Union as a Normative Foreign Policy Actor' in Nathalie Tocci (ed) *'Who is a Normative Foreign Policy Actor?'* (Centre for European Policy Studies, 2008) 11

⁹⁴⁵ *Ibid*

⁹⁴⁶ Natalie Tocci, 'The European Union as a Normative Foreign Policy Actor' in Nathalie Tocci (ed) *'Who is a Normative Foreign Policy Actor?'* (Centre for European Policy Studies, 2008) 11

preference to possession goals over milieu goals, the outcomes cannot be considered normative if they are born from strategic objectives and intent. Notwithstanding, the EU has arguably achieved an effective rule-bound environment through the extra-territorial reach of its internal energy market regulation thereby achieving normative outcomes, albeit in a strategic manner and in pursuit of strategic goals such as energy security.

5.3. Normative Mechanisms

As mentioned in Chapter 2, there are predominantly four different types of mechanisms whereby the Union exercises its normative influence in the world which include: (i) persuasion; (ii) the invocation of norms; (iii) shaping discourse; and (iv) power of example. As has already been mentioned elsewhere⁹⁴⁷, the most prominent mechanisms of normative power in the neighbourhood entail that of invoking norms and power of example. The preceding chapter provided a detailed analysis of how the Union engages in these mechanisms within the neighbourhood through conditionality clauses in the PCAs and undertakings that the respective countries confirm their legislation and policies in-line with the EU which constitutes a form of legislative approximation (invoking norms) and the Union's *acquis* export whereby the Union promotes norms by example (power of example). Similarly in its external relations with Russia, the EU can be seen to invoking norms through the activation of norms and commitments which the EU seeks to achieve by way of legally binding bilateral and multilateral frameworks regulating EU-Russia trade relations.

However, in the Union's external relations with Russia, the power of example mechanism is less effective as Russia does not gravitate towards the EU in its endeavours to emulate EU norms and values.⁹⁴⁸ The 'Contagion' analogy of Börzel and Risse which is synonymous with emulation is therefore inadmissible as far as Russia is concerned, despite the Union's efforts to establish itself as a model for upholding universal norms.⁹⁴⁹ As such, the Union's 'magnetic force' has wielded few results in Russia's receptiveness of an EU model founded on European norms and values.⁹⁵⁰ Unlike the EU's neighbourhood, Russia has not responded to the Union's gravitational pull like its immediate periphery. As a self-proclaimed superpower in its own right that has often advocated an equal footing at the negotiating table, the Russian Federation has been a reluctant participant in the Unions regional integration efforts and as such, the EU has wielded limited results in its norm promotion through example. If we concede that regional integration is the most prominent form of the Union's model power, then Russia's refusal to partake in the ENP or Eastern Partnership

⁹⁴⁷ See Chapter 2 (*Conceptualising the Union as a Normative Power: Manners' Criteria and its Adherents*) and Chapter 4 (*Normative mechanisms*)

⁹⁴⁸ Tania Börzel, Tanja and Thomas Risse, 'The Rise of (Inter-) Regionalism: The EU as a Model of Regional Integration' KFG 'The Transformative Power of Europe' Working paper 7 (Freie Universität, 2009)

⁹⁴⁹ *Ibid*

⁹⁵⁰ Richard Rosecrance, 'The European Union: A New Type of International Actor' in Jan Zielonka (ed) *Paradoxes of European Foreign Policy* (Kluwer Law, 1998)

validates the assertion that the power of example mechanism has had its limitations in terms of influence vis-à-vis Russia. Therefore, as far as the EU's external relations with Russia is concerned, the most eminent mechanism of normative power is the invoking of norms which is evident in the Union's obvious quest to entrench EU-Russia relations within legally binding frameworks where universal principles can be instilled and normative clauses invoked.

5.4. Benchmark Comparator: Distinction between EU as a Normative Power in the Neighbourhood and EU as a Normative Power in EU-Russia Energy Relations?

For the purpose of distinguishing between the two chapters and Manners' criteria regarding the extent to which the EU is a normative power, this section will address each of the criteria in turn (i.e. normative identity; normative interests; normative behaviour; normative means of influence; normative outcomes) to show the degree of deviation in the Union's external relations with Russia in the energy sphere from that of the Union's conduct in its external relations with its neighbourhood (Figure 1; page 214). With respect to Manners' first criteria (normative identity), it is posited by Manners' that the Union has a normative identity by virtue of the fact that it is derived from a treaty-based legal order from which it derives its predisposition to act in a normative way. Whilst this would suggest that there is no likely degree of change between the Union's normative identity in its neighbourhood and Russia, in the analysis above,⁹⁵¹ the thesis suggested that Manners' first criteria may be insufficiently nuanced to address other facets to the Union's role as a global actor, beyond the normative agenda. This is particularly significant if we consider the Union's bolstered energy actorhood following Lisbon which has added a security nexus to the Union's energy competence. Article 194 TFEU specifically mentions that the Union's energy policy shall aim to 'ensure security of energy supply' which inadvertently means that there are strategic security interests at play with respect to the Union's explicit energy competence.

The novelty of the Union's energy competence and dynamics of its external energy relations with Russia, as the analysis above has alluded, arguably affects the degree to which the Union has a normative identity, if we consider that the Union overall acts very differently and elicits a different identity in one field or with respect to one particular actor, versus another. This would ultimately suggest that the Union's predisposition to act in a normative way is not restricted to normative means of engagement given the security nexus of the energy sector/Union's competence and the security dimension to the Union's external energy relations with Russia. The Union's normative identity is therefore questionable as far as Russia and its energy security interests are concerned.

⁹⁵¹ See Chapter 5 Section 5.2.1 (*Does the EU have a Normative Identity in its External Relations with Russia?*)

As far as Manners' second criterion is concerned (normative interests), Manners argues that the Union's normative interest entails goals that revolve around the pursuit of values rather than interests typically associated with a traditional power. In this respect, the research has found that whilst the Union has normative goals in its external relations with the neighbourhood and Russia (i.e. legislative convergence to EU norms and values), it also has strategic interests (i.e. stability, security and prosperity in the region). The Union's interests and values in its external relations with its neighbourhood and Russia are therefore intertwined given the overlap which is why the Union is said to suffer from an interest vs values dilemma. The Union's normativity in its neighbourhood is contested in the literature given the ENP is a policy framework to ensure stability, security and prosperity. Notwithstanding, it is widely accepted in academic scholarship that the Union gives preference to its values over interests in its neighbourhood in its embryonic state. However, as far as the Union's energy security interests are concerned, its interests are given priority.

Distinguishing with the Union's external energy relations with Russia, the interests vs values dilemma is less pronounced given the clear strategic objective of ensuring the Union's security of energy supply. There is a strong security dimension to the Union's external energy relations with Russia (given its energy dependence; the 2009 Gas Crisis; the fact that Russia is a reluctant partner; the void in the legal architecture; the values gap; etc) and therefore the Union's interests / possession goals appear to override its milieu goals in its engagement with Russia. The Union's normative interests in its external energy relations with Russia are therefore less pronounced than its neighbourhood, given the security nexus with the energy sector and the Union's strategic objectives (i.e. energy security) in its external relations with its strategic partner.

With respect to the third criterion (normative behaviour), Manners maintains that normative behaviour includes a desire to uphold international law and a preference for institutionalising relations within legally binding frameworks. In this respect, the Union appears to display strong normative traits in both its relations with the neighbourhood and Russia given the bilateral and multilateral frameworks in place. The distinction lies with Russia where the legal frameworks are predominantly fragmented and as such have resulted in a void in the legal architecture. Notwithstanding, in the Union's persistent efforts to fill the said gap and institutionalise its relations with Russia within legally binding frameworks, it affirms its normative behaviour vis-à-vis Russia despite Russia's reluctance to confine itself to international norms and rules.

Manners' fourth criterion (normative means of power) includes promoting general rules and practices and the subsequent gains through cooperation. More specifically, it refers to the Union's normative power being used as a vehicle of influence. Here the Union's *acquis* export or 'external Europeanisation' is of significance which is most pronounced in the ENP

as a normative means of power.⁹⁵² As mentioned in the preceding chapter,⁹⁵³ the EU's *acquis* export entails the export of EU norms, rules and values in the Union's external relations with third countries. As a form of *acquis* export, legal approximation is the most frequently used model of integration in the neighbourhood, which is intended to create a stable and secure environment that is consistent with the Union's strategic objective in its periphery. Whilst the ultimate goal of *acquis* export is the establishment of a stable and secure European continent, there are different objectives depending on the different categories of countries: with the Eastern neighbourhood, the purpose of *acquis* export is to achieve political association and economic integration through legislative and regulatory approximation amounting to convergence with EU norms and standards;⁹⁵⁴ whereas with Russia, the EU's *acquis* export does not include a consensual application of EU law, norms and standards as Russia does not seek EU accession or aspire to joining the ENP. The dynamics of *acquis* export with respect to Russia is therefore different which is intended to facilitate trade and investment rather than conformity to an EU model of norms and values.⁹⁵⁵ This ultimately reveals that whilst most countries cannot resist the gravitational pull of the Union, having accepted an EU model of norms, rules and values for the sake of acquiring access to the European market, Russia has been the exception and not the rule.⁹⁵⁶

Against this backdrop, the Union resorts to alternative means of influence which are not strictly normative. Given Russia's reluctance to accept the *acquis* and conform to EU values and norms, the EU has unilaterally imposed its internal market rules and liberalisation model on Russia, through the extraterritorial reach of its unbundling regime and competition rules. In so doing, the Union uses normative means although in a non-normative manner given they are unilaterally imposed for strategic purposes (i.e. ensuring energy security without the voluntary acceptance of the *acquis*). The Union's cross-border reach of its regulation therefore arguably constitutes a form of EU energy *acquis* export. The distinction with its neighbourhood being that it is not voluntarily accepted but rather strategically imposed on

⁹⁵² Amichai Magden, 'Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of External Influence' (2007) 9(3) *European Journal of Law Reform* 365

⁹⁵³ See Chapter 4 (*Legislative Approximation as the Method of Acquis Export in the Neighbourhood*)

⁹⁵⁴ Council of the EU, Joint Declaration of the Prague Eastern Partnership Summit, 7 May 2009, doc.8435/09 http://europa.eu/rapid/press-release_PRES-09-78_en.htm

⁹⁵⁵ Aaron Matta, 'Differentiating the Methods of *Acquis* Export: The Case of the Eastern Neighbourhood and Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2016), 42

⁹⁵⁶ Russia's refusal to partake in the ENP subsequently resulted in the 'Four Common Spaces' which were later unveiled as the 'Road Maps' to facilitate deeper integration with the EU. Whilst the bilateral agreements with Russia and the Eastern Partnership are best understood as a form of *acquis* export through approximation it is argued that the meaning and objectives of 'approximation' have shifted over time following the disintegration of the Soviet Union from a mechanism of law reform and further development, to one of deeper economic integration which is best illustrated in the PCAs with the Eastern European countries. Russia's objection to partake in the ENP which consequently lead to the 'Four Spaces' were first alluded to at the May 2003 EU-Russia St. Petersburg Summit and later outlined at the May 2005 EU-Russia Moscow Summit officially unveiled as the Four Road Maps. See EU-Russia Summit, Saint Petersburg, 31 May 2003. Joint Statement of the Summit available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/75969.pdf

Russia as a non-participant of the ENP or Eastern Partnership. The implications for Russia and particularly Gazprom, further exacerbate the tactical element to the Union's manoeuvres despite the use of normative instruments for this purpose.

Finally, the fifth criteria (normative outcomes), according to Manners, is the ability of the Union to achieve its normative goals and interests. If we concede that the Union's normative interests (as mentioned above) are the pursuit of values over strategic interests, then to the extent that the Union has achieved legislative convergence to EU norms and values in the neighbourhood and with Russia, the Union can be said to have fulfilled its normative ends. However where the Union achieves strategic goals over normative goals, the outcome cannot be considered normative. Distinguishing between the neighbourhood and Russia, the Union's normative results in the neighbourhood are widely contested given the Union's limited success in producing any substantial diffusion of norms, values and principles to the neighbourhood. Similarly with Russia, the Union's normative ends appear to be waning given Russia's reluctance to conform to EU values and norms with the subsequent fragmented legal architecture regarding EU-Russia energy relations. However, if we accept a more nuanced approach, that the Union's normative impact can be measured by an obvious connection between the Union's actions and the establishment of an effective rule-bound environment, then Russia/Gazprom's conformity to unilaterally imposed EU rules through the cross-border reach of EU energy regulation and competition rules, would imply, as the thesis has suggested, that the Union has achieved normative outcomes, albeit for strategic purposes (i.e. energy security).

Comparing the Union's normative influence in the neighbourhood and Russia from the normative mechanisms it uses which are most prevalent in its periphery, the Union invokes norms in the neighbourhood through the conditionality clause of the PCAs and the legislative approximation of the EU *acquis*. The Union's *acquis* also acts as a form of power of example in the neighbourhood given the EU's gravitational pull and the ENP states' acceptance of the *acquis*. Distinguishing with Russia, the power of example mechanism is redundant with its strategic partner as Russia is a superpower unwilling to ensure consistency with a European model to which it considers itself an ideological alternative. Furthermore, given Russia is not a participant of the ENP and Eastern Partnership, it is not bound by any legislative approximation of the EU's *acquis*. However, if we acknowledge that the Union's unilaterally imposed energy regulation and competition rules constitute a form of EU energy *acquis* export, as advocated by this thesis, then the EU can be seen to be invoking norms through the cross-border reach of its regulation, in addition to its relentless commitment to pull Russia within legally binding bilateral and multilateral legal frameworks.

5.5. The EU as a Normative Energy Security Actor?

Since the inception of the EU as the European Coal and Steel Community, energy has been intrinsically part of the fabric of the Union's existence. While the EU still remains focused on maintaining an integrated internal market, as has been illustrated in the preceding section⁹⁵⁷ the scope of the Union's energy policy appears to have extended beyond market liberalisation to encompass security of supply. This is evident in the Union's use of internal market regulation and competition law, to ensure compliance with the EU's unbundling regime and open market economy by third country entities operating in the European market, for the sake of ensuring the Union's security of energy supply. Subsequently, energy security appears to lie at the core of EU energy policy with respect to the CFSP. European dependence on Russian gas supplies inadvertently entail security and supply risks in Europe's wider and immediate periphery. With the need to avoid any potential gas shortages being pushed to the fore with Russia's annexation of Crimea in 2014, energy security constitutes one of the fundamental policy aims pursuant to Article 194(1)(b) TFEU. It follows that the EU has become increasingly more active in its efforts to secure European energy supplies corresponding to the needs of its Member States. The Union's energy policy has by implication developed a more coercive character in the EU's endeavours to ensure compliance with its regulatory framework which extends beyond the internal dimension. The EU's ability to impose sanctions beyond its Member States to include third countries and external partners such as Russia, gives credence to this point. The securitisation of the Union's internal energy market has subsequently been pushed to the fore of the EU's energy agenda, in the Union's quest to ensure energy security by way of compliance with its regulatory architecture.

The purpose of this section is to illustrate developments in EU energy policy and the Union's energy competence which have bolstered the Union's role as an energy actor, in particular with respect to energy security. In undertaking this analysis the thesis reveals a further dimension to the Union's role as a normative energy power which adds a more nuanced approach to Manners theoretical debate. This is relevant for the analysis of the thesis given the Union's energy dependence on Russia and the strong security nexus with respect to the energy sector. Whilst the political initiative and consensus to enhance the Union's effectiveness as an energy actor has long been waning, several milestones including the Treaty of Lisbon showed impetus towards a coherent approach towards external energy relations and in turn energy security. More recently, these developments have included the 2014 European Energy Security Strategy with energy security set as a high priority on the Union's energy policy. In this respect, the Energy Union Initiative has been equally

⁹⁵⁷ See Chapter 5 Section 5.2.4.1 (*Does the EU Exhibit Normative Means of Power in its External Energy Relations with Russia? - The TEP and Unbundling Regime: Ownership Unbundling and the Third Country Clause*)

significant in its capacity to increase the Commission's vetting power vis-a-vis intergovernmental agreements and their compliance with EU law. By assessing the security dimension that exists in the Union's internal market regulation, the section highlights the growing role of energy security within the CFSP. The section endeavours to show that the Union's externalisation of its internal market policies with the extraterritorial reach of its regulations to achieve CFSP objectives, and its increased competence facilitated by the Energy Union initiative and the Energy Security Package, all point to a Union which is increasingly becoming more assertive and albeit normative, displaying traits of a global security actor. As mentioned before, whilst it would be negligent to suggest that a normative power is only driven by norms and values, the section to follow considers to what extent the Union is driven by strategic objectives in its external relations with Russia given the strong security nexus relating to the Union's heavy dependence on Russian energy resources. In undertaking this analysis, the section sheds light on whether the Union can be said to be a global normative energy power in its external energy relations with Russia or whether the Union is gradually morphing into a global security actor given its strategic quest for security of energy supply which extends beyond the normative agenda with its strategic partner, Russia.

5.5.1. The Energy Union Initiative

Although the idea of a common energy policy has been advocated since 2010 by former European Commission President Jacques Delors and the then European Parliament Polish President Jerzy Buzek,⁹⁵⁸ the concept of an Energy Union only materialised in spring 2014, after the suspension of Russian gas supply due to the Russia-Ukraine dispute following the annexation of Crimea.⁹⁵⁹ European Commission President Jean-Claude Juncker put the Energy Union as one of the top priorities of his mandate during the 2014 presidential campaign,⁹⁶⁰ given that many EU Member States rely heavily on a limited number of energy suppliers, in particular in the Eastern part, which leaves these countries vulnerable in the event of any unexpected energy supply disruptions.⁹⁶¹ It was not until November 2014, the EU Vice-President Maroš Šefčovič, unveiled the Energy Union project and announced the five key pillars of the Energy Union strategy, which were then elaborated on 25 February

⁹⁵⁸ Sami Andoura, Leigh Hancher and Marc Van Der Woude 'Towards a European Energy Community' (2009) <<http://www.notre-europe.eu/media/etud76-energy-en.pdf?pdf=ok>> accessed 20 August 2016.

⁹⁵⁹ The 2014 natural gas interruptions have been the third part of the 'gas wars' involving Russia and Ukraine. The first two gas wars took place in 2006 and 2009.

⁹⁶⁰ Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change' (2014) <http://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf> accessed 26 August 2016.

⁹⁶¹ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of Regions, and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (2015) 2 <http://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF> accessed 25 August 2016.

2015 when Commissioner Šefčovič officially presented the Energy Union package.⁹⁶² The five pillars fully reflect the provisions of Article 194 TFEU and aim to synthesize the most significant and necessary steps of the European energy policy for the foreseeable future. These entail: (i) stronger emphasis on security of supply, solidarity and trust; (ii) the finalisation of the internal energy market; (iii) the moderation of demand for security through energy efficiency; (iv) the decarbonisation of the energy mix; (v) improved efforts in research, innovation and competitiveness⁹⁶³

The first pillar of the Energy Union strategy stresses the importance of the security of energy supply. With this in mind, the Commission strives for the consolidation of joint approaches aimed at strengthening solidarity between Member States, in particular in times of crisis, so that members could be assured that in situations of tight supply they can rely on their neighbours.⁹⁶⁴ If we recall, as mentioned in Chapter 3,⁹⁶⁵ that the Council made repeated references to solidarity during the 2009 Gas Crisis when gas supplies to Europe were interrupted following a dispute between Russia and Ukraine over gas prices, we can understand why the Energy Union endeavours to bolster EU energy security with solidarity high up on the agenda. Reflecting on the first section of the case-study (Section 5.1), it was revealed that there are several issues that remain that have inhibited any constructive engagement on the part of the EU towards Russia⁹⁶⁶ which includes amongst others, the lack of coherence in external energy relations and the lack of solidarity amongst Member States. If we concede that coherence in external energy relations is a matter closely related to solidarity as diverse positions and a lack of cooperation amongst individual EU member states undermine collective EU actions and legislative initiatives, then we can see why the Energy Union has been a top priority for the EU with solidarity fundamentally part of the energy security pillar. This action is complementary to the diversification of supply, which is to be pursued through the funding and construction of the so-called 'Projects of Common Interest'⁹⁶⁷ namely projects identified by the European Commission as essential for completing the European internal energy market and for reaching the EU's energy policy

⁹⁶² European Commission, 'Energy Union: secure, sustainable, competitive, affordable energy for every European' (2015) <http://europa.eu/rapid/press-release_IP-15-4497_en.htm> accessed 12 August 2016.

⁹⁶³ Maroš Šefčovič, 'Opening Speech - EU Energy Policy and Competitiveness' (2014) <http://europa.eu/rapid/press-release_SPEECH-14-1883_en.htm> accessed 28 August 2016. The five pillars outlined are based on the three long-established objectives of EU energy policy: security of supply, sustainability and competitiveness.

⁹⁶⁴ To ensure the diversification in gas supplies, work on the Southern Gas Corridor must be intensified to enable Central Asian countries to export their gas to Europe. In Northern Europe, the establishment of liquid gas hubs with multiple suppliers is greatly enhancing supply security.

⁹⁶⁵ See Chapter 3 Section 3.1.2.3 (*EU Energy Policy and the Union's Energy Actorness – Solidarity Mechanism*)

⁹⁶⁶ Rafael Leal-Arcas, 'The EU and Russia as Energy Trading Partners: Friends or Foes?' (2009) 14(3) *European Foreign Affairs Review* 348

⁹⁶⁷ To become a PCI, a project must have a significant impact on the energy markets and market integration of at least two EU countries, boost competition on energy markets and boost the EU's energy security by diversifying sources, and contribute to the EU's climate and energy goals by integrating renewables. PCIs may benefit from accelerated planning and permit granting, a single national authority for obtaining permits, improved regulatory conditions, lower administrative costs due to streamlined environmental assessment processes, increased public participation via consultations, increased visibility to investors and access to financial support.

objectives. This would imply that any bilateral deals signed in the pursuit of national interests over Union interests which served to further entrench the Union in its energy dependency on single suppliers, would be fundamentally inconsistent with the EU's energy security objectives and diversification efforts.⁹⁶⁸

5.5.2. The Energy Security Package

Supplemental to the Energy Union, on the 12 February 2016 the long awaited Energy Security Package was released which reflects the latest step undertaken by the EU towards the creation of a European Energy Union.⁹⁶⁹ The Energy Security Package proposed the amendment of two important pieces of legislation: (i) the Decision 994/2012/EU which establishes an information exchange mechanism in relation to energy agreements between Member States and third countries (herein after the 'IGA Decision')⁹⁷⁰ and (ii) the Regulation 2012/994/EU concerning the measures to safeguard the security of gas supply and repealing Regulation 994/2010.⁹⁷¹ The proposals made included a shift of competence from Member States to the EU as regards the negotiation of intergovernmental agreements between Member States and third suppliers and provide mechanisms to prevent security of supply disruptions.

The IGA Decision requires Member States to notify the Commission of all their energy agreements with non-EU countries after they have been concluded.⁹⁷² The Commission

⁹⁶⁸ If we concede, as the analysis has tried to illustrate, that the lack of solidarity and coherence has been a recurring issue in EU-Russia energy relations, then EU trade policy is key in contributing towards greater security and diversification through the inclusion of energy-related provisions in the trade agreements with its partners with the EU eager to take the lead on negotiations in an effort to eradicate bilateralism. When the EU negotiates agreements with countries that are important for the Union's security of supply, the Commission shall seek to negotiate energy specific provisions contributing to the energy security and sustainable energy goals of the Energy Union. In so doing, the EU ensures its energy policy objectives are upheld and in turn recurring issues such as bilateralism as the default approach of engagement with Russia which serves to erode solidarity, ultimately eliminated.

⁹⁶⁹ European Commission, 'Press Release: Towards Energy Union: The Commission presents sustainable energy security package' (2016) <http://europa.eu/rapid/press-release_IP-16-307_en.htm> accessed 20 August 2016

⁹⁷⁰ As mentioned earlier, in 2012 the European institutions issued the IGA Decision (Decision 994/2012/EU), establishing an information exchange mechanism with regard to IGAs signed between Member States and third countries in the field of energy. This was the first attempt made by the EU to control the content of the energy agreements concluded by its members with countries which are not bound by EU law. IGAs are usually bilateral agreements that form the basis of private commercial contracts and investments. Their purpose is to provide legal certainty for the construction of import and export infrastructure, to facilitate the purchase of oil and gas, or to establish a more general framework for energy cooperation. Since EU energy market rules may not always be in the commercial interests of non-EU energy suppliers, single Member States may be pushed by their supplying countries to include in their IGAs clauses that hinder the functioning of the EU internal energy market. See European Parliament and Council Decision 2012/994/EU establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy [2012] OJ L299/13

⁹⁷¹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Concerning Measures to Safeguard the Security of Gas Supply and Repealing Regulation (EU) No 994/2010' [2016] COM (2016) 52 final <http://eur-lex.europa.eu/resource.html?uri=cellar:33516200-d4a2-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF> accessed 20 August 2016.

⁹⁷² The Commission's analysis of all notified IGAs showed that around one-third of them contained provisions that were not compliant with EU law. To date no such agreement has been successfully renegotiated. The adoption of the IGA Decision deeply affected the construction of the South Stream pipeline, one of the most important gas supply projects engineered in the last years. In particular, the EC considered the IGAs signed between Russia and six EU members at odds with Directive 2009/73/EC, a pro-competitive regulation part of

verifies whether the agreements signed comply with EU law, in particular with the rules on internal market and competition. In case of breach, it invites Member States to amend or terminate the IGAs in question.⁹⁷³ The review of the IGA Decision effectively ensures that the Commission has the power to ensure agreements are consistent with EU legislation before finalising negotiations with the Commission heavily involved in such negotiations.⁹⁷⁴

We can see through the Energy Union and the Energy Security Package that there has been an impetus on the part of the Union to implement effective initiatives in an effort to reduce import dependency on Russia and thereby improve resilience towards any potential energy disruptions and energy shocks. The Union's oversight powers regarding the negotiation of treaties serve to bolster the normative power theory given the EU's involvement, albeit through the auspices of the Commission, in international agreements in areas covered by the Treaty's CFSP chapter such as energy security. The Union's active engagement in vetting agreements to ensure compliance with EU law serves to bolster the normative power argument, however the fact that this is linked to matters which falls within the ambit of the CFSP, suggests a more strategic agenda when it comes to the Union's energy security. This strengthens the view that EU may increasingly becoming a more

the TEP, entered into force after those IGAs were signed. Notably, Russia preferred not to embark in lengthy renegotiations with the countries concerned and despite the years it took to conclude all the agreements, the projects were halted although the construction of the infrastructure had already started. See European Commission, 'Intergovernmental agreements in energy' (2016) <europa.eu/rapid/press-release_MEMO-16-309_en.pdf> accessed 20 August 2016

⁹⁷³ To overcome the problem of *ex post* renegotiation, on 16 February 2016 the Commission presented the sustainable energy security package, which, *inter alia*, includes amendments to the IGA Decision. The most relevant aspect provided in the said package is the adoption of a mandatory *ex ante* compatibility control by the Commission of the treaties to be signed. Accordingly, Member States will have to notify the Commission of their draft IGAs before concluding them, and defer signing until the Commission has issued its opinion or the period set out for the Commission scrutiny has elapsed. When concluding the proposed intergovernmental agreement or amendment, Member States will have to take full account of the Commission's opinion which illustrates the vetting powers the Commission has obtained over IGA's and Member States conduct regarding the treaties they enter into. The new IGA Decision, just like the former 2012 decision, will not cover commercial agreements between companies. The current control mechanism of the commercial contracts - especially with regard to EU competition law - has not changed. Apart from the EU security of supply side, the new IGA Decision could have a positive impact also on the business of individual companies involved in energy projects. Possible issues relating to non-compliance with EU law would be tackled at an early stage, providing legal certainty to investors and project promoters, by avoiding cancellation or delay costs. The new IGA Decision serves to bolster the Union's normativity if we consider that through the Union's new oversight powers, the Commission is able to set aside agreements that are inconsistent with EU law.

⁹⁷⁴ The IGA Decision was issued on the basis of Article 194 TFEU and so is the proposal to reform it. The mandatory *ex-ante* control by the Commission which has been included under the new proposal entails a shift of competence from Member States to the EU. This action is justified by virtue of the subsidiarity principle, whereby in case of shared competence, the Union can take action only when it is more effective than the action taken at national, regional or local level.⁹⁷⁴ Past experience showed that the *ex-post* control included under the IGA Decision did not work, creating substantial damage for the investment projects concerned and, ultimately, for the citizens who could not benefit from the infrastructure envisioned. A preventative check such as the one outlined in the new proposal to reform the IGA Decision is certainly a 'more effective' option to ensure compliance of the IGAs with EU law. As mentioned above, there has been a shift in competence from Member States to the EU with respect to treaty negotiation with third countries and an information exchange mechanism in the interest of the Union's energy security. See Decision of the European Parliament and the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU, COM (2016) 53 final

strategic energy actor in pursuit of its security of supply which reveals an additional dimension to the Union's normative agenda and clout on the international stage.

With respect to the measures to safeguard security of gas supply, the proposals to revise the 2010 security of gas supply regulation, entailed notification of all 'security of supply relevant contracts' to the Commission and national authorities.⁹⁷⁵ This notification related to contracts for more than one year that place more than 40% of the gas consumption in a Member State in the hands of a single third country supplier or its affiliates.⁹⁷⁶ The Energy Union strategy indicated that: 'an important element in ensuring energy security (and in particular gas security) is full compliance of agreements related to the buying of energy from third countries with EU law'.⁹⁷⁷ This was repeated by the European Council on 19 March 2015, when it called for 'full compliance with EU law of all agreements related to the buying of gas from external suppliers, notably by reinforcing transparency of such agreements and compatibility with EU energy security provisions'.⁹⁷⁸

The Union's efforts to ensure the safeguard of the security of gas supply extends beyond the oversight powers of intergovernmental energy agreements with Member States. This includes ensuring agreements related to the buying of gas from external supplier companies are indeed compliant with EU law which includes maintaining complete transparency and ensuring such external supplier gas agreements are compliant with the EU's energy security provisions. Furthermore the requirement that the Commission and national authorities be notified of any contract that places a large proportion of a state's gas consumption in a third country supplier, indicate the level of oversight powers the Union has obtained with regard to ensuring its energy security. The level of scrutiny with respect to IGAs and 'security of supply relevant contracts' that the Commission now exercises suggest a strategic dimension to the Union's agenda in the energy sector which directly addresses concerns in

⁹⁷⁵ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Concerning Measures to Safeguard the Security of Gas Supply and Repealing Regulation (EU) No 994/2010' [2016] COM (2016) 52 final <http://eur-lex.europa.eu/resource.html?uri=cellar:33516200-d4a2-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF> accessed 20 August 2016

⁹⁷⁶ *Ibid*

⁹⁷⁷ European Commission, 'Consultation on the review of the Intergovernmental Agreements Decision' (2015) <<https://ec.europa.eu/energy/en/consultations/consultation-review-intergovernmentalagreements-decision>> accessed 22 August 2016.

⁹⁷⁸ At the heart of the draft proposals to revise the 2010 security of gas supply regulation is a call for mandatory regional risk assessments, preventive action and emergency plans. These will follow a pre-set template, be peer-reviewed and require Commission approval. The preventive action and emergency plans will play a key role in the overall coordination mechanism, ensuring that the security of supply framework is correctly applied and that no measure that could jeopardise the security of supply of another Member State, region or the EU as a whole is taken by Member States. The countries members of the Energy Community will also play a role in this coordination process. Further, the proposal introduces a solidarity principle among Member States to ensure the supply of households and essential social services, such as healthcare, in case their supply was affected due to a severe crisis. However, the solidarity mechanism will apply when markets alone are no longer able to deal adequately with a gas supply disruption. See European Commission, 'Consultation on the review of the Intergovernmental Agreements Decision' (2015) <<https://ec.europa.eu/energy/en/consultations/consultation-review-intergovernmentalagreements-decision>> accessed 22 August 2016

its external relations with Russia which were left unaddressed by the fragmented legal architecture and the subsequent bilateral approach to energy relations that emerged thereafter.

5.5.3. Ensuring the Union's Security of Supply – a Change in Objective?

The analysis above has served to illustrate how the EU has gained a more active role in the energy sphere through initiatives rolled out for the purpose of ensuring the Union's energy security. Whilst Chapter 3⁹⁷⁹ focused on the relevant competence provisions pertaining to EU energy policy, it is important to recall (as indicated in Chapter 3)⁹⁸⁰ that the EU's external energy policy is largely internal objectives that have been externalised with one of the legal basis from which the Union develops its external energy policy drawn from the CCP nexus of the internal market and external relations. This is largely due to the fact that since its inception, EU energy policy has been characterised by a fragmented legal competence framework due the lack of an explicit legal basis in the then EEC Treaty with respect to the adoption of legislation in the field, whether internally or externally.⁹⁸¹

Although Lisbon remains silent on energy as an aspect of the Union's external policy, there is an inadvertent external dimension through the Union's ability to conclude international agreements with the EU's competence in matters of the CFSP (Article 24 TEU) and the conclusion of agreements with one or more countries (Article 37 TEU), provided the agreements relate to matters with a CFSP nexus. Whilst Article 37 TEU can be interpreted in light of the Union's action on the international scene (Article 23 TEU) and the CFSP competence (Article 24 TEU) with EU action guided by the promotion of EU values and principles (Article 3 TEU) and Union objectives such as democracy, rule of law and human rights (Article 21 TEU), it is important to note that none of the Union's values or objectives explicitly mention 'energy security'. Therefore, while the EU's 'energy security' competence is not expressly articulated as such in the TEU, it is implied by its external powers under Article 216(1) TFEU.⁹⁸² Article 216(1) TFEU entails a residual competence whereby the

⁹⁷⁹ See Chapter 3 Section 3.2.1 (*EU Energy Policy and the Scope of the Union's Energy Actorness - The Scope of the Union's External Energy Competence (Pre and Post-Lisbon)*)

⁹⁸⁰ See Chapter 3 Section 3.1.2 (*EU Energy Policy and the Scope of the Union's Energy Actorness - The EU's External Energy Policy – Internal Objectives Externally Pursued*)

⁹⁸¹ The EEC Treaty did not provide an express legal basis that would enable the EU to adopt energy measures and subsequently push for internal energy market liberalisation. What the Treaty provided, instead, was a host of *leges speciales* that enabled the EU legislature to regulate the Single Market or certain *leges generales* to pursue supranational objectives viz. building an internal energy market, reducing carbon emissions, and setting renewable energy and efficiency targets. It was not until the Treaty of Lisbon that 'energy policy' featured in the Treaty proper as an area of EU competence under Article 4 (2) (i) TFEU while Article 194 TFEU created a new competence in the field of energy which is now shared between the EU and the Member States. See Theodore Konstantinides, and Deni Mantzari 'Common Foreign and Security Policy and Energy Policy' in Steven Blockmans, and Panos Koutrakos (eds.) *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar, 2017) 2

⁹⁸² The Treaty only provides for express provisions regarding the EU's legal personality (Article 47 TEU), the capacity to negotiate agreements with third countries or international organisations (Article 218 TFEU) and the possibility to pursue common policies and actions to safeguard EU values, fundamental interests, security, independence and integrity (Article 21 (a) TEU).

Union may conclude agreements on energy policy such as energy efficiency and renewable (Article 194 TFEU); security of supply (Article 122 TFEU); energy networks (Articles 170-172 TFEU); or nuclear energy (Euratom Treaty), which may have an adverse effect on the EU's CFSP.

The Union's residual competence, which has enabled it to take a more active stance in external energy relations and energy deals, has inevitably had an impact on Member States. By way of example, the Union's recent request for a mandate to negotiate with Russia on the Nord Stream 2 pipeline project illustrates the EU's relentless quest to ensure EU energy security and in turn its normative agenda, in its efforts to ensure infrastructure projects are undertaken in a manner consistent with EU rules and market values such as transparency, non-discrimination and third-party access.⁹⁸³ The above serves to confirm that the EU's external energy policy in the CFSP has now acquired a certain existence given the strong intersection between these two policy realms. The EU's efforts to securitise EU energy policy and law through a number of initiatives (which have been examined above) that relate to energy security have inevitably widened the scope of the EU's external action objectives to include energy and in turn enhance the CFSP dimension of market liberalisation to accommodate the void of the CFSP legal basis in the energy domain. In so doing, the securitisation of EU energy policy and the CFSP dimension to the internal market have facilitated a comprehensive approach to external action in the energy domain which has in turn bolstered the Union's role as a normative energy power and strategic security actor.

From a European perspective, the struggle against dependence from third countries has been put at the very core of the new Commission's mandate.⁹⁸⁴ This is nothing but an acceleration of the process started years ago, with the progressive liberalisation of the European energy market and its leading to the centralisation of energy matters at a European level. This trend, as recently culminated in the Energy Union project, is the most concrete attempt of the EU institutions to 'speak with one voice' in relation to third supplying countries. In this regard, through the IGA Decision, the Union has arguably gained for the first time an active role in the treaty making process of its members in the energy field.⁹⁸⁵ The information exchange mechanism set out thereunder reflects the duty of cooperation and the solidarity principle in the energy field which have been embedded in the Lisbon Treaty since 2009.

⁹⁸³ See European Commission Press Release of 9 June 2017, available at http://europa.eu/rapid/press-release_IP-17-1571_en.htm

⁹⁸⁴ Jean-Claude Juncker, (2014). 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change,' http://ec.europa.eu/priorities/sites/betapolitical/files/juncker-political-guidelines_en.pdf, accessed 26 August 2016

⁹⁸⁵ This is a relatively fresh approach to regulate the relationship between the Union and its Member States. See Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (CUP 2014) 462

The proposed reform of the IGA Decision aims at reinforcing the role of the Union through the further enhancement of cooperation with its members. This should initiate positive effects on security of European energy supply. The new decision should also indirectly boost competition in the market by guaranteeing a level-playing field with the implementation of minimum common standard conditions in the IGAs signed. All the above should enhance and create a platform whereby European companies freely invest and compete on an equal footing in the internal energy market. In addition to the new IGA decision, the proposed scrutiny over the commercial agreements concluded by domestic undertakings and third suppliers should contribute to the enhancement of the Union's security of supply. Notwithstanding, the correct functioning of the coordination mechanisms put in place, will need to be tested. Indeed, the regional approach adopted may inevitably create homogenous areas deeply differing from one another. This would complicate the aggregation process hampering the achievement of effective market integration. Therefore, it is fundamental that the EU clearly defines the path to follow, paying attention to the progressive aggregation of the single regions in a way to create similar areas easily capable of integration.⁹⁸⁶

It is worth noting that the EU's intervention under the 2016 Energy Security Package with respect to third entities was two-fold: (i) on the one hand, the EU took a step further in the regulation of private undertakings' actions by requiring them to communicate the content of their agreements which are deemed to have an impact on the EU's security of supply; and (ii) on the other hand, the EU directly intervened at the level of energy trade policy, by setting out rules preventing third states, in particular Russia, to use their bargaining power to circumvent EU law in the IGAs signed with Member States. Hence, the recent approach of the European regulator extends not only to private undertakings operating in the market, such as Gazprom, but also sets limits to energy negotiations between third states and EU members, having an impact on their external relations. This dual approach, representing a change in the EU-Member States energy relationships, is justified from a commercial perspective by the strategic role of natural gas companies which, for ownership rights and/or management reasons, often act not only as commercial operators but also as geopolitical tools in the hands of national governments.

The overall effect of the Commission's measures mentioned above should serve as a powerful drive towards the integration of national markets in a union able to speak with one voice with respect to third countries, which could bypass the bilateralism typical of the divide and rule standard applied by large energy incumbents (and the likes of Gazprom) *vis-à-vis*

⁹⁸⁶ According to Leal Arcas, Professor of European and International law at the Queen Mary University of London, a bottom-up approach, characterised by a gradual blending of regional initiatives, could lead to the effective Europeanization of the internal energy market. See Rafael Leal-Arcas and Juan Alemany Rios 'The Creation of a European Energy Union' *European Energy Journal* 5 [2015] 37

EU Member States. This, jointly with the full implementation of the TEP, the enforcement of the EU antitrust rules, the adoption of green energy policies aimed at the differentiation of the energy mix and an efficient use of energy sources, should boost EU energy independence and should ultimately improve the Union's geopolitical leverage towards major supplying countries and in turn the Union's role as a global normative energy actor on the international stage.

5.5.4. Energy Security and the CFSP Nexus

Energy security is at the epicentre of the EU's energy policy in the context of CFSP. Energy security is placed high on the European political agenda and its foreign policy which has become a priority for the establishment of a resilient Energy Union. The Energy Union is expected to fulfil three objectives, namely: secure, sustainable, competitive and affordable energy; collective action by Member States in a spirit of solidarity; and 'speaking with one voice' in global affairs.⁹⁸⁷ The impetus to develop a coherent approach to energy security as part of the CFSP and to place energy security at the crux of internal and external action, found its inception before the Treaty of Lisbon. In his capacity as High Representative for the CFSP, Javier Solana gave credence to this assertion when he highlighted the importance of the CFSP in establishing a united policy on energy questions.⁹⁸⁸ This is also evident in the Green Paper of March 2006 where the Commission emphasised that 'Member States should promote the principles of the internal energy market in bilateral and multilateral fora, enhancing the Union's coherence and weight externally on energy issues'.⁹⁸⁹ In addition thereto, the CFSP's conceptual framework as revealed in the 2008 review of the European Security Strategy, emphasised the need for an EU energy policy with combined internal and external dimensions given the EU's energy dependence which was expected to increase.⁹⁹⁰

More recently, this focus on a coherent approach to energy security as part of the CFSP has been illustrated in the 2014 European Energy Security Strategy which as mentioned above placed energy security as an EU objective and set the tone for the Union's heavy dependence on imported energy resources.⁹⁹¹ These proposals were also articulated in the 2016 EU Global Strategy which advocates synthesising internal and external policies⁹⁹² and the 2017 Joint Communication on Resilience which specified the need to bolster the EU's

⁹⁸⁷ See Commission Communication on 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' COM 2015 080 final

⁹⁸⁸ Javier Solana, 'Energy in the Common Foreign and Security Policy' in Greg Austin et al. (eds) *Energy Conflict Prevention* (Madariaga European Foundation 2007)

⁹⁸⁹ European Commission, Communication to the European Council, 'External energy relations – from principles to action', 12.10.2006, COM (2006) 590 final.

⁹⁹⁰ European Council, 'Report on the Implementation of the European Security Strategy - Providing Security in a Changing World' Brussels, 11 December 2008 S407/08.

⁹⁹¹ European Energy Security Strategy COM (2014) 330 final.

⁹⁹² European Commission, A Global Strategy for the European Union's Foreign And Security Policy, June 2016 <https://europa.eu/globalstrategy/sites/globalstrategy/files/about/eugs_review_web_4.pdf >

resilience with respect to energy security.⁹⁹³ In this regard the 2014 Energy Union Initiative is also of significance given its endeavours to strengthen the Commission's oversight and vetting powers over intergovernmental agreements to ensure consistency with EU law.⁹⁹⁴ With the Commission acknowledging that the IGA Decision falls at the intersection of the external and internal dimension, given that it involves agreements with non-EU entities with provisions that may potentially affect the supply of energy within the internal market, transparency and cooperation has been placed high on the agenda in concluding the framework of this proposal.⁹⁹⁵

Given the EU's vulnerability in its energy dependence on external sources, it is inevitably the case that energy security falls at the cross-roads of the Union's internal market and its foreign policy as alluded to in Chapter 3.⁹⁹⁶ As such, energy security has created a strong correlation between these two policy domains with potential open issues being raised regarding the use of external instruments to address energy security issues.⁹⁹⁷ By way of example, the Energy Union may be constrained by the CFSP from a procedural and conceptual perspective given the limited role of the EU's supranational institutions and their decision-making that is unlikely to supersede national foreign policies and the restrictions to the internal market energy competence. In this respect it is important to recall that the exploitation of energy resources is at Member State discretion.⁹⁹⁸

Therefore, despite the increasing prominence of energy security in the CFSP, there are inherent limitations with respect to the Union's ability to engage in global affairs as a single entity and the conceptual ambiguity of energy security which suggests that it cannot be addressed within a single legislative framework.⁹⁹⁹ Furthermore, the multidimensional character of energy means that unlike any other commodity, energy can (and often is) used as a tool to further a political agenda.¹⁰⁰⁰ This neorealist perception of energy makes energy

⁹⁹³ European Commission, 'Joint Communication on "A Strategic Approach to Resilience in the EU's External Action"', (7 June 2017) last accessed 14 July 2017 at <http://europa.eu/rapid/press-release_MEMO-17-1555_en.htm>

⁹⁹⁴ Communication from the Commission: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy COM/2015/080 final.

⁹⁹⁵ Decision of the European Parliament and the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU, COM (2016) 53 final.

⁹⁹⁶ See Chapter 3 (*The Internal Energy Market and External Relations – The CCP Analogy*)

⁹⁹⁷ Theodore Konstantinides, and Deni Mantzari 'Common Foreign and Security Policy and Energy Policy' in Steven Blockmans, and Panos Koutrakos (eds.) *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar, 2017) 14.

⁹⁹⁸ Article 194 (2) TFEU secures the right of Member States to determine the conditions for exploiting their energy resources. This is particularly significant for energy security where it relates to the conclusion of international treaties on matters such as energy efficiency and renewable energy which are governed by Article 194 TFEU.

⁹⁹⁹ The increasing prominence of the energy security in the CFSP has created a link between the Union's foreign policy and its internal market thereby creating a potential cross-fertilisation between the legislative bases of the TEU and TFEU. See Theodore Konstantinides, and Deni Mantzari 'Common Foreign and Security Policy and Energy Policy' in Steven Blockmans, and Panos Koutrakos (eds.) *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar, 2017) 11

¹⁰⁰⁰ Tom Dyson, *Neoclassical Realism and Defence Reform in Post-Cold War Europe* (Palgrave Macmillan 2010)

security a significant issue/factor within a CFSP context¹⁰⁰¹ which would enable CFSP involvement in the field.¹⁰⁰² Notwithstanding, energy security appears to fall within the ambit of different policy dimensions and thereby supported by different policies and external instruments.¹⁰⁰³ However, action in the field of energy through CFSP instruments or competition law may not be easily distinguished. Furthermore, overlaps between the TFEU and TEU in the field of energy suggest ambiguity in relation to the exact parameters of the Union's legal power and the perpetual issue of Union competence which has plagued EU external relations law scholars for some time. In short, action in the energy sphere under the TFEU cannot single-handedly achieve CFSP objectives.¹⁰⁰⁴ Inevitably, energy security creates a strong nexus between the Union's internal market and foreign policy and whilst there are limitations¹⁰⁰⁵ posed by the CFSP framework, these limitations can be addressed by externalising the EU's internal energy market regulation, which predominantly deals with a non-CFSP dimension, in particular, competition policy.¹⁰⁰⁶ Therefore despite the increasing prominence of energy security in the CFSP, a security dimension also exists in the Union's internal energy market with a strong correlation between securitisation and competitiveness, which has been brought to the fore in the Union's engagement with Russia in the energy sector.

In this respect, the Union's ability to externalise internal market policies both within and beyond the CFSP ambit, suggests that the Union is strategically able to use non-CFSP tools (in this case, competition policy) as a means to achieve CFSP objectives.¹⁰⁰⁷ The externalisation of internal market rules such as ownership unbundling and the third country clause under the TEP are prime examples of the exercise and control of EU regulatory power beyond EU borders through internal measures with extraterritorial implications. Such measures, as well as the EU's competition rules and the subsequent implications for

¹⁰⁰¹ *Ibid*

¹⁰⁰² Theodore Konstantinides, 'Civil protection cooperation in EU law: Is there Room for Solidarity to Wriggle Past?' (2013) 19 (2) E.L.R. 267; Steven Blockmans, 'L'Union Fait la Force: Making the Most of the Solidarity Clause (Art. 222 TFEU)', in Inge Govaere and Sara Poli (eds.) *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Publishers 2014) 111

¹⁰⁰³ Energy security can therefore, be supported by different external instruments and policies ranging from CFSP to development policy as well as the solidarity provisions of Articles 222 TFEU if energy infrastructure falls victim to a natural or man-made disaster within the EU and Article 42 (7) TEU in the event energy is used as a weapon against Member States.

¹⁰⁰⁴ Theodore Konstantinides, and Deni Mantzari 'Common Foreign and Security Policy and Energy Policy' in Steven Blockmans, and Panos Koutrakos (eds.) *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar, 2017) 24

¹⁰⁰⁵ Limitations include how to combine the CFSP legal basis, the new energy legal basis, and the Treaty's Article 40 TEU non-affectation clause as the legal foundation for both internal and external energy security instruments. Lisbon poses a challenge with respect to the use of implied powers which pertains to the choice of the legal basis for cross-sectoral international agreements that involve multiple objectives such as CFSP and energy.

¹⁰⁰⁶ Theodore Konstantinides, and Deni Mantzari 'Common Foreign and Security Policy and Energy Policy' in Steven Blockmans, and Panos Koutrakos (eds.) *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar, 2017) 15

¹⁰⁰⁷ *Ibid*

Gazprom, all serve to validate the assertion that the Union is (or has increasingly become) a global normative energy security actor in its external energy relations with Russia.

5.5.5. Conclusion

This section has endeavoured to show developments in the Union's energy policy which have facilitated the Union undertaking a more active role in EU energy security which has in turn bolstered the Union's role as a normative energy power in its external relations with Russia. The Union's energy actorhood gained traction with milestones such as the Energy Union initiative and the Energy Security Package which set the Union's energy security as a priority on the EU's energy agenda and in turn bolstered the Union's effectiveness as a normative energy actor by way of greater vetting and oversight powers in relation to its intergovernmental agreements and ensuring supply contracts are consistent with EU law.

By illustrating the significant role of energy security within the CFSP, the section also endeavoured to reveal a strategic dimension to the Union's normative power where its security interests are concerned. The subtle distinction here (between the EU as a normative power with a strategic element to its normativity) lies in the fact that Union still resorts to normative means of exerting power and influence however it does so in a strategic manner through unilaterally imposed regulation which is externalised on a non-EU entity, given the void in the legal architecture and Russia's reluctance to uphold international law or rules of engagement based on an EU model. In so doing, the section has tried to reveal the security dimension of the Union's internal market regulation which has significantly obtained extraterritorial clout given its application to Russia and implications for Gazprom.

Whilst there are several techniques (as already mentioned in the introductory chapter) that serve to extend the global reach of EU law including 'extraterritoriality', 'territorial extension' and the 'Brussels Effect', this thesis has focused on the extraterritorial effect and global reach of EU internal energy market regulation and competition rules through the Union's external relations powers and the normative interaction and engagement with its neighbourhood and Russia through its multi-layered legal frameworks. The EU seeks to influence conduct and governance regimes beyond its borders through the extraterritorial impact of its internal market legislation; transnational governance structures; and bilateral and multilateral agreements. Although the EU's impact is derived from its quest to influence external conduct, this quest is driven by internal concerns, namely protecting the integrity of the Union's internal regulatory regime.

The section has revealed that against the backdrop of the Union's externalisation of its internal market policies as a means of normative power, the cross-border reach of its regulations to achieve CFSP objectives and its increased competence facilitated by the Energy Union initiative and the Energy Security Package, all point to a Union which is

increasingly becoming more assertive and albeit normative, displaying traits of a global security actor. In this respect, the section which is ancillary to the analysis of the Union's normativity in the outset of the case-study, has illustrated an additional dimension to the Union's normative agenda which is strategic given the security nexus to its energy supply and dependence on Russian natural resources. The Union can therefore be seen to be increasingly behaving like a global security actor given its strategic quest for security of energy supply in its external relations with Russia, which extends beyond the usual normative agenda it pursues in its relations with other third countries.

5.6. Case-Study Conclusion

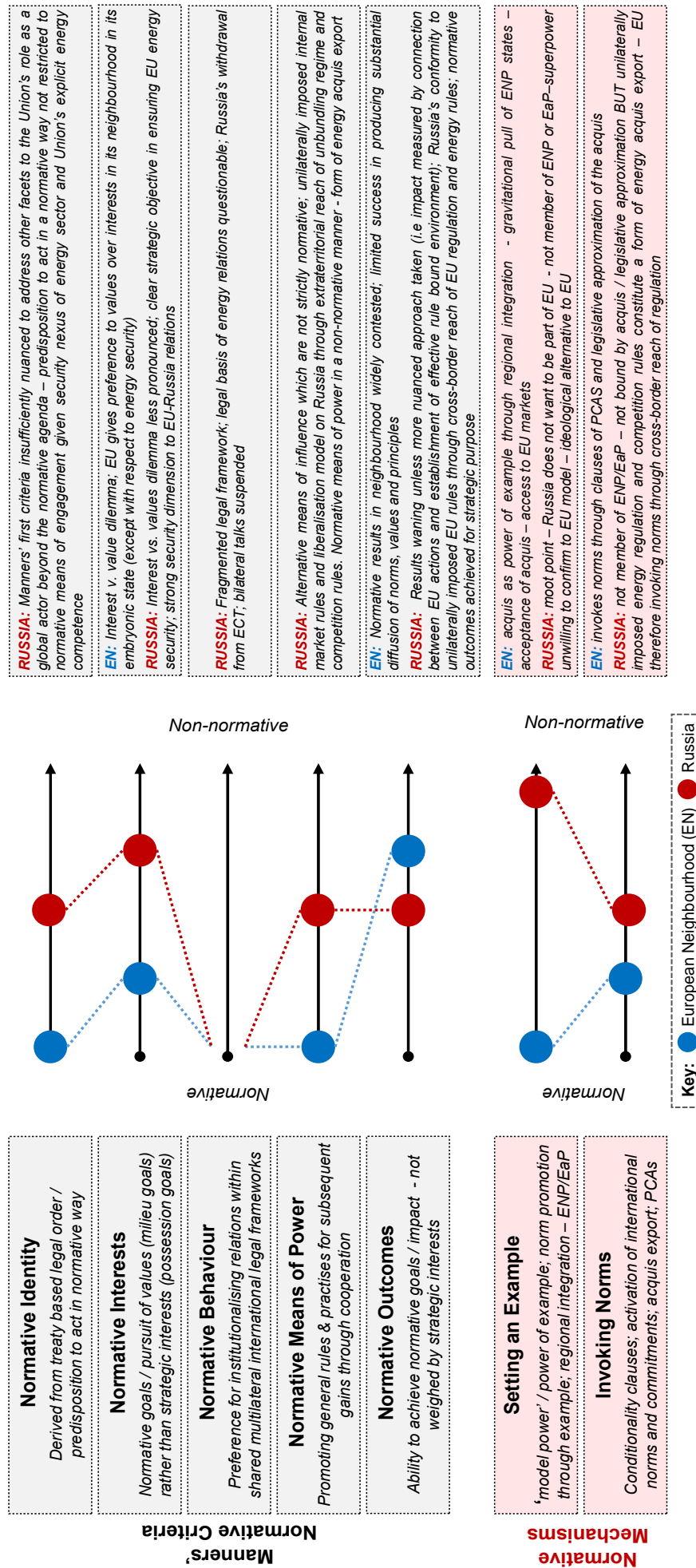
The purpose of the case-study has been to examine to what extent the EU is a normative power with respect to its energy relations with Russia. More specifically, whether the EU can be said to entail traits of a normative actor as advocated by Manners which includes a normative identity; normative interests; normative behaviour; normative means of power and the ability to achieve normative outcomes. Whilst Chapter 1 set-out the conceptual framework for exploring what a normative power is, the case-study applied this framework to the conduct of the Union in its external energy relations with Russia. If we concede that a normative power is as rigorously defined as per Manners' criteria, then the sections above have illustrated examples of foreign and energy policy behaviour which give credence to the normative power framework. Whilst the Union's normative identity cannot be disputed, the case-study showed that in its external energy relations with Russia, the Union does behave in a normative manner (by promoting international legal frameworks) and does indeed exercise normative means of power (by externalising its energy regulation and competition rules beyond its borders) but that as far as its normative interests are concerned, the Union gives weight to its strategic interests over normative interests given its energy dependence on Russia. With respect to Manners' final criteria, the case-study found that the Union's normative outcomes remain contested given the EU's strategic interest in its external energy relations with Russia which draw into question the Union's intent. In this respect the chapter suggested that the Union's normative impact remains questionable where the EU's intent is in the pursuit of possession goals (energy security) rather than milieu goals (values and norms). Notwithstanding, the Union's effective establishment of a rule-bound environment through its energy unbundling and competition rules may suggest otherwise.

In considering whether the Union uses mechanisms of a normative power, the case-study found that this was predominantly by way of the invocation of norms rather than model power given Russia's reluctance to participate in the Union's regional integration. Reflecting on this analysis, the case-study drew a distinction with the analysis undertaken in the preceding chapter as a benchmark comparator of the Union's normativity in its external

relations, whereby it found that the main distinction between the Union's *acquis* export in its neighbourhood and Russia is that economic integration and political association is not envisioned with Russia as Russia does not partake in the ENP or Eastern Partnership. In the ENP and Eastern Partnership the EU uses the law to conduct its foreign policy by promoting its values and interests through integration. The EU's integration is therefore through the law by way of extending the reach of the *acquis* through international agreements and legal frameworks. This 'integration through the law' is a powerful tool in the Union's external relations most pronounced in the Eastern Neighbourhood but not Russia. As such, the unilateral adoption of norms and values are not the *modus operandi* as is the case with the EU neighbourhood which would explain why the Union resorts to alternative measures to export its energy *acquis* through the extraterritorial/global reach of its energy regulation and internal market rules. As mentioned elsewhere,¹⁰⁰⁸ the normative power framework's explanatory value varies depending on whether the analysis is focused on the Union's external relations with its Eastern Neighbourhood or with Russia. By using the previous chapter on the Union's external energy relations with its neighbourhood (in particular its Eastern Neighbourhood) as a comparator to determine the level of deviation in the Union's conduct in its relations with Russia, the case study has shed light on the Union's normativity in its external energy relations with Russia. Against this backdrop, the chapter has alluded to other aspects of the Union's nature, which include an energy security dimension that implies strategic and geopolitical goals that come into play over and above (or ancillary to) its normative agenda.

¹⁰⁰⁸ See Chapter 4 Section (*Does the EU Exhibit Normative Means of Power in the Neighbourhood - Legislative approximation as a Means of Acquis Export in the Neighbourhood*)

Figure 1. Manners' Normative Power Theory: Distinction between EU as a Normative Power and Russia



Rationale

RUSSIA: Manners' first criteria insufficiently nuanced to address other facets to the Union's role as a global actor beyond the normative agenda – predisposition to act in a normative way not restricted to normative means of engagement given security nexus of energy sector and Union's explicit energy competence

EN: Interest v. value dilemma; EU gives preference to values over interests in its neighbourhood in its embryonic state (except with respect to energy security)

RUSSIA: Interest vs. values dilemma less pronounced; clear strategic objective in ensuring EU energy security; strong security dimension to EU-Russia relations

RUSSIA: Fragmented legal framework; legal basis of energy relations questionable; Russia's withdrawal from ECT; bilateral talks suspended

RUSSIA: Alternative means of influence which are not strictly normative; unilaterally imposed internal market rules and liberalisation model on Russia through extraterritorial reach of unbundling regime and competition rules. Normative means of power in a non-normative manner - form of energy acquis export

EN: Normative results in neighbourhood widely contested; limited success in producing substantial diffusion of norms, values and principles

RUSSIA: Results waning unless more nuanced approach taken (i.e impact measured by connection between EU actions and establishment of effective rule bound environment); Russia's conformity to unilaterally imposed EU rules through cross-border reach of EU regulation and energy rules; normative outcomes achieved for strategic purpose

EN: acquis as power of example through regional integration - gravitational pull of ENP states – acceptance of acquis – access to EU markets

RUSSIA: moot point – Russia does not want to be part of EU - not member of ENP or EaP – superpower: unwilling to conform to EU model – ideological alternative to EU

EN: invokes norms through clauses of PCAs and legislative approximation of the acquis

RUSSIA: not member of ENP/EaP – not bound by acquis / legislative approximation BUT unilaterally imposed energy regulation and competition rules constitute a form of energy acquis export – EU therefore invoking norms through cross-border reach of regulation

Chapter 6: Conclusion

This thesis has undertaken to make a valuable contribution to existing scholarship regarding the EU's role as a global actor and the extent to which the Union is a normative power in its external energy relations with its neighbourhood and Russia. For the purpose of this novel contribution, the study has undertaken the following: (i) it has introduced the normative power framework focusing on Manners' theory whilst differentiating between different strands and claims of the 'EU as a Power' debates thereby undertaking a more nuanced view; (ii) it has linked the normative actor conceptualisations to the field of energy; (iii) it has tested the normative power framework and normative actor claims by analysing the Union's external relations with its neighbourhood (in particular the Eastern neighbourhood); (iv) it has evaluated the normative power framework and normative actor claims by analysing the Union's external relations with Russia using the ENP analysis as a benchmark comparator; (v) it has revealed additional dimensions to the Union's role as a global actor that includes a strategic element to the Union's usual normative agenda; and (vi) in this conclusion the thesis provides a more nuanced understanding and perception of the EU as a global normative energy actor in strategic sectors of the economy where the Union's security interests are at stake.

For this purpose, the thesis has focused on the EU's external legal relations with Russia in the energy sphere as a case study of the normative power framework. The thesis has drawn from Manners' 'Normative Power Europe' theory, where the central component to the Union's normative power is that of a value-driven foreign policy actor based on the core norms that form its underlying identity (namely, peace, liberty, democracy, rule of law, respect for human rights and fundamental freedoms) which it seeks to promote in its external relations through multilateral legal frameworks. By using the normative power theoretical framework as a reflective device, the thesis has analysed the Union's manoeuvres in the energy sphere with respect to its neighbourhood and Russia to establish whether the Union can be said to be a global normative energy actor. The examination has focused on the EU's approach towards Russia in its energy relations through the normative power lens; which has then been gauged against the EU's approach towards third countries, in particular the Eastern Neighbourhood. In so doing, the perception of the EU as a normative power driven by values has been benchmarked against other underlying factors underpinning external relations with Russia, such as economic and security interests.

Whilst the study does not purport to suggest that the EU is exclusively normative, it has alluded to the possibility that the EU may be using a normative agenda for non-normative and strategic objectives.¹⁰⁰⁹ The case study has therefore specifically focused on the

¹⁰⁰⁹ The Union's extraterritorial reach of its internal market regulation and competition law to ensure fully liberalised and competitive markets in pursuit of its energy security, constitutes a normative means of pursuing strategic objectives.

Union's external relations with Russia in the energy sphere using the analysis undertaken vis-à-vis the Union's neighbourhood, as indicators for the Union's conduct in its external relations. In applying the broader analysis to the Union's external energy relations with Russia, the thesis has tried to demystify the conceptualisation of the EU as a normative power driven by values, by shedding light on the nature of the EU as a normative energy actor that pivots between a value-based agenda and a geopolitical approach in its energy relations with Russia, where its strategic objectives are involved. Significantly, the analysis has found that there are additional facets to the Union's nature that suggest more than a normative agenda when strategic sectors and partners are involved where the Union's security and interests are at stake.¹⁰¹⁰ The analysis has thus revealed additional dimensions to the Union's nature as a global actor and the factors that come into play in the role it undertakes on the international political stage. In this respect the thesis has demonstrated that the Union is predominantly normative in its external relations with its neighbourhood, despite the overlap between values and interests, however in its external energy relations with Russia, the EU displays traits that are not only normative but also strategic and geopolitical at heart with preference given to Union interests over values. Here the thesis has revealed that where there is an overlap between Union values and interests, where these interests are specifically related to EU security and energy supply, the Union gives priority to its self-regarding interests.

It is within this context that the thesis has attempted a novel contribution to the field using the EU's external energy relations with Russia to show that the mainstream perception regarding the Union's normative actorness, needs to be reviewed and reconsidered in the context of its external energy relations where its non-normative strategic security interests lie. Although the conceptualisation of the Union as a normative power is prevalent in the literature, there is conceptual ambiguity surrounding what a normative power constitutes which the thesis has endeavoured to demystify by applying Manners' criteria and in turn deciphering whether the concept of the Union as a 'normative power' relates to the Union's identity itself or aspects of its identity which are intrinsically 'normative'.

For this purpose, the thesis has unpacked the conceptualisation of a normative power based on Manners' criteria which has been applied to the analysis vis-à-vis its neighbourhood (in particular the Eastern Neighbourhood) and Russia. This has included an assessment as to the extent to which the Union entails: (i) a normative identity (ii) normative interests; (iii) normative behaviour; (iv) normative means of power; and (v) normative outcomes. Over and above Manners' criteria, the thesis has also examined the normative mechanisms by which the Union exerts influence on the global stage, namely through: (i)

¹⁰¹⁰ The Union's agenda is arguably not normative if it is applied in a strategic manner in pursuit of non-normative interests.

persuasion (ii) invoking norms; (iii) shaping discourse; and (iv) power of example. In undertaking the analysis the thesis has tried to determine whether the most pronounced perception of the EU in the literature, namely Normative Power Europe, explains the EU's external energy relations with Russia and more specifically, to what extent the EU can be said to be a global normative energy actor in its external relations with Russia.

In order to answer the primary research question and to address this line enquiry, the thesis has endeavoured to answer five secondary questions, one within each chapter which have ultimately shed light on the primary research question. These have included: *What kind of global actor is the EU?* (Chapter 1); *To what extent is the EU a normative power in its external relations?* (Chapter 2); *To what extent is the EU a global normative energy actor?* (Chapter 3); *To what extent is the EU a global normative energy actor in its neighbourhood?* (Chapter 4); and finally, *To what extent is the EU a global normative energy power in its external energy relations with Russia?* (Chapter 5). As an ancillary question, against the backdrop of the research undertaken in the case study, the chapter also considers to what extent the EU has become a global normative energy security actor. In exploring the extent to which the Union is normative in its external energy relations with Russia and its neighbourhood, the analysis has discovered an additional dimension to the Union's role as a global actor where its security interests lie. In undertaking this analysis, the research has set a platform for a more detailed discussion whereby the notion of the EU as a potential energy security actor can be further developed as ancillary to the focus of this thesis, setting the stage for future research which will be supplemental to the analysis already undertaken.

In the section to follow the findings of each chapter will be summarised which relate to the secondary research questions mentioned above (one addressed in each chapter) which have driven the analysis towards answering the primary thesis question.

6.1. Chapter 1: What kind of global actor is the EU?

In the first chapter, the thesis briefly introduced the theoretical framework and engaged in the theoretical debate on EU foreign policy by drawing from some of the international relations theories that endeavour to explain what kind of power the Union is. The study considered the 'soft' power, 'civilian' power, 'trade' power and 'regulatory' power arguments which it deemed relevant to the EU foreign policy debate vis-à-vis Russia. Although Duchêne's perception of the Union as a civilian power together with Ian Manners' conception of the Union as a normative power have become core references in the literature, the thesis drew from Manners alone for the purpose of the detailed analysis, specifically from his conceptualisation of the Union which coined the phrase 'Normative Power Europe'. Whilst the purpose of this thesis was not to provide a definitive statement as to which conceptualisation of the Union as a power is best or most accurate when considering EU external relations, the thesis introduced the most pronounced perception of

the EU in the literature (i.e. Manners' Normative Power Europe) which was thereafter used as a reflective device to examine the EU's external energy relations with Russia and the Eastern Neighbourhood. As a means of refining the analysis, the thesis set the stage for an examination of the Union's normativity within the normative power thesis by bracketing the idea of 'power' as a more contextual starting point. Therefore, whilst the Union's use of the law may be classified as a form of power, the thesis undertook to assess the extent to which the Union is 'normative' as an 'actor' rather than a 'power' in its external engagement with the Neighbourhood by examining the impact and global reach of EU law beyond its borders through the legal instruments the EU uses vis-à-vis the Eastern Neighbourhood and Russia

6.2. Chapter 2: To what extent is the EU a normative power in its external relations?

The second chapter delved further into the normative power theory by examining Manners' respective adherents and critics and a review of the prevailing theoretical scholarship. The chapter highlighted the assessment standards that the literature has established as reflective of a normative actor which either serve to validate or contest Manners' conceptualisation of the Union as a normative power. By presenting the secondary literature on the EU as a normative power and by highlighting the different ideas of what a normative power constitutes, the chapter established a framework based on Manners' criteria that was used in later chapters against which the EU's external relations were gauged. More specifically, Manner's argument of a normative power and what it constitutes (namely: normative identity; normative interests; normative behaviour; normative means of power; and normative outcomes) was applied to examples of EU engagement with proximate third countries, specifically Russia and the Eastern Neighbourhood, to deduce the extent to which the Union can be considered a normative power within the context of its energy relations. The chapter also identified the mechanisms of a normative power most relevant to the Union's engagement with its neighbourhood, namely the invocation of norms and the power of example, which has been used as a framework in the chapters to follow. The purpose of the chapter was to set the platform to assess to what extent the Union is normative in its external energy relations with Russia and its Eastern Neighbourhood, the subject matter of the thesis, by reviewing the prevailing scholarship and assessment standards established in the literature. In the alternative to a normative power, the thesis considered whether a more appropriate conceptualisation of the EU as an international actor exists and whether the notion of the EU as a normative power is realistically possible in modern-day global politics which set the platform for a more detailed discussion of the true nature of the EU. The thesis proposed a more nuanced approach and understanding of the Union's normativity by shifting the focus from the pursuit of ethical values to the use of the law to pursue EU objectives which include both values and interests. The thesis undertook to show that the Union's normativity is vested in the use of legal frameworks as

mechanisms in EU external relations from which the Union derives its impact and influence in the world rather than its objectives being value based.

6.3. Chapter 3: To what extent is the EU a global normative energy actor?

The third chapter considered the role of the Union as an international actor and to what extent the Union constitutes a normative power in its external relations. It also considered to what extent the Union constitutes a global normative energy actor given its newly bestowed energy competence following Lisbon and the extent to which its internal energy objectives have been externalised in its foreign energy relations. The chapter assessed the scope of the Union's external energy competence by examining the intersection between the Union's internal market and its external energy relations. In this respect the chapter found that the Union's internal energy objectives that have been pursued in its external actions and foreign energy relations, thereby creating an external dimension to an internal sectoral competence. With the CCP being a key policy area for the Union as well as an important corollary for the maintenance of the internal market, the chapter looked at how the CCP resembles the Union's voice in the international trading order and exemplifies the inextricable link between the Union's internal and external policies.¹⁰¹¹ In the absence of an external energy policy, the chapter revealed that the internal market has been externalised with an external dimension to the internal energy market developed to serve EU internal objectives. In this respect the chapter found that the different objectives of EU external energy policy have been pursued by a law-based market-orientated approach given the internal challenges to extending the EU legal order to the international domain and in turn the Union's external relations.

The chapter also examined the EU's energy policy and the extent to which the Union's energy competence bolstered the Union's actorness in the energy domain. In this respect, the chapter found that the explicit energy competence under Article 194 TFEU and the novelties introduced by Lisbon (i.e. the solidarity provision; new actors in external relations and objectives in external action) set the Union's actorness in motion and facilitated the Union becoming a global normative energy actor. The chapter indicated that the Lisbon Treaty paved the way for the legal formalisation of the Union's policies that significantly enhanced the external dimension of the EU internal market and the Union's role as a global actor which aspires to promote its own democratic, economic and legal values beyond its borders which is fundamentally normative. The chapter illustrated that the Union's competence conferral enabled the EU to pursue internal objectives in its external relations with a solidarity provision and a distinct set of new actors and structures to facilitate coherence and a less haphazard approach to bilateral diplomacy in the energy sector. In

¹⁰¹¹ Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) 306

the analysis undertaken the chapter revealed that Lisbon has provided a basis by which the EU can potentially act as a normative power in its external energy relations by enhancing the Union's position as a global player and its international capacity to promote its democratic and market economy values to third countries. In other words, the chapter showed how Lisbon has provided a basis by which the EU can potentially act as a normative power in its external energy relations, thereby reinforcing the view that the EU could be morphing into a global normative energy actor.

6.4. Chapter 4: To what extent is the EU a global normative energy actor in its neighbourhood?

Against the backdrop of the preceding chapter, the fourth chapter examined the Union's *acquis* export in its neighbourhood and assessed to what extent the Union has Europeanised its neighbourhood and their respective energy sectors through its energy *acquis*. The analysis showed that by institutionalising its relations in its neighbourhood within shared multilateral normative frameworks, the Union has been behaving as an ideal conceptualisation of a normative power.¹⁰¹² The chapter found that in the Union's efforts to Europeanise the fringes of its boundaries and their respective energy sectors, through its *acquis*, the Union has arguably been upholding international norms, promoting universal rules and projecting its values on third countries thereby yielding power through its influence and shaping discourse through its norms. Applying Manners' criteria of normative power theory as supplemental to the more nuanced approach of this study (which takes other voices in the literature into account), the chapter considered to what extent the Union has a normative identity; normative interests; normative behaviour; normative means of power; and normative outcomes in its neighbourhood. In this respect, the chapter illustrated that the Union arguably fulfils all Manners' criteria save for the last criteria of normative outcomes, which remains questionable.

More specifically, with respect to Manners' criteria, the chapter found that the Union has a **normative identity** by virtue of the fact that it has evolved from a treaty-based legal order with a predisposition to act in a normative way. That whilst the Union does have **normative interests** in its pursuit of foreign policy goals based on the promotion of Union norms and values, in the Union's neighbourhood, in particular the Eastern neighbourhood, the EU agenda is not solely value-based but also strategic and self-regarding. This is specifically relevant to the Union's security interests in relation to its periphery and its energy corridors. The analysis therefore found that there is an overlap between EU values and interests with both inextricably intertwined. Building on the preceding chapter and the scope of the Union's external energy competence and the interplay between the Union's internal market and external energy relations, the chapter examined the instruments of the Union's external

¹⁰¹² Tuomas Forsberg and Hiski Haukkala, *The European Union and Russia*. (Palgrave Macmillan 2016) 229

energy policy to determine the extent to which the Union can be said to be exhibiting **normative behaviour** in its neighbourhood regarding energy. In this respect, the chapter illustrated that by 'invoking norms' through the export of its energy *acquis* using a market-based approach and by 'leading by example' through regional integration and multilateral cooperation, the Union can be seen to be behaving in a manner that is quintessentially normative and undertaking **normative means of power**. The chapter therefore showed how the Union's conduct amounts to normative behaviour by trying to institutionalise external relations with its periphery in legally binding frameworks; and how the Union's conduct constitutes normative means of influence with the Union invoking norms, shaping discourse and leading by example through the *acquis* and its legislative approximation.¹⁰¹³ With respect to **normative outcomes**, as mentioned above, the chapter found that the Union has yielded limited results in the neighbourhood with its record of achieving normative ends widely contested. This argument has been instilled by the fact that the ENP is worse off now than it was before (by way of example, in the Eastern neighbourhood: Russia's opposition to the ENP in a post-Crimea setting; occupation of part of Ukraine; pressure on Moldova; exclusion of Armenia from the ENP process; and more widely with respect to the Mediterranean dimension of the ENP: instability in the region; the rise of Islamic State; war; terrorist attacks; and large flow of migrants towards EU borders) which gives credence to the assertion that the EU's influence in its periphery has been dwindling in recent years.

The chapter also found that of the four normative mechanisms (i.e. persuasion; invoking norms; shaping discourse and power of example) the most prominent mechanisms of normative power in the neighbourhood entailed invoking norms and power of example. The chapter showed that the Union engages in these mechanisms in the neighbourhood predominantly through conditionality clauses in the PCAs and undertakings that the respective countries conform their legislation and policies in-line with the EU which is a form of legislative approximation (invoking norms) and through the EU *acquis* export whereby the Union promotes norms by example (power of example or 'model power'). In this respect the chapter found that Union has arguably Europeanised its neighbourhood and their respective energy sectors through the legally binding frameworks with which the Union has endeavoured to entrench its external relations with its neighbouring trading partners, in particular with respect to the Association Agreements and DCFTAs with Georgia, Moldova and Ukraine.

Drawing from Ian Manners' Normative Power Europe theory, the chapter showed that by incorporating EU values in the Union's legal order, the Union has promoted its market economy norms and principles in its external relations with its periphery, which has entailed engagement based on conformity to an EU model. In the Union's efforts to Europeanise its

energy corridors through the sectoral application of its *acquis* beyond its borders, the Union displayed manoeuvres reminiscent of a normative power given its influence on third country institutional and legal structures in conformity to EU values and norms. The normative power theory is therefore only partially viable as a true conceptualisation of the Union in the neighbourhood regarding energy, as there appears to be a clear overlap between the Union's values and interests in its periphery where its strategic security interests are concerned (namely, energy security). For this purpose the chapter showed that Manners' normative power theory does not offer a complete rationale for the Union's external action with respect to its energy corridors. Despite the Union being predominantly normative in its engagement with its neighbourhood, the EU pursues both values and interests in its foreign policy goals where its external energy relations in its periphery are concerned. The chapter supplemented the research findings by referring to the rhetoric of the Commission and the EU Security Strategy where Mogherini affirmed this view by stating *inter alia* that values are driven by interests while interests are guided by values.

6.5. Chapter 5: To what extent is the EU a global normative energy power in its external energy relations with Russia?

In Chapter 5, the thesis turned to the EU's external energy relations with Russia as a case study. The purpose of the case study has been to establish the extent to which the Union is a global normative energy actor in EU-Russia energy relations. In pursuing this line of enquiry, the research arguably challenged the 'normative actor' claim by unveiling additional facets to the Union's manoeuvres in the Union's external energy relations with Russia which are not purely normative but also strategically motivated. The analysis has been undertaken against the normative power framework set-out in Chapter 2 using as a comparator the analysis in Chapter 4 on the EU energy relations with the Eastern neighbourhood. To set the scene, the first section provided context to the case study with an analysis of the 2009 gas crisis. The section highlighted the simmering issues in EU-Russia energy relations such as the lack of coherence and solidarity which have strengthened Russia's position in the European market and in-turn politicised Gazprom's activities in the gas industry. In an effort to address these recurring challenges that have been fuelled by energy policy competences retained at a Member State level rather than a Union level which is dependent on voluntary cooperation of Member States, the section showed that there has been a more assertive stance on the part of the Union to facilitate a progressive shift of competences from Member States to the EU. This has shown a more active role on the part of the Union in the energy realm which strengthened the view that the EU is a global normative energy power and why the Union has potentially become a security actor given the energy security concerns and issues illustrated by the 2009 Gas Crisis.

The case study thereafter applied Manners' criteria (as well as the nuanced approach of the research that considers other contributions to scholarship regarding the normative power debate) to ascertain to what extent the Union has a normative identity; normative interests; normative behaviour; normative means of power and normative outcomes in its external energy relations with Russia. In this respect the chapter found that whilst the Union has a **normative identity** simply because (as stipulated by Manners) it is a treaty-based hybrid polity and a *sui generis* entity, the analysis alluded to the idea that Manners' first criteria may not be sufficiently nuanced, given the EU's energy competence and the energy security nexus vis-à-vis EU external relations with Russia, which inevitably suggests a strategic dimension to the Union's identity. As far as the Union's **normative interests** are concerned, the analysis found that the EU gives priority to its possession goals and strategic objectives in its external energy relations with Russia (i.e. energy security) over its milieu goals and normative foreign policy agenda in its neighbourhood (i.e. the promotion of norms and values). The case study therefore showed that despite the interests-vs-values dilemma in the Union's neighbourhood where the Union pivots between values and interests given the overlap in its foreign policy goals in its immediate periphery, in its external energy relations with Russia, the EU gives preference to its strategic interests (i.e. energy security) over its normative agenda in its external action.

In assessing the extent to which the Union has **normative behaviour** in its external energy relations with Russia, the chapter examined the instruments in place vis-à-vis Russia and the Union's continuous efforts to entrench its external relations with Russia in legally binding multilateral frameworks. In undertaking this examination, the chapter considered to what extent the international law instruments at the Union's disposal are effective in regulating the Union's external relations with its strategic partner. The chapter showed that one of the predominant problems and ever-prevailing issues in EU-Russia energy relations is the fact that there is no solid over-arching international legal framework regulating energy in international trade and investment between these two powers which has subsequently resulted in a void in the legal infrastructure. As a result, there is a deficiency in the legal framework in terms of an effective legal solution for recurring disputes and security of European energy supply, which explains the Union's measures and initiatives instigated in the energy sphere including the extraterritorial impact of the of the Union's internal market rules. The section illustrated that in the Union's efforts to regulate its energy relations with Russia through legally binding frameworks, the Union has been behaving in a manner which is quintessentially normative. The Union's normativity has been further tested by Russia's reluctance to sign-up to legally binding instruments founded on Union values for which we see the Union resorting to measures that are not strictly normative but geopolitical and strategic in nature.

In the absence of a comprehensive international legal framework regulating energy relations, the chapter considered the Union's **normative means of power** in assessing whether the EU's internal market has been externalised with the Union thereby exporting its liberalisation model and its rule-based approach beyond its borders. The case study showed that at the core of the EU's rule-based market approach, is the belief that a fully liberalised and competitive EU market can facilitate energy security by way of enhancing diversification of suppliers; boosting infrastructure investment; which will diminish the impact of any supply disruptions and in turn build energy solidarity at a Community level. In this respect the section revealed the Union's efforts to fulfil its objectives in the energy sector by way of a market-based approach heavily embedded in regulation which suggests that the Union has evolved into a global normative energy actor.

Against this backdrop, the chapter illustrated how in the absence of a comprehensive international legal framework, the EU promotes the export of its own values and norms on the basis of a rule-based market approach which is evident in the Union's sectoral application of the *acquis* beyond its borders in its endeavours to Europeanise its energy corridors and ensure energy security. In undertaking this analysis, the section showed an external dimension to the European internal energy market whereby the Union's market mechanisms and liberal market-based energy regulations are being imposed on third countries and its strategic energy partner which strengthens the view that the Union is a normative power in its external relations with Russia. Whilst the EU's unbundling regulation is limited to its own territory and does not specifically address Gazprom, Gazprom's presence on the European energy market means that it falls within the scope of its application. Although the application of EU energy regulation concerning ownership and management of Russian pipelines on EU soil would have best been addressed within the realm of a bilateral or multilateral legal agreement, the fact that Russia has been reluctant to institutionalise EU-Russia relations within a legally binding frameworks or the multilateral global architecture, may provide some rationale for the Union's manoeuvres in pursuing its agenda in a unilateral manner.

The ever-prevailing delays in negotiating a new partnership agreement and Russia's withdrawal from the ECT, give credence to the Union's unilateral manoeuvres and to some degree allude to a somewhat strategic Union which has pursued its energy security agenda through its internal regulation which has been externalised, in the absence of international legal instruments that would otherwise regulate energy relations between these strategic partners. In so doing, the case study has illustrated how the Union has addressed the void in the legal architecture regulating EU-Russia energy relations through the use of internal energy regulation (i.e. ownership unbundling; third country clause; third party access; reciprocity) and competition law to address simmering issues that are perceived as a threat to the Union's energy security. The EU can therefore be seen to be bolstering its normative

agenda through normative means of influence such as the use of its internal market regulation that has obtained extra-territorial effect¹⁰¹⁴ and that through competition law, the EU can be said to be behaving like a global normative energy actor in its external relations with Russia. Notwithstanding, the analysis has suggested that despite the Union using normative means of power to forward its agenda with Russia, the manner within which it is pursued is fundamentally strategic given it is unilaterally imposed against its reluctant partner. In this respect, the analysis has aimed to show that the EU uses normative means of influence in a non-normative manner (given that they are unilaterally imposed) for strategic purposes (i.e. ensuring energy security without voluntary acceptance of the *acquis*). The Union's external dimension and cross-border reach of its energy regulation therefore arguably constitutes a form of energy *acquis* export which has suggested a tactical manoeuvre on the part of the Union to unilaterally impose its energy liberalisation model on Russia, a non-participant of the ENP and Eastern Partnership. This establishes the fundamental distinction with the Union's engagement with its neighbourhood where the *acquis* is voluntarily accepted rather than strategically imposed through the extraterritorial reach of its internal market regulation.

In determining whether the Union achieves **normative outcomes**, as the last variable of Manners' normative criteria, the chapter argued that where the Union gives preference to possession goals over milieu goals, the outcomes cannot be considered normative if they are born from strategic objectives and intent. Notwithstanding, the EU has arguably achieved an effective rule-bound environment through the externalisation of its internal market rules and extra-territorial reach of its energy regulation thereby achieving normative outcomes albeit in a strategic manner and in pursuit of strategic goals such as energy security. Assessing the Union's normative mechanisms, the case study found that of the four mechanisms (the most prominent of which in the neighbourhood is invoking norms and power of example); the EU invokes norms through the activation of norms and commitments which the EU seeks to achieve by way of legally binding bilateral and multilateral frameworks regulating EU-Russia relations, with the power of example less effective given Russia's reluctance to conform to an EU model. The Union's model power therefore appears to be ineffective vis-à-vis Russia given Russia does not gravitate towards an ideal based on EU values and norms. Russia's refusal to partake in the ENP and Eastern Partnership as part of the Union's regional integration (as a form of 'model power') gives credence to this assertion.

Finally, having applied Manners' criteria and having considered the EU's normative mechanisms, the chapter assessed the security nexus to the Unions energy policy and its role in the energy sphere to establish additional potential facets to the Union's nature. Given

¹⁰¹⁴ i.e. extraterritorial impact in its application to non-EU entities operating within the internal energy market

the growing security approach the Union is undertaking in its external relations, the chapter considered whether the Union is becoming a global energy security actor as an extension of its global normative power and agenda. For this purpose the analysis examined the Commission's Energy Union initiative that was launched in February 2015 with a mandate to bolster energy security and solidarity as one of the cornerstones of the said union; and the Commission's 'Energy Security Package' with legislative proposals released in February 2016 that aim at increasing security of gas supply and transparency of IGAs. This section showed how developments in the Union's energy policy which have facilitated the Union undertaking a more active role in EU energy security have in turn bolstered the Union's role as a normative energy power in its external relations with Russia.

The Union's energy actorness gained traction with milestones such as the Energy Union initiative and the Energy Security Package which set the Union's energy security as a priority on the EU's energy agenda and in turn bolstered the Union's effectiveness as a normative energy actor by way of greater vetting and oversight powers in relation to its intergovernmental agreements and ensuring supply contracts are consistent with EU law. By illustrating the significant role of energy security within the CFSP, the section revealed a strategic dimension to the Union's normative power where its security interests are concerned. In so doing, the section showed the security dimension of the Union's internal market regulation which has significantly obtained extraterritorial clout given its application to Russia and implications for Gazprom. The section illustrated that the Union's externalisation of its internal market policies with the cross-border reach of its regulations to achieve CFSP objectives, and its increased competence facilitated by the Energy Union initiative and the Energy Security Package, all indicate a Union which is increasingly becoming more assertive and albeit normative, displaying traits of a global security actor. In this respect, the section revealed an additional dimension to the Union's normative agenda which is strategic given the security nexus to its energy supply and dependence on Russian resources. The Union can therefore be seen to be increasingly behaving like a global energy security actor given its strategic quest for security of energy supply in its external relations with Russia, which extends beyond the usual normative agenda it pursues in its relations with other third countries in its neighbourhood.

In a nutshell, the aim of the case study was to consider to what extent the normative power theory explains the Union's conduct in its external energy relations with Russia benchmarked against the Union's usual value and rule-based normative approach to its relations with its neighbourhood. The case study found that the normative power framework's explanatory value varies depending on whether the analysis is focused on the Union's external relations with its Eastern neighbourhood or with its strategic energy partner, Russia. By using the preceding analysis on the Union's external energy relations with its neighbourhood, in particular the Eastern neighbourhood, as a comparator to

determine the level of deviation in the Union's conduct in its relations with Russia, the case study provided insight on the extent of the Union's normativity in its external energy relations with Russia.

Acknowledging that the notion of the EU as a normative power does not entail an entity that pursues values alone with a complete disregard to its strategic interests, the case study found that the strong security nexus in the Union's external energy relations with Russia means that an additional dimension to the Union's actorhood exists which inevitably compels the Union to behave in a manner that is not purely normative but also strategic at heart. In this respect, in applying the normative power framework to analyse the Union's conduct in its neighbourhood and its external energy relations with Russia, the case study unveiled the possibility that the Union may not only be global normative energy power but also a strategic energy security actor. This revelation is predominantly based on the Union's quest for European security of energy supply which stems from the Union's normative and geopolitical approach in its external energy relations with Russia and its immediate periphery. In undertaking this analysis, the research endeavoured to set the platform for a more detailed discussion whereby the notion of the EU as a potential energy security actor can be further developed as ancillary to the focus of this thesis, namely of the EU as a global normative energy power in its external energy relations with its neighbourhood. Whilst the conceptualisation of the Union as a potential energy security actor falls beyond the normative power framework and scope of the research question pertaining to the Union's role as a normative power, it is worth exploring as an extension of the Union's role as a global energy actor in its external energy relations with Russia and its immediate periphery. In many ways, the conceptualisation of the EU as a potential energy security actor suggests that Manners' framework needs to be updated in light of recent developments in the Union's external energy relations with Russia and its quest for energy security where a normative agenda will not suffice for pursuing strategic considerations and security objectives. The findings of the thesis which arguably suggest that the Union may have evolved into a normative energy security actor in its external energy relations with Russia, suggest a further nuance and dimension to the normative power debate.

6.6. Conclusion

By examining the Union's conduct in its external energy relations with Russia and considering additional facets to the Union's role as a global actor, the analysis has endeavoured to reveal a significant and important addition to the debate about the true nature and place of the EU in the world. The research has proposed that as a hybrid of a normative power, the Union can arguably be said to be increasingly morphing into a security actor given its quest for energy security in its external energy relations with Russia and its neighbourhood. In this respect, the EU can be said to be behaving like a **global normative**

energy security actor given the security dimension to its relations with Russia that has supplemented its usual normative agenda in its external relations with its neighbourhood.

This is evident in the European Commission's assertive stance in its external energy policy which is fundamentally based on the principles of the Union's internal energy policy and the projection of internal energy market rules and principles to the outside world. At its core, is the belief that the objectives of the Union's external energy policy (as examined in Chapter 3) can only be achieved when the principles underlying the Union's internal energy policy¹⁰¹⁵ are fully respected in the Union's external relations with third countries (discussed in Chapter 4).¹⁰¹⁶ It goes without saying that the external dimension of the internal market (illustrated in Chapter 3), the export of the energy *acquis* to the Union's neighbourhood (assessed in Chapter 4), as well as unilateral initiatives such as the TEP's famously dubbed 'Gazprom clause' and the EU's Competition rules (scrutinised in Chapter 5), all form part of the Union's energy security governance mode and in turn the Union's normative power (explored in Chapter 2), where 'power' is understood to be the use of the law as an instrument in the Union's external engagement as an international actor.

Here the Union's 'normativity' is derived from its ability to use the law in its external action as a means of projecting its presence on the global stage. It follows that the Union's normative power is therefore derived from the impact and global reach of EU law beyond its borders which is most pronounced in its Eastern Neighbourhood and Russia. The EU's 'actorness' is therefore bolstered by the 'global reach' of EU law which is facilitated by the interchange between law and action and the Union's use of the law to promote its objectives in its external relations with its periphery. In the energy sector, all these manoeuvres illustrate an impetus on the part of the Union to expand its legal boundary and extend its governance beyond its borders in the interest of securing its energy supply, which imply that with respect to Russia, the EU's approach differs to that of its neighbourhood to include additional facets and non-normative elements that are strategic and geopolitical in nature.

Deviating from Manners' normative power claim and the perception that the Union's external action is predominantly driven by ethical values, the thesis shows that where the Union's strategic interests such as energy security are concerned, other geopolitical factors come into play. However, despite this deviation from Manners' normative power framework, the thesis posits that where the Union's external action is vested in the *use of law* as a mechanism to forward its agenda through which it derives its external impact, the Union can still be said to be 'normative' despite its objectives being strategic and not purely value-based. By shifting the focus from the pursuit of ethical values to the use of legal frameworks

¹⁰¹⁵ Underlying principles of the Union's internal energy policy include market-based principles such as diversification of supply; unbundling; free and fair competition; etc

¹⁰¹⁶ Peter Van Elsuwege, 'The EU's Governance of External Energy Relations: The Challenges of a 'Rule-Based Market Approach' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press, 2014) 215-237

as a more nuanced approach to Manners' theory, this thesis illustrates that even where the EU pursues strategic objectives (as opposed to normative objectives) in its external energy relations with Russia, where such objectives are attained through legal instruments and frameworks, the EU can still be said to be engaging as a normative actor despite the *telos* of the objective being geopolitical and strategic in nature. A reassessment of Manners' normative power theory is therefore required vis-à-vis the EU's external energy relations with Russia where the EU is not only normative but also strategic in its manoeuvres given the strong security nexus of the EU's energy supply and its heavy dependence on Russian energy resources.

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