An Upstream Battle: The EU and the Reform of the Energy Charter Treaty

Citation for published version (APA):

Herranz-Surrallés, A. (2016). An Upstream Battle: The EU and the Reform of the Energy Charter Treaty. In E. Barbé, O. Costa, & R. Kissack (Eds.), *EU Policy Responses to a Shifting Multilateral System* (pp. 49-69). Palgrave Macmillan. The European Union in International Affairs https://doi.org/10.1057/978-1-137-54758-3_3

Document status and date:

Published: 01/01/2016

DOI:

[10.1057/978-1-137-54758-3_3](https://doi.org/10.1057/978-1-137-54758-3_3)

Document Version:

Publisher's PDF, also known as Version of record

Document license:

Taverne

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/309078690>

An Upstream Battle: The EU and the Reform of the Energy Charter Treaty

Chapter · January 2016

DOI: 10.1057/978-1-137-54758-3_3

CITATIONS

4

READS

123

1 author:

[Anna Herranz-Surrallés](#)

Maastricht University

44 PUBLICATIONS 574 CITATIONS

SEE PROFILE

Some of the authors of this publication are also working on these related projects:

EU-NormCon (Normative contestation in Europe: Implications for the EU in a changing global order) [View project](#)

Grup de Recerca Consolidada "Observatorio de Política Exterior Europea" [View project](#)

- Walker, W. (2000). Nuclear order and disorder. *International Affairs*, 76(4), 703–724.
- Walsh, J. (2005). Learning from past success: The NPT and the future of non-proliferation. Stockholm: Weapons of Mass Destruction Commission. Available at: live.belfercenter.org/files/wmdcno41.pdf
- Wan, W. (2015). Why the 2015 NPT review conference fell apart. United Nations University, Centre for Policy Research. 25 May 2015. Available at: <http://cpr.unu.edu/why-the-2015-npt-review-conference-fell-apart.html>
- Weiss, L. (2007). U.S.-India nuclear cooperation. *The Nonproliferation Review*, 14(3), 429–457.

In: E. Barbé, O. Costa and R. Kissack (eds.)
*EU Policy Responses to a Shifting Multilateral
 System*, London: Palgrave Macmillan.

An Upstream Battle: The EU and the Reform of the Energy Charter Treaty

Anna Herranz-Surrallés

1 INTRODUCTION

Despite the mounting challenges related to the fast growing global consumption and trade of energy resources, energy remains one of the least institutionalised areas of global governance. The institutional architecture of global energy governance is parcelled up into a number of institutions that have a limited functional scope and little binding powers (see, e.g., Lesage et al. 2010: Ch. 3). In this vein, energy policy has been regarded as suffering from a ‘paradox of sovereignty’, meaning a situation where states have ever less control over policy but remain unwilling to act jointly (McGowan 2009: 21). One of the institutions that have come closer to overcoming this paradox is the Energy Charter Treaty (ECT). Born with the favourable winds of the immediate post-Cold War, this institution was the first to bridge energy consumer and producer-countries with a set of binding rules on trade and investment and transit of energy resources. Still nowadays, the ECT is the most advanced and widespread energy regime of this kind, currently integrating 54 states and almost 30 observers.¹

However, the ECT has not fully escaped the sovereignty predicament. Persistent disagreements over the scope and functions of the institution, particularly during the second half of the 2000s, led the ECT to a standstill

A. Herranz-Surrallés (✉)

Political Science Department, Maastricht University, Maastricht, Netherlands

and to withdrawal of one of its main members, the Russian Federation, in August 2009.² In line with the guiding concern of this volume, the crisis of the ECT exposed broader structural shifts, which have generally placed the West, and particularly the EU, the main sponsor of the ECT, in a complex situation. On the one hand, the shifting geography of world's energy demand and supply over the past decade and a half has given the upper hand back to producer-countries, compared to the relatively advantageous position that consumer-countries enjoyed during the 1980–1990s. On the other, the advent of the financial crisis and ascendancy of new economies have put further strain on Western liberal economic discourse and ideas for tackling global problems. Therefore, in reference to the EU's ambition to promote liberal energy reforms at regional and global levels, some authors argue that 'the EU [has started] to look somewhat isolated on its stated energy foreign policy course and less well equipped to influence energy negotiations in the market liberal direction' (Kuzemko 2014: 65).

This chapter thus examines the evolution of the EU's role in the ECT, enquiring into how it has dealt with a growingly unpropitious context for its ability to exert influence. The chapter finds that the EU has *not* followed its general disposition to *accommodate* other actors' preferences, as its commitment to effective multilateralism (European Council 2003) would lead us to expect. Instead, the EU has tended towards *entrenchment* in the defence of its own rules, opposing a substantial reform of the ECT, a behaviour that arguably contributed to the institution being brought to a critical standstill in 2009. Despite the fact that Russia's withdrawal triggered the so-called 'modernisation process' of the ECT, which could be interpreted as a move towards accommodation, signs of entrenchment on the EU's side have remained. To explain this seemingly puzzling foreign policy choice, the chapter puts forward some propositions to explain the EU's disposition to entrench (or accommodate). More specifically, the chapter emphasises the relevance of the EU's established policy philosophies and of practices ingrained in institutions, as well as the perception of EU regional ascendancy (despite a more challenging global context), as factors that inhibit the EU's disposition to accommodate.

The chapter proceeds as follows. The first section presents the puzzle this chapter seeks to address by placing the evolution of the ECT, and the EU's role in it, in the context of the changing *structures* of global energy governance. The second section presents the theoretical underpinnings, arguing that a constructivist perspective is most useful to understanding the dynamics of accommodation and entrenchment in EU foreign policy.

The fourth and fifth contain the analysis of the EU's role in the ECT before and after the turning point of 2009. The study is based on expert analyses of the ECT process—primary documents from the ECT and the EU, complemented by two confidential interviews of officials of the European Commission and the ECT. The final section discusses practical implications of findings for the EU's role in global energy governance.

2 THE RISE (AND FALL?) OF THE ECT: CHANGING STRUCTURES, BEHAVIOURAL CONTINUITY

Building on the theoretical framework advanced by Costa et al. (this volume), this chapter considers *institutions* to be 'particular amalgams of *ideas* and *material power*' (Cox 1981: 137). As argued by Robert W. Cox, institutions tend to emerge in *hegemonic* orders, where material power and ideas are aligned. However, their effectiveness to channel conflict decreases when this alignment fades (Ibid. 1981). Taking this conceptualisation of international structures, this section argues that the emergence and evolution of the ECT reflect a transition from a *quasi-hegemonic* structure, favourable to Western countries, to a *dysfunctional* one, where none of the key variables that conform to the international structure (material power, ideas and institutions) seems to be aligned. The section also argues that the EU's reaction to these structural changes may seem counterintuitive, namely, the EU became less prone to accommodation precisely when the international structure turned less favourable to its ability to influence the course of the regime.

The global institutional landscape of energy in the immediate post-Cold War was almost limited to two institutions, representing the divide between producer and consumer-countries: the Organisation of Petroleum Exporting Countries (OPEC), created in 1960 as an economic cartel to sustain oil prices at adequate levels for producers, and the International Energy Agency (IEA), created by Western countries after the energy crisis that followed OPEC's 1973 oil embargo. In the Eurasian context, despite the growing energy trade between the Soviet Union and Western Europe since the late 1960s, the level of institutionalisation of energy relations had remained very low. Even within the European Community (EC), energy policy remained a strict national competence, despite the repeated efforts of the European Commission to advance the idea of an Internal Energy Market (McGowan 1989). However, after the dissolution of the Soviet

Union, the lack of common rules regulating energy trade in the Eurasian context started to appear more problematic due to the multiplication of actors involved, particularly the new transit states. In this context, the initiative of the Energy Charter, providing rules for investment, trade and transit between Western Europe and the countries of the former Eastern bloc, was a major shift. The initiative was launched by the Dutch Prime Minister Ruud Lubbers in 1990 with the political backing of the EC (Matlary 1996: 265). The first step towards the realisation of the initiative was the *European Energy Charter*, signed soon thereafter, in December 1991, by the EC, the Interstate Economic Community and 48 states, including Canada, United States and Japan (Doré 1996).

The rapid success of the initiative is evidence of the alignment between material power and ideas that unfolded with the end of the East–West divide. In terms of *material power*, the idea of the ECT took ground at a propitious time for Western consumer-countries and companies. The increase in non-OPEC production after the 1973 oil crisis had led to well-supplied markets and downward prices since the mid-1980s, and Western energy companies were in a leading position in terms of technology and capital. The opening up of a highly resource-endowed region that had remained largely closed to foreign investment for decades was therefore particularly attractive. At the other end of the power shift, a much weakened Russia and the newly independent states (NIS) also welcomed the initiative (Konoplyanik 1996), with the expectation that higher inflow of foreign capital and Western technology could help revive their depressed energy sectors, severely hit by a decade of divestment and plummeting oil prices (e.g., Russia's oil production experienced a drastic decrease during the first 1990s, from 8 mb/d in 1992 to 6 mb/d in 1994).³

On the *ideational* dimension, the ECT represented the success of the Western liberal market philosophy and the idea that energy could be treated as just another commodity. The initiative of an ECT was also imbued with Western functionalist ideas about the relevance of sectorial cooperation as a first step towards a wider market economy and political reforms as well as for generating dynamics of a greater regional integration. Given that the envisaged ECT would be modelled on GATT rules of free trade and non-discrimination, the regime was meant to serve as a tool to internationalise and 'socialise' those countries emerging from a planned economy system into the institutions and rules of market economies (Lubbers 1996: xiv). The momentum for liberal-oriented regional integration also took hold in other corners of the globe, with initiatives such as the US-sponsored

Hemispheric Energy Initiative (HEI) to promote liberal reforms in the energy markets between North and South America.

Subsequent negotiations for turning the 1991 political declaration into a fully-fledged binding treaty were more protracted, mostly because of disagreements within the OECD bloc (Doré 1996: 140). The main point of disagreement was the liberal scope of the treaty: whereas the US defended the strict application of WTO rules and the principle of national treatment for investments (even in the pre-investment phase), EU member states favoured a more flexible and gradual approach that would better accommodate the preferences of Russia and other producer-countries. The treaty that was finally signed in 1994 hewed closer to the flexible option defended by the EU, which still included legally binding investment protection provisions, but only for the post-investment phase, banning practices such as the nationalisation or expropriation of assets without due compensation (Art. 13 ECT). More specifically, the ECT provided for a dispute settlement mechanism (Art. 26 ECT) that included the possibility of investor-state arbitration.

However, the outcome of the negotiation and ensuing ratification process indicated that, despite the alignment between material power and ideas that made possible a significant institutional change (the adoption of the ECT), producer-countries like Russia were not fully convinced of the appropriateness of the new rules and were still able to resist an institutional setup that would allow a too-strong Western influence over their energy sectors. Indeed, the treaty entered into force in 1998 without the ratification of two of the key producing countries involved in the ECT process (Russia and Norway). This situation, Nevertheless, by virtue of Article 45 of the ECT, Russia accepted to provisionally apply the treaty and hence remain bound by all its obligations. This period can therefore be depicted as a '*quasi*' *hegemonic structure*; i.e., the alignment between power and ideas was strong enough to bring about new international rules, but some actors still showed willingness and enough leverage to limit the scope of the institutional change.

Conversely, the turn of the millennium marked a shift towards a period of gradual opening of a gap between the institutional setting in place and the evolving material and ideational conditions. The first decade of the 2000s was characterised by the tightening of world energy markets, among other reasons due to a growing energy demand by new emerging economies, leading to an unprecedented increase in oil prices (from the 15 USD/barrel in 1998 to the record price spike of 147 USD/barrel

in mid-2008). The stronger position of producer countries and growing strategic character of the energy sector halted—and in many cases reversed—the privatisation wave that had spread through a number of producer-countries during the 1990s (Goldthau and Witte 2009). This turnaround was also underpinned by a return to the idea of sovereignty over energy resources. For example, the US-driven HEI was overtaken by Venezuela's Petro-America, an initiative that directly challenged the market liberal framing of energy to advance instead ideas of sovereignty over resources, regional solidarity, socio-economic development and geopolitical leverage of South America (Ministros de Energía de la Comunidad Sudamericana de Naciones, 2005). Similarly, in Russia President Putin embarked on a process of regaining control of the energy sector after a decade of chaotic privatisations, and already in 2001 the state had raised its share in Gazprom up to 51 percent (Fernández 2008: 352ff). The Russian government also tried to regain control of the export pipelines passing through Ukraine and Belarus in a context of growing transit risks due to the underinvestment in infrastructure maintenance and the deterioration of political relations (Westphal 2009).

In the opposite direction, the EU finally started speeding up the process of building an internal energy market, particularly with the 2003 directives on the liberalisation of the gas and electricity sectors. This ideational clash between market and state-controlled energy paradigms, and the shifting power balance from consumer to producer-countries, started to leave a mark on the ECT. Demands for reform of the institution, particularly with the negotiation of the Transit Protocol that began in 2000, were unfruitful (Belyi 2012; Yafmava 2011; Herranz-Surrallés 2012). This period could therefore be depicted as *institutional lag*, in the sense that the changes in the material and ideational spheres were not matched by institutional reform. However, this situation soon evolved into a *dysfunctional structure* when, in August 2009, Russia announced its intention to stop the provisional application of the Treaty. Moreover, the Russian government proposed the creation of an alternative framework to the ECT, the 'Convention for International Energy Security'.

In response to these developments, the ECT launched a 'modernisation process' that eventually finalised with the adoption of the political declaration of the *International Energy Charter* (IEC) in May 2015, aimed at boosting the global character of the ECT. However, the results of this process are so far mixed, given that Russia and other Central Asian producers have not (yet) adhered to the IEC and, for the first time, a full

contracting party (Italy) announced its withdrawal from the ECT. The structure can therefore be interpreted as dysfunctional in the sense that none of the basic components of the international structure (ideas, material power and institutions) are significantly aligned: the dominant parties appear entrenched in conflicting policy paradigms; the new emerging power structure is unsettled; and the institutional setting consists of a regime that remains contested and of proposals for alternative institutions that have not been realised thus far (Table 4).

Table 4 Evolution of international structures in energy governance

Capabilities	Ideas	Institutions	Resulting structure
1990s Low energy prices and reinforced position of consumer-countries	Generalised spread of neoliberal ideas, privatisation wave in the energy sector	<i>Emergence of ECT</i> (though some key actors postpone the ratification)	<i>Quasi-hegemonic structure</i> (Power and ideas aligned and institutions almost reflecting this new balance)
2000s Growing energy prices and reinforced position of producer-countries	Enduring thrust of <i>market liberal ideas</i> in the West, but ascendancy of <i>state-control paradigm</i> and sovereignty of energy resources in other regions	<i>Crisis of ECT</i> with protracted negotiations for Transit Protocol (2000–2009) and eventual withdrawal of Russia (2009). Russia proposes an alternative framework	<i>Institutional lag</i> (Power is challenged and ideas contested, but institutions do not reflect the changes)
2010s Until 2014, high energy prices continue putting pressure on consumer-countries (though not in US), but lower energy demand due to economic crisis and fall in revenues with 2014 oil price collapse also negatively affect producer-countries	Further <i>strain on liberal ideas</i> due to economic and financial crisis	Attempt to reform the ECT. Launch of the modernisation process (2010) with the aim to bring Russia back on board	<i>Dysfunctional structure</i> (No dominant power or ideational patterns, and institutions in reform process)

Source: Author's elaboration

This brief overview of the evolution of the international structure in the Eurasian energy governance leads to the question, 'How did the EU, the initiator and main supporter of the ECT, handle this adverse structural shift?' As argued by some, '[T]he ECT violated the first rule of effective institution building: it alienated the most important player' (Van de Graaf 2013: 58). Therefore, contrary to the creation stage of the ECT, when the EU even challenged the US in order to accommodate Russia's preferences and enable the creation of the new institution, in the late 2000s the EU seems to have failed to accommodate to prevent the institution going down to a point of near rupture. How are we to understand the choice of entrenchment over accommodation in world politics, and particularly in the EU?

3 DEALING WITH POWER SHIFTS: EXPLAINING ACCOMMODATION/ENTRENCHMENT IN INTERNATIONAL POLITICS

Mainstream theories of international relations appear to be of little guidance to answer the above-mentioned question of why actors sometimes choose to respond to *structural power shifts* with accommodation, while at other times they respond with entrenchment. From a (neo)realist perspective, the expectation would be that incumbent powers will react to emerging ones with entrenchment, as their aim is to prevent any loss in relative power vis-à-vis actors challenging the existing order. Conversely, (neo)liberal theorising would predict the contrary: namely, a proclivity to accommodate, given that for states to achieve their objectives through cooperation they must 'adjust their behaviour to the actual or anticipated preferences of others' (Keohane 1984: 51). A constructivist perspective is thus more helpful for the purposes of this chapter, given that behaviour is not seen as predetermined by structural factors. Paraphrasing Blyth (2003), 'structures do not come with an instruction sheet', meaning that it is for actors on the ground to interpret them and determine adequate policy choices (Bell 2012: 665). To understand actor disposition to accommodate or entrench it is therefore necessary to look at the cognitive and normative lenses through which actors interpret international structures (Carlsnaes 1986: 91; Costa et al. in this volume).

Due to its highly composite character and evolving international identity, determining the EU's disposition to accommodate or entrench in the face of international power shifts is a complex undertaking. On the one

hand, *multilateralism* is a cornerstone of the EU's foreign policy (European Council 2003), even 'a constitutional goal of Europe' (Barroso 2010: 4). Multilateralism, in its ideal traits, is characterised by inclusiveness, equal treatment and deliberative quality (Barbé et al. 2015) and hence presupposes a high disposition to accommodation. On the other, however, the EU's international 'actorness' is often referred to in terms of *normative power* (Manners 2002) as well as *market power* (Damro 2012). These concepts denote the idea that the EU's external action often takes the form of 'external governance' (Lavenex 2004) or the extension of the Union's norms and regulations beyond its borders. The behavioural consequences of the two foreign policy identities (EU as promoter of multilateralism and EU as normative power) may often coincide. After all, the EU is itself 'the most extensive example of profound multilateral cooperation one could imagine' (Patten 2000: 4); and therefore, its norm entrepreneurship is based on the idea that its own multilateral solutions can provide a model for international institutions. However, these two different ideational sources of EU foreign policy may also often conflict, particularly when international structures are adverse (Barbé et al. 2015). This is because, by contrast to the disposition associated with a multilateralist identity, the disposition of a normative (or market) power will be that of entrenchment, namely to disregard or even defy power shifts in order to continue defending the externalisation of EU norms and rules.

As explained by Costa et al. (this volume), accommodation and entrenchment may each take different forms depending on the kind of challenge new actors pose for existing institutions. Yet we still need to define the conditions under which one disposition or the other will prevail. As a contribution to this discussion, this chapter focuses on two factors. The first has to do with the *normative* cohesion within the EU. More specifically, it has been argued that the EU is more likely to accommodate to international norms in areas where it does not have well-articulated preferences and preconceived views (Costa 2013: 1217). In contrast, 'if international negotiations start once the EU has a clear position on the issue at hand, the fragmented character of the EU as a political system combines with less malleable stances and makes the EU less prone to take an attitude in tune with the multilateral institution' (ibid.).

The second factor is a *cognitive* one and has to do with how actors interpret the nature of the shift and chances of realizing their own objectives. In other words, disposition to accommodate or entrench may vary depending on whether actors deem that the existing institutions will eventually

survive and fulfil the desired functions in the absence of reform or not. In this regard, an important element to take into account is that structures are not always easy to interpret as they are not homogeneous across issue areas. Perhaps more importantly, the judgement of an actor may also depend on whether it gives precedence to the global or to the regional structures. For example, a situation of global-decline but regional ascendancy may complicate the interpretation of structural conditions. Formulated as a proposition, if the EU's norms and rules appear to have a strong sway at a regional level (or among other relevant groups of actors interested in following the EU model), EU policy-makers will be more inclined to entrenchment, in the hope that its position will eventually prevail.

A careful analysis of how the two factors interplay in the choice for accommodation or entrenchment may also shed some light on whether the EU's foreign policy is guided by a long-term strategy instead of by more short-term tactical moves (Costa et al. in this volume). The factor of normative cohesion seems to indicate that the EU's choice for entrenchment may often be a reactive move, emerging from established ideational or institutional path dependencies rather than from a well-thought assessment of the consequences of this option for multilateral institutions. However, normative entrenchment may also be purposefully embraced as part of its 'liberal grand strategy' (Smith 2011). After all, as Manners (2008: 37) phrased it, 'the diffusion of ideas in a normatively sustainable way works like water on stone, not like napalm in the morning', so perseverance in the defence of certain norms and rules may sometimes be a conscious option to realise the EU's long-term vision. Therefore, the analysis of the cognitive dimension (how actors interpret and make sense of their choices) may help us to better understand whether the EU's chosen foreign policy responses are by-default reactive moves or respond to a particular assessment of the chances of success of entrenchment and/or the consequences of accommodation.

4 ON A COLLISION COURSE: ACTORS' ENTRENCHMENT AND NEAR RUPTURE OF THE ECT

The entry into force of the ECT in 1998 coincided with frequent disputes between Russia and the former Soviet republics on matters of transit (Westphal 2009). The lack of transparency in the prices of gas and transit fees as well as the poor state of the pipeline systems started to generate tensions, especially with the deterioration of political relations between

Russia and some of the NIS. This situation led to a consensus among the ECT constituency that transit rules should be enhanced via an additional protocol. Negotiations for the Transit Protocol (TP) began in 2000, coinciding with Putin's rise to power in Russia. Under his presidency, the Russian government made its ratification of the ECT, pending since 1994, conditional to a successful outcome of the TP negotiations. In fact, for the Russian government the TP was an occasion to re-negotiate important aspects of the ECT, given that the treaty had been negotiated in a context of Russian weakness (Belyi 2012: 265). However, the EU opposed this attempt and rather tried to press for provisions to enhance the market liberal orientation of the ECT.

The initial reluctance by the EU to revise the treaty can be regarded as an example of entrenchment by default. The pressure to reform the ECT emerged in a moment when the EU was adopting its second directives on the liberalisation of the gas and electricity sectors (the so-called Second Energy Package, approved in 2003), which would soon be revised as from 2007, leading the adoption of the Third Energy Package, in 2009. The adoption of these directives was the result of a decades-long process of intra-EU negotiations and a tug-of-war between the Commission and some pro-liberalisation member states on the one hand and another powerful group of member states in favour of maintaining higher state control over the energy sector (McGowan 1989; Matlary 1996: 271ff; Eikeland 2011). Stirred by the European Commission, the second and third energy packages were meant to accelerate the construction of an internal energy market, through ensuring third party access (TPA) to energy networks and the break-up of monopolies, preferably through mandatory ownership unbundling (MOU), together with the strengthening of national energy regulators' independence and their harmonisation and coordination at EU level (Buchan 2009: 20ff).

In line with these internal developments, the EU also started to develop a more ambitious external dimension of its incipient internal energy market. From a market liberal perspective, the EU's growing dependency on energy imports would not necessarily become a source of vulnerability, as long as producer, transit and consumer-countries would share a transparent and efficient market regulatory regime. Therefore, as early as 2003 the EU set the aim of creating a common energy regulatory space with the candidate and neighbouring countries (European Commission 2003). The objective of convergence with the EU's internal energy market rules was inserted in most ENP Action Plans, and new multilateral initiatives

were launched, most notably, the Energy Community (EnCT), in 2005, aimed at the integration of future candidate countries from South East European Countries into the EU's energy regulatory space ahead of their accession (Prange-Gstölzl 2009). This period of accelerated norm generation in the EU and norm entrepreneurship in the immediate neighbourhood eventually spilled over the ECT as well. Even when Russia refused to take part in those initiatives, the European Commission used bilateral dialogues as well as the ECT framework to persuade the Russian government to converge with EU energy market rules, including highly sensitive issues such as the requirement of third party access to the Russian pipeline system by Caspian producers (European Commission 2006: 4).

The EU's own process of liberalisation also affected its position in the TP negotiations in important ways. On the one hand, the EU asked for the suppression from the draft TP of the *Right of First Refusal* (ROFR) clause, namely the right of exporters to prolong an existing transit contract before the pipeline capacity is offered to other competitors. An ROFR clause was an important condition for Russia, given that many of its transit contracts were expiring before its supply contracts. However, the EU insisted that due to the obligation of TPA introduced with the 2003 Gas Directive, such a clause was now incompatible with the principle of non-discrimination in the internal energy market (Yafimava 2011: 304). On the other hand, the EU also asked for the introduction of a *Regional Economic Integration Organisation* (REIO) clause into the TP. The reasoning behind this request was that the 2003 Gas Directive had de facto abolished the categories of transit and distribution within the EU. Therefore, the TP should only apply to the EU as a whole and to third states, and not to relations between EU member states. Russia plainly opposed such a REIO clause and, in reaction, even suspended the negotiations for almost a year (Yafimava 2011: 286). According to Russia, the recognition of the EU as a REIO in the TP, and other aspects of the ECT, was considered unfair, since it would give instruments to the EU to hinder Russian companies' access to the EU market (Belyi 2009), and it could affect arbitration rules in the resolution of disputes. More specifically, the EU claimed that for disputes involving member states the competent authority should be the European Court of Justice and not an international court, as Russia required (Buchan 2009: 97).

The EU's insistence on its special rights as an REIO is an indication of a shift towards a more strategic entrenchment. In contrast to the initial phase of the ECT, when the new international rules were fully in

line with the incipient energy liberalisation process within the EU, by the mid-2000s a gap had grown between the minimum standards of the ECT and the much deeper liberalisation rules introduced by the Second and Third Energy Directives (Talus 2013: 243ff). The persistence of two different regulatory frameworks (the ECT and EU energy *acquis communautaire*) without a clear hierarchy could negatively affect the completion of the EU's internal energy market. For example, the Commission objected to the possibility that EU companies from member states could sue other member states for breaches of ECT law related to compliance with EU law. In other words 'the ECT may be seen as a thorn in the side of the European Commission's legislative initiative and future objectives' (Hadfield and Amkhan-Bayno 2012: 9).

Admittedly, the Commission's efforts in ensuring the compatibility between internal and external developments have not been supported by all EU member states in equal measure. Negotiations for the Third Energy Package between 2007 and 2009 were particularly difficult as the Commission sought to steer the liberalisation process amidst the resistance of a powerful coalition of states led by France and Germany (Buchan 2009; Eikeland 2011). The Commission's proposals to include a stringent third country clause (also dubbed the 'Gazprom clause'), to make it more difficult for foreign, vertically integrated companies such as Gazprom to strengthen their position in the transit and distribution business in the EU, were eventually much watered down by the member states (Grätz 2011: 77). As referred by Youngs (2009: 84), representatives of several member states also expressed sympathy for Russian objections towards the ECT, which considered it 'too naively market-based'. In sum, therefore, understanding the role of the European Commission in its quest for defending the completion of the internal energy market is crucial for understanding the ever more strategic entrenchment path of the EU in the ECT process.

5 RUPTURE OR REFORM: THE ECT MODERNISATION PROCESS AS ACCOMMODATION?

In this context of the growing gap between the EU and Russia's expectations over the ECT, in August 2009 the Russian government decided to formally terminate its provisional application of the ECT. Yet the last straw for Russia was still to come, when in November 2009 the United Nations Commission on International Trade Law (UNCITRAL) arbitral tribunal

announced its jurisdiction to hear the Yukos case, a backlash to Putin's government and its position that the ECT dispute settlement provisions were not applicable to Russia.⁴ In an attempt to delegitimise the ECT and set the agenda, the Russian government proposed the creation of a similar multilateral regime to the ECT in terms of subject matters and pretension of universality, but clearly less market-centric. It envisaged, for instance, a more protectionist investments regime and favoured long-term contracts as the centrepiece of market stability (Belyi et al. 2011; Selianova 2012). In response to Russia's open challenge to the ECT, the EU backed the idea of opening a 'modernisation process' and the adoption of a roadmap for reform in November 2010 (Belyi et al. 2011; Westphal 2011). In 2011, the EU also decided to cancel the negotiations of the TP and open a consultation process among all participants to re-start the negotiation on a new basis. However, the extent to which this could mean that the EU was adopting a more accommodative stance remains unclear.

On the one hand, the modernisation process could be seen as an attempt at accommodation, both in terms of the power balance and the ideational content of the ECT. As argued by the ECT Secretary General, the modernisation process was seeking to 'increase the level of political ownership of the constituency over the Charter Process' and to make it 'more open and attractive particularly for developing countries and rising energy powers' (Rusnák 2013). Following the 'dining' analogy mentioned in the introduction (Costa et al., this volume), besides 'making space at the table' (i.e., changes in membership and procedures to include new relevant actors), the modernisation process also envisaged the need for changing the 'menu' (the substance of the norms), 'with the intent of more equally balancing out the interests of energy consuming and producing nations', and thus 'strengthen its legitimacy' (Rusnák 2013). Since 2009, the ECT also reinforced its outreach activity in order to seek endorsement by the countries of the Middle East and North Africa and more distant ones such as India or China, a strategy that garnered the ratification of the ECT by a new member (Afghanistan) and new signatories (e.g., Morocco and Montenegro). As expressed by its Secretary General, the ECT constituency would also try to bring Russia back on board and to position the institution as a 'neutral platform' to deal with transit disputes and to facilitate EU–Russia dialogue (Rusnák 2014).

On the other hand, however, parallel to the reform process of the ECT and the seemingly more accommodative stance on the EU side, the continuity in the previous entrenchment path is also apparent. Most

notably, since 2009 the EU accelerated its strategy of opening the EnCT to a broader circle of states beyond the candidate countries. Moldova and Ukraine entered as new members in 2010 and 2011, respectively, and in 2011 the EU proposed to create a fully fledged Euro-Mediterranean Energy Community, following the same idea of creating a single regulatory energy space on the basis of the EU acquis. This could be considered an example of a more strategic entrenchment in that the expansion of the EnCT to ever more members of the ECT would inevitably contribute to a marginalisation of the latter. This more self-assured attitude on the EU side despite the tougher global context may therefore be explained by the EU's growing leadership on a regional level. Moreover, the combined effect of several factors—greater EU resilience as a result of the new measures implemented after the 2009 supply crisis, the global gas glut motivated by the US shale gas revolution and the downward trend in gas demand due to the economic crisis—gave the EU further signals of strength, despite the fact that prices remained very high until late 2014. Internally, the growing liquidity in the gas trading hubs increased the optimism with regards to the effects of the internal energy market (ECT Secretariat 2013: 4); and externally, the interest of neighbouring countries in adopting the acquis communautaire presaged 'the EU's emergence as the dominant European energy actor' (Hadfield and Amkhan-Bayno 2012: 9).

The EU's position in the negotiations and adoption of the International Energy Charter in 2015 is also an indication of further strategic entrenchment on the side of the European Commission, even defying the position of the Council. The Commission manifested its intention to present a declaration at the IEC Conference on 20–21 May in The Hague, affirming that 'due to the nature of the EU internal legal order', the IEC's provisions on dispute settlement mechanisms would not apply in the relations between the member states or in their relations with the Union (Council of the EU 2015a). This statement triggered an open conflict with the Council, which maintained that the Commission did not have the competence to represent the EU autonomously in a mixed agreement (Ibid.). Given that the Commission eventually presented its statement anyway, the Council submitted a counter-statement openly discrediting the EU executive (Council of the EU 2015b). The negotiations of the IEC, show the determination of the Commission to defend its position that, given the EU status as an REIO, the ECT cannot create legally binding effects upon the member states *inter*

se.⁵ Similarly, the Commission's minor reaction to Italy's surprising announcement in December 2014 that it would withdraw from the ECT has also been interpreted as a sign of support for this move, as it is in line with the Commission's effort to outroot intra-EU bilateral investment agreements (MENA Chambers 2015; Dreyer 2015). However, Italy's move, possibly motivated by political-commercial factors connected to the close relation between the Italian company ENI and the Russian Gazprom, represents a new setback for the ECT, casting a shadow over the extent to which the EU as a whole is supporting this institution as a cornerstone of its external energy policy.

6 CONCLUSION

Although the area of global energy governance has always been characterised by low levels of multilateral cooperation, over the past decade even the most developed international regime on energy trade and investments, the ECT, has become the playground of intense normative struggles (Belyi 2014). In reference to the shifting global power from the Atlantic to the Pacific and Russia's growing assertiveness as an international actor, the Secretary General of the ECT affirmed that 'it would be highly myopic to imagine that all of these developments and game breaking changes in the global energy landscape would not have significant implications for the Energy Charter Process' (Rusnák 2013). While the ECT has gone through a process of reform to adapt to these sea changes, this chapter has argued that the EU's course of action shows more signs of entrenchment into previous positions than a disposition to accommodate the preferences of powerful contestants, in this case, Russia.

In order to explain this foreign policy choice, the chapter attempted to relate the EU's disposition to accommodate or entrench with its different foreign policy identities (as a promoter of multilateralism and as a normative power) and to define some potential conditions (normative and cognitive) explaining the prevalence of one disposition over the other. More specifically, the EU's preference for entrenchment was explained by two dynamics. On the one hand, the findings are in line with the expectation that the likelihood of choosing entrenchment over accommodation increases with the higher degree of intra-EU normative cohesion. Although EU actors remain divided on a number of issues, the EU's reluctance to reform the substance of the ECT can be seen as the result of the Commission's effort to build an internal energy market and of the

pressure this effort has generated for extending the regulatory space to the crucial transit and producer-countries. In the early 2000s, this process of projecting the EU norms on the ECT could be seen as the result of institutional inertia. However, the more the EU energy acquis reinforced as compared to the ECT rules, the more the EU turned towards a more strategic entrenchment in order to shield the EU's on-going liberalisation process from the potentially adverse consequences of the international regime. On the other hand, the chapter also emphasised the role of cognitive factors, in particular decision-makers' interpretation of the signals of structural change at both global and regional levels. More specifically, the analysis indicated that the tendency of the EU (and in particular, of the Commission) towards a more strategic entrenchment in the ECT despite the more unpropitious context for its ability to influence this institution has been propped up by a perception of success in attracting third countries towards its energy regulatory space at a regional level.

More practically, the outcome of the EU's entrenchment path for the evolution of the ECT process is hard to assess. The Russian withdrawal from the provisional application of the ECT effectively opened the debate on the need to reform this institution. However, although the modernisation process and adoption of the IEC reflect some move towards institutional rebalancing, the binding part of the process (the ECT) has remained unchanged. Therefore, the prospects for bringing Russia back into the current multilateral regime, or to convince further producer-countries to join the ECT, appear moot. The direction of Eurasian energy governance thus remains uncertain given the normative clash and relative symmetry of power relations between the key actors. The EU's liberal market paradigm may have on its side better market conditions, particularly with the recent downward trend in energy prices. However, in the background of growingly tense political relations with Russia following the annexation of Crimea, the EU's progressive abandonment of long-term, oil-indexed prices and higher reliance on spot markets may also lead to higher volatility in gas prices and costlier adaptation to peaks of demand, thus questioning the alleged higher efficiency and reliability of the market paradigm. The focus of the Energy Union concept on diversifying supplies away from Russia and the new emphasis on stepping up EU mechanisms of energy diplomacy are together precisely a sign of the insufficient trust that markets alone are able to provide security of supply (Herranz-Surrallés 2015). The future evolution of the current normative and power stand-off is therefore difficult to foresee. In any case, the EU's role in global energy

governance provides yet another example of the growing difficulties the EU may encounter for reconciling its normative-power aspirations with its commitment to effective multilateralism.

NOTES

1. The political agreement giving place to the ECT was the *European Energy Charter* (December 1991), recently updated into the *International Energy Charter* (May 2015), signed by 66 countries plus the EU and Euratom.
2. Russia was one of the signatories of the ECT in 1994 but never ratified it. However, the country accepted applying the ECT provisionally. Russia's 2009 withdrawal was therefore from the *provisional application* of the ECT.
3. Data from the historical data series of the US Energy Information Administration (EIA) (<http://www.eia.gov/beta/international/country.cfm?iso=RUS>).
4. For a detailed account of the Yukos v. the Russian Federation process, including the final historical arbitral award of 50 billion against Russia in June 2014, see Gazzini (2015).
5. Position formally held by the Commission's legal service (Interview, European Commission, September 2015). The urgency of this topic is given by the growing number of cases of intra-EU Investor-State Dispute Settlement proceedings initiated under the ECT (see Dreyer 2015).

REFERENCES

- Barbé, E., Herranz-Surallés, A., & Natorski, M. (2015). Contending metaphors of the European Union as a global actor: Norms and power in the European discourse on multilateralism. *Journal of Language and Politics*, 14(1), 18–40.
- Barroso, J. M. (2010). The European Union and multilateral global governance. *SPEECH/10/322*, Florence, 18 June 2010.
- Bell, S. (2012). The power of ideas: The ideational shaping of the structural power of business. *International Studies Quarterly*, 56, 661–673.
- Belyi, A. V. (2009). EU external energy policies: A paradox of integration. In J. Orbé (Ed.), *Europe's global role. External policies of the European union*. Aldershot: Ashgate.
- Belyi, A. V. (2012). The EU's missed role in international transit governance. *Journal of European Integration*, 34(3), 261–276.
- Belyi, A. (2014). International energy governance: Weaknesses of multilateralism. *International Studies Perspectives*, 15, 313–328.
- Belyi, A., Nappert, S., & Podgoretsky, V. (2011). Modernizing the Energy Charter Process? The Energy Charter Conference Road Map and the Russian
- Draft Convention on Energy Security. *Oil, Gas & Energy Law Intelligence*, 5. Available at: www.ogel.org
- Blyth, M. (2003). Structures do not come with an instruction sheet: Interests, ideas and progress in political science. *Perspectives in Politics*, 1(4), 695–706.
- Buchan, D. (2009). *Energy and climate change: Europe at the crossroads*. Oxford: Oxford University Press/Oxford Institute for Energy Studies.
- Carlsnaes, W. (1986). *Ideology and foreign policy: Problems of comparative conceptualization*. Oxford: Basil Blackwell.
- Costa, O. (2013). A force for and because of multilateralism. When is the EU a multilateralist actor in world society? *Journal of European Public Policy*, 20(8), 1213–1228.
- Council of the European Union. (2015a). *International Energy Charter (The Hague, 20–21 May 2015)—Declaration by the Commission on behalf of the European Union on the applicability of the part of the International Energy Charter devoted to dispute settlement mechanisms*, 8917/15, 13 May 2015.
- Council of the European Union. (2015b). *International Energy Charter (The Hague, 20–21 May 2015)—Declaration by the Commission on behalf of the European Union on the applicability of the part of the International Energy Charter devoted to dispute settlement mechanisms = Approval of the statement by the Council*, 8872/3/15 REV 3, 28 May 2015.
- Cox, R. W. (1981). Social forces, states and world orders: Beyond international relations. *Millennium—Journal of International Studies*, 10(2), 126–155.
- Damro, C. (2012). Market power Europe. *Journal of European Public Policy*, 19(5), 682–699.
- Doré, J. (1996). Negotiating the Energy Charter Treaty. In T. W. Wälde (Ed.), *The Energy Charter Treaty. An East-Way gateway for investment and trade*. London/The Hague/Boston: Kluwer Law International.
- Dreyer, I. (2015). Brussels moves against bilateral investment treaties within EU, undermines Energy Charter, Borderlex, 7 September 2015. Available at: <http://www.energypost.eu/brussels-moves-intra-eu-investor-state-arbitration-puts-pressure-energy-charter/>. Accessed Sept 2015.
- ECT Secretariat. (2013). Contractual issues related to energy trade. Workshop report, Budapest, 20 March 2013.
- Eikeland, P. O. (2011). The third internal energy market package: New power relations among member states, EU institutions and non-state actors? *Journal of Common Market Studies*, 49(2), 243–246.
- European Commission. (2003). *On the development of energy policy for the enlarged European Union, its neighbours and partner countries*, COM(2003) 262 final, Brussels, 26 May 2003.
- European Commission. (2006). *External energy relations—From principles to action*, COM(590) final, 12 October 2006.

- European Council. (2003). *A secure Europe in a better world. European Security Strategy*. Brussels, 12 December 2003.
- Fernández, R. (2008). Gas y Gazprom: Situación interna y estrategia internacional de Rusia. In E. Palazuelos (Ed.), *El petróleo y el gas en la geoestrategia mundial* (pp. 347–379). Madrid: Akal.
- Gazzini, T. (2015). Yukos, Universal Limited (Isle of Man) v The Russian Federation: Provisional Application of the ECT in the Yukos Case. *ICSID Review*, 30(2), 293–302.
- Goldthau, A., & Witte, J. M. (2009). Back to the future or forward to the past? Strengthening markets and rules for effective global energy governance. *International Affairs*, 85(2), 373–390.
- Grätz, J. (2011). Common rules without strategy: EU energy policy and Russia, in V. L. Birchfield and J. S. Duffield (eds.) *Toward a common European Union energy policy*. Basingstoke: Palgrave Macmillan.
- Hadfield, A., & Amkhan-Bayno, A. (2012). From Russia with cold feet: EU-Russia energy relations, and the Energy Charter Treaty. *International Journal of Energy Security and Environmental Research*, 1, 1–16.
- Herranz-Surrallés, A. (2012). La UE y el Tratado de la Carta Energética: la política energética europea en el limbo de la (in)coherencia. In E. Barbé (Ed.), *Cambio mundial y gobernanza global: La interacción entre la Unión Europea y las instituciones internacionales*. Madrid: Tecnos.
- Herranz-Surrallés, A. An emerging EU energy diplomacy? Discursive shifts, enduring practices. *Journal of European Public Policy*, early view. doi:10.1080/13501763.2015.1083044.
- Keohane, R. O. (1984). *After hegemony: Cooperation and discord in the world political economy*. Princeton: Princeton University Press.
- Konoplyanik, A. A. (1996). The Energy Charter Treaty: A Russian perspective. In T. W. Wälde (Ed.), *The Energy Charter Treaty. An East-Way gateway for investment and trade*. London/The Hague/Boston: Kluwer Law International.
- Kuzemko, K. (2014). Ideas, power and change: Explaining EU-Russia energy relations. *Journal of European Public Policy*, 21(1), 58–75.
- Lavenex, S. (2004). EU external governance in 'Wider Europe'. *Journal of European Public Policy*, 11(4), 680–700.
- Lesage, D., Van de Graaf, T., & Westphal, K. (2010). *Global energy governance in a multipolar world*. Aldershot: Ashgate.
- Lubbers, R. (1996). Foreword. In T. W. Wälde (Ed.), *The Energy Charter Treaty. An East-Way gateway for investment and trade*. London/The Hague/Boston: Kluwer Law International.
- Manners, I. (2002). Normative power Europe: A contradiction in terms? *Journal of Common Market Studies*, 40(2), 235–258.
- Manners, I. (2008). The normative power of the European Union in a globalised world. In Z. Laidi (Ed.), *European foreign policy in a globalized world. Normative Power and Social Preferences* (pp. 23–37). London/New York: Routledge.
- Matlary, J. H. (1996). Energy policy: From a national to a European framework? In H. Wallace & W. Wallace (Eds.), *Policy making in the European Union* (pp. 257–277). Oxford: Oxford University Press.
- McGowan, F. (1989). The single energy market and energy policy: conflicting agendas? *Energy Policy*, 17(6), 547–553.
- McGowan, F. (2009). International regimes for energy: Finding the right level for policy. In I. Scrase & G. Mackerron (Eds.), *Energy for the future* (pp. 20–34). New York: Palgrave Macmillan.
- MENA Chambers. (2015). Italy's withdrawal from the Energy Charter Treaty, Note 12, 5 May 2015. Available at: http://www.menachambers.com/expertise/energy-charter-treaty/MCET_ECT_Note-12_05052015.pdf. Accessed Aug 2015.
- Ministros de Energía de la Comunidad Sudamericana de Naciones. (2005). *Declaración de Caracas*, 26 September 2005.
- Patten, C. (2000). *What does Europe's common foreign and security policy mean for Asia*, SPEECH/00/276, Tokyo, 19 July 2000.
- Prange-Gstöhl, H. (2009). Enlarging the EU's internal energy market: Why would third countries accept EU rule export? *Energy Policy*, 37(12), 5296–5303.
- Rusnák, U. (2013). Modernization of the Energy Charter. *Russia in Global Affairs*, December. Available at: <http://eng.globalaffairs.ru/number/Modernization-of-the-Energy-Charter-16294>
- Rusnák, U. (2014). *Reinforcing the EU's external energy policy: Views from the Energy Charter Secretariat*, Brussels, 21 May 2014.
- Selianova, Y. (2012). The Energy Charter and the international energy governance. In Y. Selianova (Ed.), *Regulation of energy in international trade law*. New York: Kluwer Law International.
- Smith, M. E. (2011). A liberal grand strategy in a realist world? Power, purpose and the EU's changing global role. *Journal of European Public Policy*, 18(2), 144–163.
- Talus, K. (2013). *EU energy law and policy: A critical account*. Oxford: Oxford University Press.
- Van de Graaf, T. (2013). *The politics and institutions of global energy governance*. New York: Palgrave.
- Westphal, K. (2009). Russian Gas, Ukrainian Pipelines, and European Supply Security. Lessons of the 2009 Controversies, SWP Research Paper 11, Berlin: Stiftung Wissenschaft und Politik.
- Westphal, K. (2011). *The Energy Charter Treaty revisited*, SWP Comments, 8, Berlin: Stiftung Wissenschaft und Politik.
- Yafimava, K. (2011). *The transit dimension of EU energy security*. Oxford: Oxford University Press/Oxford Institute for Energy Studies.
- Youngs, R. (2009). *Energy security. In Europe's new foreign policy challenge*. London: Routledge.