4

Avoiding Russia's Sphere of Influence: The European Union, Energy Supply and Climate Sustainability

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4.1 Introduction

Largely because of an abundance of natural resources, which make up almost half of its federal budget, the Russian Federation is one of the world's main oil and gas producers.[1] Russia is also one of the world's biggest emitters of carbon dioxide and its main gas producer, State-owned Gazprom, consistently ranks among the largest emitters of industrial greenhouse gases.[2] While the federal Parliament ('Duma') has recently passed climate legislation establishing, inter alia, a national carbon-pricing scheme, the country is reportedly far from being on track to achieve the objectives established under the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.[3] Theoretically, the situation has been convincingly contextualised within a framework whereby Russia uses energy as a weapon to strengthen its 'spheres of influence', along the lines of a political doctrine that is deeply rooted in the Cold War.[4] Prior to war in Ukraine, the EU imported 90% of its gas supply, with Russia providing around 45% of those imports, in varying levels across Member States.[5] Russia also accounted for around 25% of oil imports and 45% of coal imports.[6] Essentially, the EU and its Member States represent the main market for Russia's oil and gas, importing 50% and 70% of Russia's exported oil and gas, respectively.[7] Arguably, while interdependence between States has the potential to minimise conflict, in the case of Russia it has exacerbated the potential for war in Ukraine and the EU energy crisis.[8] Scholars indeed speak of an 'EU–Russia energy war'.[9]

[1] International Energy Agency, Russia, 2024. www.iea.org/countries/russia.
[2] H. Xiao, W. Zhao, Y. Shan, D. Guan, CO_2 emission accounts of Russia's constituent entities 2005–2019. *Scientific Data* 2021, 8: 172; B. Cooper, Rosneft, Gazprom, and Russia's Failure to Adopt Green Policies. Policy Note, Foreign Policy Research Institute, 2021.
[3] Climate Action Tracker, Russian Federation, 2024. https://climateactiontracker.org/countries/russian-federation.
[4] T. Casier, The rise of energy to the top of the EU–Russia agenda: from interdependence to dependence? *Geopolitics* 2011, 16(3): 536.
[5] European Commission to the European Parliament, The European Council, The Council, The European Economic and Social Committee and the Committee of the Regions, REPowerEU: Joint European Action for More Affordable, Secure and Sustainable Energy, 8.3.2022 COM(2022) 108 final, at p. 1.
[6] Ibid. [7] US Energy Information Administration, Russia, 2024. www.eia.gov/international/analysis/country/RUS.
[8] A. Krickovic, When interdependence produces conflict: EU–Russia energy relations as a security dilemma. *Contemporary Security Policy* 2015, 36(1): 3–26, at 3–4; O. Lazard, Russia 's Ukraine invasion and climate change go hand in hand. Commentary, Carnegie Europe. 2022.
[9] S. Vakulenko, Shots fired: is an EU–Russia energy war inevitable? 2022. https://carnegieendowment.org/eurasiainsight/87160.

In a fast spiral of dependence on Russia, the EU and its energy policy have been significantly affected by the ongoing war in Eastern Europe, given that several limits on import of oil and gas from Russia have been established as sanctions in response to the use of force against Ukraine.[10] Furthermore, some pipelines transporting energy from Russia and Ukraine to the EU have de facto become unavailable.[11] Moreover, Gazprom has halted the provision of energy to countries such as Bulgaria, Finland and Poland.[12] In addition, war necessarily undermines the cohesion of the international community and its cooperative capacity to react to the global climate threat required by the very nature of climate as a common good and codified in the UNFCCC, particularly in Articles 3 and 4. At the same time, war has disclosed the possibility of a fundamental rethinking of the EU energy policy within the framework outlined by the Green Deal,[13] including the possibility of accelerating the roll out of clean energy technologies as the preferred option.[14] Indeed, when Russia began to send troops into Ukraine in February 2022, the President of the European Commission, Ursula Von Der Leyen, stated that a transition away from fossil fuel is an adequate response, massively and strategically investing into renewables for EU energy independence.[15]

This contribution examines the situation based on a three-step analysis. The first part of the chapter is dedicated to climate policies in Russia, aiming to understand whether the Russian energy policy is fundamentally aligned or misaligned with the UNFCCC. The second part of the chapter outlines possible ways forward for the EU *vis-à-vis* Russia's influence, particularly in the light of recent developments triggered by war in Ukraine, with specific regard to the way in which the EU envisages implementing the Green Deal and the clean energy transition in the long term. The third part of the chapter assesses the feasibility of the ways forward, by focusing on the implications of war in Ukraine for contracts that the EU, its Member States and companies have in place with Russia, in order to understand whether the EU options are legally plausible.

[10] European Council, EU Sanctions against Russia Explained. 2024. www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained. On the legality of economic sanctions in international law, see generally A. Z. Marossi and M. R. Bassett (eds.), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences* (TMC Asser Press, 2015).

[11] J. F. Adolfsen, F. Kuik, E. M. Lis, T. Schuler, The impact of the war in Ukraine on Euro area energy markets. ECB Economic Bulletin. 2022. www.ecb.europa.eu/pub/economic-bulletin/focus/2022/html/ecb.ebbox202204_01~68ef3c3dc6.en.html.

[12] A. Mihailov, Why Bulgaria and Poland can withstand Russia cutting off their gas supply. 17 April 2022. https://theconversation.com/why-bulgaria-and-poland-can-withstand-russia-cutting-off-their-gas-supply-182068.

[13] European Commission, A European Green Deal. 2019. https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[14] Institute for Energy Economics and Financial Analysis, Accelerating the Transition to a Diverse, Sustainable and Profitable Energy Economy. 2024. https://ieefa.org; I. Bourke, Net zero is the energy answer to Russian aggression. *The New Statesman*, 24 February 2022; Russian invasion of Ukraine encourages energy transition, self-sufficiency. *Oil and Energy Trends* 2022, 47(4): 11.

[15] A. Godson, King or pawn? Where does REPowerEU leave Europe? 2022. https://eurocities.eu/latest/king-or-pawn-where-does-repowereu-leave-europe.

4.2 A Difficult Green Transition

4.2.1 Russia as a Fossil Fuel-Based Economy

Natural gas, oil and coal amount to around 90% of domestic energy supply in Russia, with renewables, mostly based on hydropower, only scoring around 4%.[16] No major economy depends on fossil fuel more than Russia, which is considered unprepared for the global transition from hydrocarbons to green energy.[17] According to the International Energy Agency (IEA), the Russian Federation accounts for a huge portion of global oil output and is thus the world third largest oil producer after the United States and Saudi Arabia. In 2021, Russian crude and condensate output reached 10.5 million barrels per day, that is, 14% of the world total supply. Russia is also responsible for 17% of global gas production, as the second largest producer after the United States. Russia also has an extensive pipeline network for gas export, with transit routes reaching the EU directly or via Belarus and Ukraine. In 2021, Russia exported 40 billion cubic metres (bcm) of liquefied natural gas (LNG), accounting for approximately 8% of global LNG supply and making it the fourth largest LNG exporter globally. In 2021, the government developed a long-term LNG plan to compete with growing export from the Unites States, Australia and Qatar, aiming to achieve 110–190 bcm in annual LNG exports by 2025. Oil and gas production facilities are spread throughout the country, with their bulk located in western and eastern Siberia.[18]

Historically, Russia is the third major carbon emitter in the world, accounting for around 7% of total cumulative global emissions since 1850. It follows the People's Republic of China (PRC), which is responsible for around 11% of global emissions, and the United States, which has reportedly released more than 509 gigatons of carbon dioxide (CO_2) since 1850, comprising some 20% of the global total. Most greenhouse gas emissions are production-based, whereby most of the country emissions, that is, around 80%, come from the energy sector burning fossil fuel. Russia also ranks very high in terms of per-capita emissions, as it emits 11 CO_2 tons per person per year, that is, twice the world average, which places it fifth in the world ranking, behind the United States, Estonia, Australia and Trinidad and Tobago.[19]

Russia is also one of the States most affected by climate change, so much so that it is predicted that global warming will exert the strongest impact on Russia's strategic future for decades to come, more than any other political conjuncture – indeed, warming in Russia is reportedly progressing two and a half times faster than in the rest of the world. As a consequence, permafrost – permanently frozen subsoil which covers nearly two-thirds of Russia's landmass – is quickly thawing. In 2020, regions across the country experienced the hottest temperatures on record, triggering flash floods that destroyed entire villages in Siberia and forest fires that burned through acreage the size of Greece, emitting one-third more CO_2 into the atmosphere than in 2019, while Arctic Sea ice coverage shrank to its second-lowest extent in over 40 years.[20]

[16] Climate Transparency, Climate Transparency Report: Comparing G20 Climate Action towards Net Zero. 2021.
[17] T. Gustafson, *Klimat: Russia in the Age of Climate Change* (Harvard University Press, 2021).
[18] IEA, Russia. 2024. www.iea.org/countries/russia.
[19] S. Evans, Analysis: which countries are historically responsible for climate change? Carbon Brief. 2021, www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change; H. Ritchie and M. Roser, Russia: CO_2 country profile. 2022. https://ourworldindata.org/co2/country/russia.
[20] H. A. Conley, C. Newlyn, Climate change will reshape Russia. Centre for Strategic and International Studies. 2021. www.csis.org/analysis/climate-change-will-reshape-russia; Y. Davydova, Record breaking fires in Siberia. 2021. www.greenpeace.org/international/story/49171/russia-record-breaking-fires-siberia.

Legally, Russia has ratified both the UNFCCC and the Paris Agreement, but, for a long time, public discourse has denied the scientific reality of climate change, with the country deploying only limited efforts to decarbonise and incentivise the green economy.[21] After ratifying the Paris Agreement on 15 October 2019, Russian President Vladimir Putin still expressed doubts on the possibility of a global shift to renewable energy.[22] In November 2020, the country announced an updated emission reduction target of at least 30% below 1990 levels by 2030. In 2021, for the first time, Putin mentioned the mitigation of climate change as a key State priority, which resulted in the adoption of national legislation setting limitations on greenhouse emissions.[23]

4.2.2 Spheres of Influence and Deficient Climate Policies

In October 2021, the Russian government approved a long-term climate strategy, establishing a net zero emission target by 2060, with an 80% reduction below 1990 levels envisioned by 2050. However, it has been noted that there is a lack of detail on how and when targeted measures will be implemented, and their projected impact.[24] The country aims to achieve the objective by doubling the level of negative emissions from land use, land use change and forestry (LULUCF) between 2030 and 2050. In this respect, it is worth noting that Russia's forests account for one-fifth of the world's total. At the same time, the Ministry for the Environment announced the intention of calculating emissions by including negative emissions from unmanaged forests, which nonetheless violates United Nations (UN) guidelines for national inventories and excludes deep cuts in emissions from fossil fuel combustion. This is within a context whereby Russia's LULUCF capacity as a carbon sink has declined from 723 megatons of carbon dioxide equivalent ($CO_{2\text{-}e}$) in 2010 to 535 megatons of $CO_{2\text{-}e}$ in 2019 and is expected to continue declining to 246 megatons of $CO_{2\text{-}e}$ in 2030 under the current climate policy. Moreover, given that in 1990 Russia (as the then-Russian Soviet Federative Socialist Republic) was still part of the Union of Soviet Socialist Republics (USSR) and emitted nearly 2.4 billion tons of CO_2, as the USSR's successor State at international law the country can effectively increase its emissions over the next decades. Russia's 2021 Energy Strategy has thus been criticised for largely focusing on promoting fossil fuel extraction, consumption and export to foreign countries, threatening the future of the Paris Agreement.[25]

In 2021, Russia introduced a federal law, 'On Limiting Greenhouse Gas Emissions', which establishes a national cap-and-trade system.[26] Fundamentally, that law determines greenhouse gas reduction targets, compels businesses emitting large amounts of greenhouse gases to report on emissions and introduces 'carbon units' as tradable property rights. It also

[21] V.-P. Tynkkynen, *The Energy of Russia: Hydrocarbon Culture and Climate Change* (EE, 2019) at p. 92.
[22] N. Sauer, Russia readies to ratify Paris Agreement, warns about renewables 'absolutism'. 10 July 2019. www.euractiv.com/section/energy/news/russia-readies-to-ratify-paris-agreement-warns-about-renewables-absolutism.
[23] Conley and Newlyn, Climate change will reshape Russia. [24] Climate Transparency Report.
[25] Climate Action Tracker, Russia.
[26] Federal Law No. 296-FZ 'On Limiting Greenhouse Gas Emissions', 2 July 2021. Available in English at https://leap.unep.org/countries/ru/national-legislation/federal-law-no-296-fz-limiting-greenhouse-gas-emissions.

establishes the right of natural and legal persons to take part in climate projects aimed at reducing greenhouse gas emissions or improving carbon sinks. The law outlines reporting and monitoring procedures for greenhouse gas targets and tradable units to be spelled out in detail via further regulations, including liability under the Code of Administrative Offences of the Russian Federation for late, inaccurate or omitted reporting. These measures have nonetheless been criticised in many respects, as they do not directly establish quotas or penalties for large greenhouse gas emitters, but only require enterprises to report on emissions starting in 2023. Similarly, it has been noted that Russia's renewable energy sector has no targets in place, except for a very modest renewable electricity generation target of 4.5% – excluding hydropower – by 2024, which it is unlikely to achieve. Therefore, it is considered that if Russia does not set more ambitious targets for emission reductions and provide additional financial input, instead of rapidly declining, its emissions are predicted to either flat-line or increase by 2030.[27] Additionally, in 2020 Russia abolished mandatory energy-efficiency standards for new buildings and replaced them with mandatory automated heating controls and prohibitions on inefficient heating systems. Furthermore, measures in the transport sector remain very limited, with next to no electric vehicles sold in the country in 2020 and no programmes to reduce emissions from heavy-duty vehicles. In the light of these data, Russia's climate action is rated as 'critically' or 'highly' insufficient with respect to the 1.5°C increase threshold envisaged in the Paris Agreement, in terms of policy and action, domestic targets, fair-share targets and climate finance.[28] Russia's current emission trend is indeed predicted to lead to an average temperature increase of 3–4°C.

Developments in the area of investment confirm that the Russian system is not geared towards the implementation of an effective green transition. Foreign investment in Russia is regulated by federal legislation that protects investors in fossil fuel from expropriation on the same footing as investors in renewables.[29] International investment agreements are underpinned by the same logic and lag behind recent proposals to align international investment treaties with climate-friendly policies,[30] in contrast with the approach promoted by the EU.[31] It has thus been suggested that Russia urgently increase its financial contribution to the implementation of the Paris Agreement and stop funding fossil fuel abroad.[32] However, the recent announcement of a gas deal worth around US$117.5 billion, including a 30-year gas contract boosting Russia's gas supply to the PRC by 'a quarter', does not seems to be primarily rooted in the logic of climate sustainability.[33]

Rather than pursuing an effective climate policy, it has been convincingly asserted that Russia uses its energy resources, particularly oil and gas, as a 'weapon' to increase its

[27] Climate Action Tracker, Russia. [28] Ibid.
[29] Russia, Law No. N 160-FZ, adopted 1999, lastly amended 2011, UNCTAD Reporter. https://investmentpolicy.unctad.org/investment-laws/laws/87/russian-federation-foreign-investment-law.
[30] V. Nerets, A. Kazāks, Concerns about investment protection in Russia during its invasion of Ukraine. 18 March 2022. www.sorainen.com/publications/concerns-about-investment-protection-in-russia-during-its-invasion-of-ukraine.
[31] Energy Charter Secretariat, Policy Options for the Modernisation of the ECT, CCDEC 2019 08 STR, 6 October 2019, at p. 15.
[32] Climate Action Tracker, Russia, 2022.
[33] What does Russia's invasion of Ukraine mean for energy and climate change? *Carbon Brief*. 25 February 2022, www.carbonbrief.org/qa-what-does-russias-invasion-of-ukraine-mean-for-energy-and-climate-change.

'spheres of influence'.[34] The doctrine is still largely rooted in Cold War thinking, which purports that only powerful nations have a right to full sovereignty and can maintain it by establishing a degree of control over neighbouring countries.[35] In this context, market opportunities and security challenges merge, as dependence on Russian gas makes Central and Eastern European markets vulnerable to supply cuts and allows Russia to leverage energy as a tool to implement its foreign policy.[36] Thus, for instance, in 2006 Russia shut down the Druzhba pipeline, allegedly for repairs, disrupting oil supply to Lithuania for several years, after Mazeikiu, a Lithuanian oil refinery, had been sold to PKN Orlen, a Polish company.[37] In July 2008, Russia significantly reduced oil supplies to Czechia for several weeks, alleging technical problems, after Czechia signed an agreement for the provision of missile defence systems with the United States.[38] When in 2009 Putin approved the interruption of gas supply to the EU following a dispute with Ukraine over gas transit fees and other payments concerning a pipeline connecting Russia, Ukraine and the EU, the fact that Ukraine abandoned plans to alternatively import gas from Turkmenistan resolved the crisis and the gas flow resumed.[39] Along these lines, the fact that Russia is extending its sovereign claims and military presence in the Arctic have prompted scholars to speak of a 'path dependency' caused by a 'hydrocarbon culture', which would accentuate large-scale and State-led projects supported by authoritarian rules.[40]

4.3 Accelerating the European Green Deal as a Response to Russian Influence?

While the EU has over time sought to improve the diversification of energy supply, for instance, by unbundling energy production and distribution through the Third Energy Package,[41] this has proved insufficient to unwind Russian dependencies,[42] with half of natural gas imports coming from Russia in 2021,[43] as clearly underscored by the recent Ukrainian crisis. Therefore, the crisis represents a critical moment that might trigger a shift in the EU energy supply policy to end the 'EU's tacit support in perpetuating Russia's

[34] M. Jirušek, P. Kuchyňková, The conduct of Gazprom in Central and Eastern Europe: a tool of the Kremlin, or just an adaptable player? *East European Politics and Societies* 2018, 32(4): 818–844, at p. 819; M. Kofman, A. Fink, D. Gorenburg, et al., Russian military strategy: core tenets and operational concepts. CNA research memorandum, 2021, at p. 26; R. Falkner, B. Buzan, *Great Powers, Climate Change, and Global Environmental Responsibilities* (Oxford University Press, 2022), p. 174.

[35] P. Polak, B. Polakova, Changes in the EU's geopolitical position and energy doctrine in light of the Ukraine invasion. *Society* 2022, 59: 254–258, at pp. 254, 256.

[36] I. Dreyer, F. Erixon, R. Winkler, The quest for gas market competition fighting Europe's dependency on Russian gas more effectively. Research Report No. 1/2010, ECIPE Occasional Paper. www.econstor.eu/handle/10419/174707; Krickovic, When interdependence produces conflict, p. 9.

[37] P. Wasilewski, Moscow says no decision yet on Lithuania oil link. Reuters. 12 April 2007. www.reuters.com/article/russia-lithuania-refinery-idUKL1231819920070412.

[38] Y. Fabrichnaya, Russia says Czech oil supply cut 'not political'. Reuters. 15 July 2008. www.reuters.com/article/czech-russia-oil-idUSL1451616820080714.

[39] S. Pirani, J. Stern, K. Yafimava, *The Russo-Ukrainian Gas Dispute of January 2009: A Comprehensive Assessment* (Oxford Institute for Energy Studies, 2009).

[40] Tynkkynen, *The Energy of Russia*, p. 77.

[41] European Commission, Third Energy Package, 2009; Jirušek and Kuchyňková, The conduct of Gazprom in Central and Eastern Europe, p. 819; R. Korteweg, Energy as a tool of foreign policy of authoritarian states, in particular Russia. European Parliament Paper, 2018, p. 31.

[42] Polak and Polakova, Changes in the EU's geopolitical position, p. 255.

[43] IEA, A 10-point plan to reduce the European Union's reliance on Russian natural gas. 2022, p. 1. www.iea.org/reports/a-10-point-plan-to-reduce-the-european-unions-reliance-on-russian-natural-gas.

authoritarian regime',[44] including short- and long-term measures. Leaders in the EU, UK and United States have indeed welcomed the decision of Germany to halt the certification of the Nord Stream 2 pipeline when Russian forces proper moved into those regions of Ukraine occupied by Russian-backed separatists since 2014. Reportedly, besides the possibility of a hydrogen and gas pipeline from Norway and the Netherlands as well as renewed North Sea drilling,[45] the German government is also aiming to accelerate a shift to a 100% renewable electricity system by 2035.[46]

In the short term, the EU is looking favourably to increasing energy import from developing countries such as Libya, Algeria and Azerbaijan, as well as delaying coal plant closures as an immediate response to shortages in gas supply.[47] Furthermore, the EU envisages measures aiming to lower domestic energy prices induced by war in Ukraine, such as setting retail prices for households and micro-enterprises.[48] At the same time, the EU envisages reliance on a larger State Aid toolbox. The idea is that of establishing a Temporary Crisis Framework, which could, for instance, allow liquidity support for all undertakings directly or indirectly affected by the crisis,[49] specifically, energy-intensive consumers, as a form of compensation for the increase in energy costs owing to price shocks triggered by war in Ukraine. Another possibility is expanding the list of sectors eligible to benefit from the Emission Trading System State Aid guidelines, subject to demonstrable improvements in energy efficiency and decarbonisation, but avoiding competition distortions among Member States. Other measures aim to allow EU Member States to levy temporary taxes on windfall profits, offsetting higher energy bills.[50] From the standpoint of supply security, smarter use of energy infrastructure has also been proposed so as to improve EU storage, particularly gas storage, and prevent possible supply disruptions by Russia.[51] In this regard, the EU is also investigating the possibility of anticompetitive practices by Gazprom, whose storage is allegedly at 16%, well below the market average of 44%.[52]

In the long term, the EU estimates that the clean energy transition will have to be drastically accelerated in order to increase the independence of the EU and its Member States from unreliable suppliers and volatile fossil fuel markets. The European Commission considers that the case for a rapid clean energy transition has never been stronger. War in Ukraine is thus seen as a means to implement the Green Deal and accelerate the transition to a green economy, benefiting both households and energy-intensive companies. In more detail, the EU envisages the necessity of reaching independence from Russian gas well before the end of 2030. According to the Commission, it is indispensable to accelerate the diversification of supply, reducing energy demand and improving the roll out of green energy technologies.[53] The general framework is outlined in the Fit-for-55 package, which implements the objectives of the European Green Deal. On the one hand, this package envisages the acceleration of energy-efficiency efforts by Member States, such as increased

[44] Ibid. [45] Russia tensions lead Germany to seek alternative gas supplies. *Oil and Energy Trends* 2022, 47(4): 6.
[46] What does Russia's invasion of Ukraine mean for energy and climate change? Carbon Brief. 25 February 2022. www.carbonbrief.org/qa-what-does-russias-invasion-of-ukraine-mean-for-energy-and-climate-change.
[47] Russian invasion of Ukraine, 11; M. Wijffelaars, E.-J. van Harn, Ukraine war poses a threat to EU industry. 12 April 2022. https://economics.rabobank.com/publications/2022/april/ukraine-war-revives-supply-chain-crisis.
[48] Ibid. at p. 2. [49] Ibid. at p. 3. [50] Ibid. [51] Ibid. at p. 4. [52] Ibid.
[53] European Commission, Communication to the European Parliament et al., REPowerEU: Joint European Action for More Affordable, Secure and Sustainable Energy, COM(2022) 108 final, 2022, at p. 10.

annual energy savings obligations and new rules to decrease energy consumption in buildings. Similarly, the Commission foresees a revision of the taxation of energy products.[54] On the other hand, the package envisages an improvement in renewables via the enhancement of sectoral targets, with a special focus on sectors where progress with integrating renewables has been slower to date, particularly in the fields of transport, buildings and industry. In this context, the EU adopted the REPowerEU Plan as a response to the situation in Ukraine, aiming to improve the production of renewable gas, particularly biomethane and hydrogen, coupled with a diversification of LNG supply via pipelines and other transport means.

More specifically, the objective of the REPowerEU Plan is doubling the Fit-for-55 target for biomethane,[55] producing 35 bcm per year by 2030 and an additional 14 million tons of renewable hydrogen on top of the 5.6 million tons foreseen under the Fit-for-55 package to replace 25–50 bcm per year of imported Russian gas by 2030.[56] These measures require the development of an adequate regulatory framework to support a European market for hydrogen, including the installation of integrated gas and hydrogen infrastructure and storage facilities. This is in line with the Fit-for-55 proposal to lower gas consumption by 30% by 2030. At the same time, the EU aims at increasing the share of renewables in the grid, particularly via extensive electrification, and addressing infrastructure bottlenecks.[57] Within this framework, the goal is improving the Fit-for-55 objectives, which currently envisage doubling the EU photovoltaic and wind capacity by 2025 and tripling it by 2030. This can be done by channelling EU financing into next-generation technologies, particularly by prompting States to identify areas suitable for the development of renewable energy projects and via a simplification of bureaucracy and procedures for implementing necessary operative licences through fast permit procedures. Based on these developments, it is estimated that the EU could reach 1 terawatt hour of solar power capacity by 2030.[58] It is therefore interesting to note that the sixth package of sanctions adopted by the EU against Russia includes a ban on import of fossil fuel, particularly covering crude oil, seeking to strengthen the diversification of energy supply and accelerate the deployment of renewables.[59]

The combination of the Fit-for-55 and REPowerEU plans will bring energy generation within the EU borders through renewable sources, together with improved renewable import capacity. It is calculated that the Fit-for-55 package has the capacity to reduce annual EU fossil fuel-derived gas consumption by 30% – equivalent to 100 bcm by 2030 – with the REPowerEU plan further reducing another 155 bcm.[60] Doubts have been cast concerning the feasibility of such an accelerated EU green policy timeline, however. For instance, while REPowerEU focuses on diversifying gas supplies and using larger volumes of biomethane and hydrogen production and imports, it has been noted that higher gas prices have led to an increase in power costs, which in turn has increased the cost of

[54] European Council: Fit for 55. www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition.
[55] Ibid. at p. 7. [56] Russian invasion of Ukraine, p. 11. [57] Ibid. at p. 4. [58] Ibid., p 11.
[59] European Council, How Russia's war in Ukraine has impacted markets: EU leaders agree on oil ban and priorities to strengthen the EU's energy independence. 2022. www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/how-russia-s-war-in-ukraine-has-impacted-markets.
[60] Russian invasion of Ukraine, p. 11.

producing green hydrogen.[61] More fundamentally, the generation of renewables envisaged under REPowerEU seems to be in excess of what has been achieved to date, and economic modelling suggests that, for the time being, it is virtually impossible for the EU to 'overbuild' renewable electricity generation capacity.[62]

4.4 Can the EU and Its Member States Move Forward?

4.4.1 Implications of War in Ukraine

The necessary premise for the EU and its Member States to accelerate the Green Deal is the possibility of relinquishing their current ties with, and therefore their dependence on energy supply from, Russia. It is indeed imperative to cut off long-term production and transportation agreements with State-controlled multinational energy corporations, which have been used as a foreign policy tool to establish commercial relationships that perpetuate Russia's influence over the EU.[63] It thus bears asking – can the EU, its Member States, and companies operating in the energy sector abandon current contracts with Russia and Russian companies?

With specific regard to the conflict in Ukraine, war de facto limits trade between hostile countries, but does not preclude it out of hand.[64] Within this context, unless they are justified by specific exceptions, measures such as restrictions on energy export and import do not exclude responsibility under conventional obligations, such as those embedded in agreements under the World Trade Organisation (WTO), bilateral investment treaties and multilateral investment agreements. Thus, the aggressor should be held liable to compensation *vis-à-vis* foreign investors as well as importers and exporters affected by a disruption of economic relations. By contrast, the victims should be able to invoke justifications such as necessity under Article 25 of the International Law Commission's (ILC) Draft Articles on State Responsibility (DASR) and on the Responsibility of International Organisations (DARIO), or specific provisions such as Article XXI(b)(iii) of the General Agreement on Tariffs and Trade (GATT) and Article 13 and 24(3)(a)(ii) of the Energy Charter Treaty (ECT), which provide that war excuses measures in derogation from the fundamental tenet of free cross-border trade and investment. It is also worth noting that public property, including energy and energy infrastructure, must be administered by the occupying power, which is in fact only considered an administrator of public buildings and real estate belonging to the hostile State situated in the occupied country. Therefore, the occupying power must safeguard the occupied country's properties and administer them in accordance with the rules of usufruct (Hague Regulations on Land Warfare Articles 53 and 55). Along these lines, under both Article 23(g) of the Hague Regulations on Land Warfare and Article 53

[61] Ibid.
[62] J. Kneebone, I. Cont, A First Look at REPowerEU: The European Commission's Plan for Energy Independence from Russia. European University Institute. 2022.
[63] Polak and Polakova, Changes in the EU's geopolitical position, p. 255; K. Abnett, EU Energy Chief tells companies not to sign new Russian LNG deals. Reuters. 9 March 2023. www.reuters.com/business/energy/eu-energy-chief-tells-companies-not-sign-new-russian-lng-deals-2023-03-09.
[64] M. Grinberg, Wartime commercial policy and trade between enemies. *International Security* 2021, 46(1): 9–52.

of the Geneva Convention IV on the Law of War, the occupying power cannot destroy enemy public and private property, unless this is imperatively justified by the necessity of war.

As concerns private economic relations, war affects contracts between individuals and companies related to the parties to a conflict, or contracts between companies and States involved in war. Thus, Shell, TotalEnergy and Exxonmobil have already divested their engagement in energy operations in Russia to varying extents. Shell, for instance, has entirely pulled out, in a move that could cost the company between around 3.5 and 18 billion pounds sterling.[65] The EU and its Member States also have a clear interest in limiting relationships with Gazprom, as the policies of the company 'are shaped by both commercial considerations as well as Russia's foreign policy objectives'.[66] Fundamentally, the object of a contract may perish and its execution may become problematic owing to the dangers related to combat operations. In principle, the obligation of performance is discharged if it becomes unexpectedly burdensome or otherwise impossible.[67] This approach is codified in Article 79 of the Vienna Convention on Contracts for the International Sale of Goods,[68] which provides that a debtor is not liable for failing to perform contractual obligations owing to an impediment beyond control which was reasonably unexpected at the time of the conclusion of the contract. Moreover, in common law countries the outbreak of war prohibits trading with the enemy, rendering unlawful any performance of a contract with any individuals residing on enemy territory, regardless of nationality.[69] At the end of a war, peace treaties often apply the principle that pre-war contractual obligations resume, save different provisions and arrangements such as those establishing the UN Compensation Commission and a corresponding Compensation Fund to meet liabilities after the First Gulf War of 1991.[70]

4.4.2 Energy Supply Crisis and Necessity as a Circumstance Precluding Wrongfulness

Given the above outlined framework, prima facie, measures in derogation from free trade and investment should be allowed for Ukraine, at least pending hostilities, as the aggressed State in the ongoing war with Russia.[71] However, the question is different for the EU and its Member States, which are not (legally speaking) 'aggressed' countries in a state of war with Russia. Fundamentally, neutral powers are not restricted in their economic relationships with States at war, except in the provision of war material, which is subject to equal treatment – a sort of 'most-favoured-nation' clause – *vis-à-vis* belligerent States, which is an intrinsic element of neutrality that applies via a customary extension of Article 6 of the 1907 Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in

[65] Russian invasion of Ukraine, p. 11; Impact of Russia's invasion of Ukraine on oil and gas sector. *Oil and Energy Trends* 2022, 47(4), at pp. 3 and 5.
[66] Korteweg, Energy as a tool of foreign policy of authoritarian states, in particular Russia, p. 4; see also Jirušek and Kuchyňková, The conduct of Gazprom in Central and Eastern Europe, p. 834.
[67] *Taylor v Caldwell* [1863] 3 B & S 826. [68] Opened for signature 11 April 1980, entered into force 1 January 1988.
[69] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; *Ertel Bieber & Co v. Rio Tinto Co Ltd* [1918] AC 260.
[70] UN Security Council Resolution 687/1991 of 3 April 1991.
[71] UN General Assembly, Humanitarian Consequences of the Aggression against Ukraine, Doc. A/RES/ES-11/2, 8 March 2022; European Council, Conclusions on the Russian Military Aggression against Ukraine, 24 March 2022.

Naval War. A State may pre-emptively derogate from neutrality under particular treaty regimes,[72] such as Chapter VII of the UN Charter, thus qualifying as an entity not being a party to the conflict, instead of a neutral one, according to article 2(c) of the 1977 Protocol I Additional to the Geneva Conventions on the Law of War. On these terms, and in the light of their repeatedly reiterated support for, and provision of arms to, Ukraine,[73] it is not easy for the EU and its Member States to argue true legal neutrality. On this basis, their classification as 'belligerents' in support of Ukraine would certainly allow the interruption of economic relations under provisions such as DASR and DARIO 25, Article XXI(b)(iii) of the GATT and ECT Articles 13 and 24(3)(a)(ii). However, the EU and its Member States have constantly refused a direct engagement in hostilities exactly to avoid taking on the status of belligerent powers.[74]

Given this framework, in all likelihood it can be supposed that the EU and its Member States should properly be considered 'non-belligerent' countries, rather than 'neutral' ones. For instance, prior to engaging in World War II, the United States declared their 'non-belligerency' *vis-à-vis* the UK, so as to avoid the duties of neutrality and be entitled to aid the belligerent, save armed intervention at its side. During the 2003 intervention in Iraq under the guidance of the United States, Italy also issued a proclamation of 'non-belligerency', while Germany did not make such a declaration but supported the actions of the 'Coalition' nonetheless.[75] In the light of such precedents, the concept of 'non-belligerency' is not firmly established in international law and thus it is doubtful whether a declaration of non-belligerency is apt to exclude responsibility for breaching the duties imposed by neutrality.[76] However, *tertium non datur*. Assuming that they are to be implicitly considered 'non-belligerent' *vis-à-vis* Ukraine and Russia, are the EU, its Member States and natural and legal persons based in their territories able to suspend contracts for the provision of energy with Russia and natural and legal persons operating there? The answer might be positive, at least for the duration of hostilities. After that, absent a specific treaty regulating the matter at the end of hostilities, the EU and its Member States might need to resort to broader arguments.

Prospectively, the EU and its Member States might claim, for instance, that war in Ukraine has triggered a situation of *force majeure* (DASR and DARIO article 22) or necessity (DASR and DARIO article 25) that extends beyond the conflict, particularly in the light of security of supply and conflicting obligations contracted under the UNFCCC regime. Necessity and *force majeure* are indeed classified either as justifications, thus precluding wrongfulness, or as excuses, thus precluding the legal consequences of wrongfulness, that is, sanctions.[77] The Permanent Court of International Justice – forerunner to the

[72] J.-F. Lalive, International organization and neutrality. *British Yearbook of International Law* 1947, 24: 72.
[73] European Council, EU response to Russia's invasion of Ukraine. 2022. www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion.
[74] Impact of Russia's invasion of Ukraine on oil and gas sector, p. 5.
[75] N. Ronzitti, Italy's non-belligerency during the Iraqi war, in M. Ragazzi (ed.), *International Responsibility Today* (Brill, 2005), p. 198.
[76] F. R. Coudert, Non-belligerency in international law. *Virginia Law Review* 1942, 29(2): 143–151, at p. 143; Ronzitti, Italy's non-belligerency during the Iraqi war, pp. 198–200.
[77] J. Crawford, Second Report on State Responsibility. UN Doc. A/ CN.4/ 498 and Add. 1–4 (1999) II(1) *Yearbook of the International Law Commission* 3, at pp. 58–59, para. 223.

modern International Court of Justice – did not in principle exclude that war may trigger the impossibility of performance, and thus *force majeure*, in the cases of the *Serbian Loans* and *Brazilian Loans*.[78] More specifically, the EU and its Member States might invoke necessity under DASR and DARIO article 25,[79] arguing that war in Ukraine has undermined the security of energy supply and that the sole means by which they can safeguard such an essential interest from grave and imminent peril is for them and their businesses to abandon contracts with Russian energy suppliers and move to alternative energy sources, with the green option as the preferred one.[80] It would thus be the energy crisis triggered by war, rather than war itself, that could be relied upon as a justification to switch from (unsustainable) Russian energy supply to diversified (sustainable) sources of energy for the EU. Along these lines, in a letter to the French Ecological Transition Minister Barbara Pompili, the Greek energy minister Kostas Skrekas commented that the energy crisis caused by war in Ukraine has a 'destructive impact' on the life of European industries and citizens and industries, triggering a 'crisis situation' to be addressed by 'an extraordinary meeting of the Council of Energy Ministers as soon as possible'.[81] Similarly, if Russia's policies are not aligned with the standards of the European Green Deal and importing energy from Russia entails the impossibility of fulfilling clean energy obligations under the UNFCCC and the Paris Agreement, it could be argued that the conflict of obligations imposes on the EU and its Member States the necessity of abandoning existing contractual obligations *vis-à-vis* Russian exporters.

4.5 Conclusion

Russia's energy policy is still largely grounded in fossil fuel dependence, with the war in Ukraine another instance of Russia's use of energy supply as a means to create dependency and spheres of influence. The war is therefore a culminating moment that discloses the possibility of a paradigm shift – among other things – in EU energy policy. Within the boundaries outlined by the Green Deal, the EU aims to adopt short- and long-term measures. While short-term measures mostly seek to support households and energy-intensive companies in facing the energy price shock triggered by war, long-term measures aim to

[78] *Payment of Various Serbian Loans Issued in France (France v. Serbia)* (Judgment) [1929] PCIJ Series A No 20, 3, at pp. 39–40; *Brazilian Loans (France v. Brazil)* (Judgment) [1929] PCIJ Series A No 21 94, at 120.

[79] Despite limited practice, the International Law Commission considers that not only States, but also international organisations – and thus the EU — can can invoke necessity as a circumstance precluding wrongfulness under international law (see, in particular, G. Gaja, Fourth Report on the Responsibility of International Organisations. UN Doc. A/CN.4/564, p. 111 at para. 35).

[80] See F. Birol, What does the current global energy crisis mean for energy investment? 13 May 2022. www.iea.org/commentaries/what-does-the-current-global-energy-crisis-mean-for-energy-investment; A. Vaughan, The first global energy crisis. *New Scientist*, 2022, 253(3379): 18. ICSID tribunals have considered that economic and social stability, as well as the provision of essential services, in times of economic crisis amount to an 'essential interest' under DASR article 25 (*LG & E Energy Corp., LG & E Capital Corp. and LG & E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award of 3 October 2006, at para. 257; *Total SA v. Argentine Republic (Decision on Liability of 27 December 2010)*, ICSID Case No ARB/04/1, at paras. 345 and 484.

[81] G.-E. Karagianni, A Greek initiative for an EU energy crisis solidarity facility. 28 February 2022. https://eu-sysflex.com/a-greek-initiative-for-an-eu-energy-crisis-solidarity-facility. This approach may be reinforced by consistent arguments, such as the 'essential elements' human rights clause that the EU invokes in the negotiation of its most recent international trade agreements, whereby the possibility of opening up cross-border trade and investment is increasingly linked to respect for fundamental rights (see J. Zamfir, Human Rights in EU Trade Agreements: The Human Rights Clause and Its Application, Doc. PE 637.975, 2019).

increase the diversification of energy sources for the EU at the expense of energy provision from Russia. Diversification discloses the opportunity of improving the quantity of low-carbon energy in the mix, particularly via intensive electrification, facilitating a fast green transition under the European Green Deal. After all, this approach would be in line with the EU plan to introduce a carbon border adjustment mechanism, which in a baseline scenario is predicted to cost Russian exporters some 33 billion euros by 2030.[82]

From a legal standpoint, it might be argued that the EU and its Member States are 'non-belligerent' entities *vis-à-vis* Russia, and thus war in Ukraine might provide a justification to suspend contracts for energy provisions currently underway with Russia, but not necessarily to terminate them. A more radical and adequate justification might therefore be found in the broader context of necessity, whereby the need to ensure energy security of supply is undermined by war and would compel a diversification of energy sources, with investment in renewables as the preferred option, particularly in the light of the UNFCCC obligations.

[82] Conley and Newlyn, Climate change will reshape Russia.