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The Death of Steel - or the Death of EU-US Trade Relations?

The 2022 Czech EU Presidency

Stuck in the Middle with EU: Neutral Member States and EU Defense



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WTO Consultations and... Extra-WTO Resolution

"STEEL — *steel was dead. Your business was dead. [...] And I put a little thing called 'a 25% tariff' on all of the dumped steel all over the country. And now your business is thriving.*"¹

IN 2018 Trump announced a 25% tariff on steel imports. China was presumably the main target of tariffs, but imposing tariffs under the pretext of national security according to the World Trade Organisation (WTO) rules meant that the US could not discriminate. Hence, the tariffs equally applied to steel imports from the EU. In retaliation, in June 2018, the EU adopted safeguard tariffs on Iconic American Goods to protect its steel market, ranging from blue jeans to corn, and, evidently, steel.² That same month, the EU requested consultations before the WTO.³ After

fruitless WTO consultations in 2018, the Biden administration and the EU reached an extra-WTO agreement to suspend their tariffs in October 2021.⁴

By applying Putnam's two-level game,⁵ this paper analyses the following research question: *Why were the WTO consultations fruitless and how did the various win-sets determinants and level-games alter the stakes leading to provisional extra-WTO resolution of the EU-US steel dispute?* As Putnam's two-level game is a wide-spread theory, this article departs from the presumption that the reader is familiar with the concepts it advances.⁶ Likewise, this article presumes at least elementary knowledge on WTO dispute resolution.⁷

US Win-Sets: Nerves of Steel

Before determining separate win-sets⁸ of the WTO consultation and extra-WTO agreement, two US institutional

1 Trump, Donald. President of the United States of America, "Donald Trump Addresses Energy and Manufacturing Growth", speech, Monaca, 13 August 2019.

2 European Commission, "Commission Implementing Regulation (EU) 2018/724 of 16 May 2018 on certain commercial policy measures concerning certain products originating in the United States of America", Official Journal of the European Union, L 122, 17.5.2018, p. 14–28.

3 Request for Consultations by the European Union, United States - Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS548/1, 6 June 2018.

4 European Commission, "Statement by President von der Leyen on a new Global Sustainable Steel Arrangement and EU-US steel and aluminium dispute", 31 October 2021, accessed 31 October 2021. https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5679.

5 Putnam, Robert D. «Diplomacy and Domestic Politics: The Logic of Two-Level Games», *International Organization*, 42 no. 3 (1988), 427–460.

6 In short, Putnam's theory perceives international negotiations on two levels i.e., the domestic and the international one. On the domestic level, negotiators absorb domestic concerns which they use as guidelines during international negotiations to identify possible "wins" within a range of acceptable wins that can be ratified or backed by domestic interest groups ("win-set"). An international agreement can ultimately be concluded when there is an overlap of win-sets among the international negotiators.

7 WTO, "Understanding the WTO: settling disputes", accessed August 10, 2022. https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

8 Cf. explanation footnote 6.

characteristics warrant highlighting. Firstly, in trade matters, President-Congress dynamics, executive hierarchy, and the WTO system empower the President.⁹ As head of the executive, the President (or a trade representative) negotiates international trade agreements and litigates before the WTO. Secondly, the President has the unilateral competence to levy –and lift– tariffs under Section 232 of the 1962 Trade Expansion Act, without Congress' consent. Given this degree of autonomy, the President's ambitions are determining in shaping US win-sets.

WTO Consultations (June-October 2018)

Trump announced the tariffs shortly after meeting with steel executives.¹⁰ Supposedly, then, the steel industry and unions' political clout significantly influenced the President's policy ambitions and WTO consultations.¹¹ Undoubtedly, steel lobbying and its electoral pertinence in (swing) states against the backdrop of an upcoming midterm, forced the win-set towards maintaining the tariffs at any cost. This influence mirrors Bush's precedent in 2002, where steel tariffs benefited key electoral constituencies and helped the Republicans persuade swing states like Ohio and even West-Virginia, a traditionally Democrat state.¹²

By contrast, Trump met strong domestic cleavages including aluminium lobby opposition, tariff exemption requests and claims against the tariffs by US steel users,¹³ pro-trade Republican divides,¹⁴ Democrat opposition,¹⁵ and (symbolic) shifts in production of *i.a.* Harley Davidson.¹⁶ Moreover, the transnational steel industry echoed domestic voices in warning Trump of the repercussions for American jobs.¹⁷ As such, advocates of lifting the tariffs further limited the win-set.

Internationally, competition with China and its (steel) overcapacity was the principal variable to the Trump win-set. Moreover, Brazil and Argentina conceded to quotas from the outset, confirming the perceived rationale to the tariffs. Furthermore, the EU and Japan concluded a trade agreement just before consultations took place.¹⁸ In addition, the weakened international rules-based order –and Trump's limited regard thereof– further limited the win-set of reaching agreement through the WTO.¹⁹

Whereas “voluntary defection” refers to defection between principal (President) and agent (Trade Representative), one could argue that *in casu* the defection originated with the principal. Trump's seemingly arbitrary trade policy,

9 Brewster, Rachel. «Rule-Based Dispute Resolution in International Trade Law», *Virginia Law Review*, 92 no. 251(2006), 264-284.

10 Wang, Zhaohui. “Understanding Trump's Trade Policy with China: International Pressures Meet Domestic Politics”, *Pacific Focus*, 34 no. 3 (2019), 381.

11 *Ibid.*

12 *Ibid.*, 382.

13 Donnan, Shawn “Steel users file legal challenge to Trump's tariffs”, *Financial Times*, 27 June 2018, accessed 5 November 2021, <https://www.ft.com/content/1ca612fc-7a10-11e8-8e67-1e1a0846c475>.

14 *Ibid.*

15 Wang, *op. cit.*, 382.

16 Donnan, Shawn, *et. al.*, «US trade war with Europe revs up as Harley-Davidson shifts production», *Financial Times*, 25 June 2018, accessed 5 November 2021, <https://www.ft.com/content/54a6cc82-7867-11e8-8e67-1e1a0846c475>.

17 Atkins, Ralph. «ABB chief warns US jobs put at risk by Trump steel tariffs», *Financial Times*, 11 June 2018, accessed 5 November 2021, <https://www.ft.com/content/09775be0-6d5a-11e8-852d-d8b934ff5ffa>.

18 «A measured cheer for the EU-Japan trade deal», *Financial Times*, 17 July 2018, accessed 7 November 2021. <https://www.ft.com/content/3c44a364-85fd-11e8-a29d-73e3d454535d>.

19 Wang, *op. cit.*, 380.

deliberately disregarding the multilateral rules-based order, suggests self-serving objectives premised on the perceived prospect that remedying the 'trade deficit' creates jobs and results in electoral gains. One could wonder whether lobbying, international developments, and domestic cleavages had any incidence on Trump's negotiation instructions in the first place. After all he is *verbatim* "the only one that matters, because when it comes to it, that's what policy is going to be".²⁰ One could argue further that steel played a predominant role throughout Trump's administration, considering the composition of his overshadowing trade team led by Robert Lightizer, then-US Trade Representative, and including several other members previously employed by Skadden -a big law firm with established ties to the steel industry.²¹

Theoretically, the US win-set was very narrow. Between staunch support and opposition, any ratification seemed unfeasible. Considering the President's "defection" and unilateral role however, any win-set required alignment with his ambitions. Perhaps the sole ratifiable win-set was one that maintained the tariffs, without any concessions, let alone before the WTO, i.e. the *status quo*.

Extra-WTO Resolution (October 2021)

If win-set overlap was unfeasible during WTO consultations, how did the stakes alter leading to an extra-WTO resolution in 2021?²² Attributing all achievement to the change in administration is likely too simplistic. Even if more amenable, Biden too, was susceptible to the steel industry's electoral weight and Chinese overcapacity. Biden unilaterally upheld the tariffs and his Commerce chief openly defended them.²³

Nevertheless, Biden's administration depoliticised the dispute and broadened potential overlaps through goodwill and side-payments. Biden solved some inherited conflicts with the EU, *i.a.* the digital services tax and Boeing-Airbus subsidies.²⁴ Complementarily, deepened cooperation through the joint-venture Trade and Technology Council further paved the way for reconciliation. More broadly, Biden managed expectations throughout his campaign by portraying the EU as an ally, facilitating domestic ratification of lifting the tariffs in the long term.

Arguably, the biggest variable to both US win-sets is a crucial delay between rulings of the WTO and the President's ability to levy or lift tariffs. There is less incentive to solve disputes through WTO consultations,

²⁰ *Ibid.*

²¹ Politi, James. «Trump trade team draws heavily from one law firm: Skadden», *Financial Times*, 25 September 2018, accessed 14 November 2021, <https://www.ft.com/content/2aed20f0-bdac-11e8-94b2-17176fbf93f5>.

²² Cf. footnote 4.

²³ Mason, Jeff, and David Shephardson. "US Commerce chief: metals tariffs helped save some US jobs», *Reuters*, 7 April 2021, accessed 3 November 2021, <https://www.reuters.com/article/usa-tariffs-biden-idUSL1N2M027O>.

²⁴ European Commission, "EU and US take decisive step to end aircraft dispute", 15 June 2021, accessed 20 July 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3001; Condon, Christopher, et. al., "U.S., European Nations Reach Deal to End Digital-Tax Dispute", *Bloomberg*, 21 October 2021, accessed 20 July 2022, <https://www.bloomberg.com/news/articles/2021-10-21/u-s-european-nations-reach-deal-to-end-digital-tax-dispute>.

because the system enables the President to make unilateral temporary defections from WTO regulation in favour of specific constituencies and to retract potentially prohibited measures just before a panel ruling, without paying the political price of damages.²⁵ In total, this glitch in the WTO tolerated 22 months of (potentially) prohibited tariffs. Coincidentally, a WTO panel decision was expected by late 2021. Add to this EU doubling tariffs scheduled to enter into force in December and the pieces of Biden's win-set puzzle fall into place.

EU Win-Sets: Fine Steel is Forged in Hot Fire

To analyse the EU win-set, this paper adopts an integrated approach combining three-level game theory²⁶ and De Bièvre and Poletti's EU WTO dispute-settlement framework.²⁷ As it was established that any Trump-EU win-set overlap seemed unfeasible, this part largely focuses on the 2021 provisional agreement and its build-up.

The EU win-set and its development over time can be qualified as "compliance after escalation".²⁸ Firstly, the dispute, save for Eurofer and European Aluminium, was not particularly salient to public opinion, which limited the potential for the dispute to escalate on the EU side. In terms of

political mobilisation, on the one hand, the win-set was restrained by the industries' lobbying (Eurofer met with DG Trade on at least 12 occasions²⁹) and politicisation in the European Parliament (over 30 parliamentary questions³⁰). Furthermore, there was division in the European Council between ardent steel Member States such as Germany, Italy, Poland, and France. *A fortiori* when Trump threatened with additional car-tariffs.³¹ In addition, many Member States limited the win-set by traditionally shying away from countering China explicitly. On the other hand, in 2021, only 12 Member States requested the Commission to investigate the need to prolong EU safeguard tariffs on steel.³²

Secondly, in terms of substantive outcomes, the number of veto-players determine the potential changes to the *status quo* and thus the win-set. Such change requires a ratifiable trade-off and the number of veto-players varies depending on the bargained issues. For instance, if a deal exclusively lowers or removes tariffs, the EU veto-players are limited to the Commission and the Council by qualified majority voting, which results in a relatively high ability to meet demands. If tariffs become part of a larger agreement, depending on the format, other players might acquire veto-rights.

25 Brewster, *op. cit.*, 266, 285.

26 Gstöhl, Sieglinde. "The EU in International Negotiations: Three-Level Game and Principal-Agent Approaches", in *The External Action of the European Union: Concepts, Approaches, Theories*, edited by Gstöhl, Sieglinde and Simon Schunz, (London: Red Globe Press, 2021), 102-116. The EU does not fit in Putnam's traditional model of two-levels as the EU operates on the national, supranational, and finally international level. Hence, for the EU we speak of a three-level game.

27 De Bièvre, Dirk, and Arlo Poletti. "Political Mobilization, Veto Players, and WTO Litigation: Explaining European Union Responses in Trade Disputes", *Journal of European Public Policy*, 21 no. 8 (2014), 1185. Combining two explanatory factors (political mobilisation and dispute escalation) into one framework, De Bièvre and Poletti advance that "while the degree of political mobilization can account for whether or not a dispute involving the EU escalates, the number of veto players can account for whether or not the EU brings its policies in line with the complainants' demands".

28 De Bièvre and Poletti, *op. cit.*, 1187.

29 Lobby Facts. "The European Steel Association (EUROFER)", accessed 9 November 2021, <https://lobbyfacts.eu/representative/9ed0de316b01474ca5a43d39a60ff268/the-european-steel-association>.

30 European Parliament, "Parliamentary questions", accessed 14 November 2021, <https://www.europarl.europa.eu/plenary/en/parliamentary-questions.html#sidesForm>.

31 Brunsden, Jim. "France pushes back on EU plan for talks on car tariffs", *Financial Times*, 13 July 2018, accessed 8 November 2021, <https://www.ft.com/content/81ce7084-869a-11e8-96dd-fa565ec55929>.

32 European Commission. *Towards competitive and clean European steel*, SWD(2021) 353, 5 May 2021, accessed 9 November 2021, https://ec.europa.eu/info/sites/default/files/swd-competitive-clean-european-steel_en.pdf, 24.

The EU further attempted to broaden both win-sets through goodwill by offering to talk about a long-standing US beef tax,³³ domestic expectation management by portraying Biden as a fresh start for Transatlantic relations, and by cautioning EU stakeholders in advance that complete tariffs removal was improbable.³⁴

Externally, the win-set was broadened by rising concern with Chinese competition and overcapacity. More importantly, countries such as Brazil and Argentina accepting absolute quotas, and Canada and Mexico accepting tariff rate quotas meant the EU would lose less face for accepting a tariff rate quota. To make up for any loss of face and extra-WTO resolution, the EU pursued issue-linkage with steel industry carbon management to achieve a ratifiable trade-off.³⁵ Ideally, it would persuade the US to subscribe to its Carbon Border Adjustment Mechanism. In conclusion, the EU win-set comprised any solution between lifting the tariffs and maintaining a reduced version thereof, depending on the trade-off.

Melding EU-US Win-Sets

What altered the stakes of resolving the steel dispute between 2018 and 2021? During the WTO consultations, the Trump win-set seemed confined to the *status quo* pursuant to his preferences and staunchly opposing domestic forces. It is undeniable that the change in administration was necessary to reach an agreement. Still, under Biden, despite common ground on Chinese overcapacity and increased political will to solve outstanding trade-disputes, there were wrinkles to iron out.

Ultimately, a trade-off between the US tariff rate quota and EU removal of tariffs in exchange for prospective cooperation on carbon management seems a plausible explanation for overlap. Furthermore, both parties gained from reaching an extra-WTO agreement. Fighting it out before the WTO would result in a lose-lose. A binding WTO judgment on national security could either open Pandora's Box of national security exceptions or bandwagon on the narrative of WTO state-sovereignty encroachment, hampering any future reform.

A concluding, essential caveat, is the non-completion of Putnam's analysis. Will the agreement be ratified domestically? From an EU perspective, this raises doubts. Singling out China and accepting managed trade that debatably constitutes an irregular voluntary limitation to the WTO threaten the ratification of this agreement. Furthermore, the unchanged legal basis of the US national security tariff, between NATO allies, is equally alarming. Finally, the vague carbon ambitions could potentially increase veto-players, depending on what negotiation and regulation format will tie lowering of tariffs with carbon management.

This provisional agreement solves a major obstacle in the Transatlantic relationship and might pave the way to solving other challenges. While the EU-US trade relationship may thus not be dead, there is room for scepticism on whether this is the right way forward.

33 Brunsden, Jim. "EU seeks to end long-running row over curbs on US beef", *Financial Times*, 3 September 2018, accessed 8 November 2021, <https://www.ft.com/content/03ec6d4c-af85-11e8-99ca-68cf89602132>.

34 Fleming, Sam, and Alan Beattie. "EU trade chief says US steel deal may fall short of removing all barriers", *Financial Times*, 25 July 2021, accessed 9 November 2021, <https://www.ft.com/content/7cfdc6cf-7255-452c-af9f-d8bb39cd58?sharetype=blocked>.

35 European Commission. "EU and US agree to start discussions on a Global Arrangement on Sustainable Steel and Aluminium and suspend steel and aluminium trade disputes", 31 October 2021, accessed 1 August 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5721.



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THE 2022 CZECH EU PRESIDENCY: GETTING THE FREE TRADE ENGINE IN THE INDO-PACIFIC GOING AGAIN?

Introduction

ON July 1st 2022, the Czech Republic took over the presidency of the Council of the European Union. As is tradition, the country presented its priorities, one of which is contributing to the strategic resilience of the European Economy. More specifically, the country hopes to accelerate the process of concluding trade agreements with democratic states.¹ When Czech Trade minister Jozef SÍkal presented his country's priorities to the International Trade Committee of the European Parliament, he stated that *"free trade agreements are the core tasks of the Czech Presidency"* and at the same time urged *"the conclusion and ratification of free trade agreements with, among others, New Zealand, Australia and India"*.²

Stalled trade agreements and new opportunities?

The priority of the Czech EU presidency brings hope for many of the Union's stalled trade negotiations such as the

ones with Mercosur, launched in 1999, India, launched in 2007, or Australia, launched in 2018.³ Trade negotiations have been particularly difficult during the French presidency and the French national elections as President Macron tried to avoid upsetting French farmers by backing new trade deals with agricultural powerhouses in Latin-America or Australia.⁴

Furthermore, the Russian-Ukrainian war and the already existing supply-chain disruptions due to the COVID-19 pandemic have fueled calls to open up more trade with the rest of the world in order to diversify Europe's sources of supply. The Czech and especially the Swedish presidency –which comes next– are an additional opportunity as the two countries are known to be firm believers in the benefits of free trade.⁵

And, apparently, they are not the only ones. On June 20, 2022, fifteen EU member states signed a letter to EU Trade Commissioner Valdis Dombrovskis. They called on the European Commission to accelerate the conclusion of free trade agreements to

1 Czech Presidency of the Council of the European Union. *Priorities of the Czech Council Presidency* (Brussels: European Union, 2022). Accessed July 15, 2022. <https://czech-presidency.consilium.europa.eu/en/programme/priorities/#:~:text=During%20its%20presidency%2C%20the%20Czech,defence%20capabilities%20and%20cyberspace%20security.>

2 European Parliament. "Czech Presidency outlines priorities to EP committees." Press release, July 12, 2022. Accessed July 15, 2022. <https://www.europarl.europa.eu/news/nl/press-room/20220711IPR35010/czech-presidency-outlines-priorities-to-ep-committees.>

3 European Commission. *Overview of FTA and other trade negotiations* (Brussels: European Union, 2022). Accessed July 15, 2022. https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

4 Politico, "A wonk's guide to the Czech EU presidency policy agenda." *Politico*, June 23, 2022. Accessed July 15, 2022. [https://www.politico.eu/article/czech-presidency-council-of-the-eu-policy-agenda/.](https://www.politico.eu/article/czech-presidency-council-of-the-eu-policy-agenda/)

5 *Ibid.*

ensure long-term economic growth and solidify the geopolitical standing of the EU in the world.⁶ According to Dombrovskis, the EU has to use its network of free trade agreements to face the current geopolitical challenges in order to diversify away from Russian supplies.⁷ The recently concluded trade deal with New Zealand is a step towards this direction and gives new credibility to the EU's ability to conclude trade agreements with like-minded partners.⁸

In what follows, the reasons behind a number of stalled EU trade agreements with states in the Indo-Pacific such as India, China, Australia, and New-Zealand will be explored. It is argued that the EU free trade engine in the Indo-Pacific might be provided with new impetus in light of recent events such as the Russian-Ukrainian war and increasing Chinese assertiveness in the region. An ironic conclusion as the world is turning increasingly protectionist due to rising geopolitical tensions.

EU-India trade negotiations

Negotiations for a trade agreement with India were brought to a standstill in 2013 due to a serious gap in the levels of ambitions and broad disagreement over market access.⁹ This did not come as a surprise given India's history in this matter and the fact that the country has intermittently raised its tariffs across a wide range of industries –some of which have been subject to a dispute panel at the WTO. Such

behavior has been exacerbated in recent years by Prime Minister Modi's vision of a self-reliant (more protectionist) India.¹⁰

Nevertheless, the EU and India formally restarted trade talks with the aim to strike an agreement before elections in 2024. This has primarily been driven by the fact that India is out to bolster alliances against Beijing due to increasing Chinese assertiveness and Europe against Moscow in light of its sanctions in response to the Russian-Ukrainian war. Both sides have the potential to be partners in a changing geopolitical world.

Renewed trade talks will include industrial goods, agricultural tariffs, and market access for goods and services as well as public procurement. Even though trade between the EU and India has historically been low –a total of 88 billion euros in goods in 2022, being the tenth most important trade partner of the EU– the country of nearly 1.4 billion people has huge potential.¹¹ In early 2021, the EU and India started a high-level dialogue on trade and investment and in April 2022, Commission President Von Der Leyen visited New Delhi and announced the establishment of a Trade and Technology Council –a privilege previously only given to the United States. However, at the end of the day, Europe could still be more interested in breaking down the Indian 125% tariff on cars than to play a bigger role in Himalayan security.¹²

6 Reuters, "Fifteen EU nations say bloc must urgently accelerate trade deals." *Reuters*, June 20, 2022. Accessed July 15, 2022. <https://www.reuters.com/markets/europe/fifteen-eu-nations-say-bloc-must-urgently-accelerate-trade-deals-2022-06-20/>.

7 Brenton, Hannah, "EU trade chief pledges to speed up efforts to strike new deals." *Politico*, July 24, 2022. Accessed July 27, 2022. <https://www.politico.eu/article/eu-trade-chief-dombrovskis-new-deals/>.

8 *Ibid.*

9 European Commission. *Overview of FTA and other trade negotiations* (Brussels: European Union, 2022). Accessed July 15, 2022 from https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf

10 Shiino, Kohei, "India's increasingly protectionist trade policy." *Institute of developing economies*, November 29, 2021. Accessed July 17, 2022. <https://www.ide.go.jp/Japanese/Publish/Reports/AjikenPolicyBrief/153.html>.

11 Brzozowski, Alexandra and János Allenbach-Amann, "EU and India to start trade negotiations with 2024 target." *Euractiv*, June 10, 2022. Accessed July 20, 2022. <https://www.euractiv.com/section/eu-india/news/eu-and-india-to-start-trade-negotiations-with-2024-target/>.

12 *Ibid.*

The EU-China Comprehensive agreement on investment (CAI)

During the last days of the German EU presidency in December 2020, the Union signed an investment agreement with China. According to the European Commission, the deal addresses enhanced market access for European investors in China, tackles forced technology transfer, non-transparent subsidies and state-owned enterprises and commits China to 'make efforts' to ratify conventions banning forced labor.¹³ However, several member states criticized the deal since the EU did not coordinate with the United States on its China policy and as it supposedly gives up on decent human rights protections for some quick economic gains and minor Chinese commitments.¹⁴ Industries of Germany and France –the most vocal supporters of the deal– were set to gain the most from the CAI through enhanced market access.¹⁵

However, when the EU slapped sanctions on four Chinese individuals and one entity because of their role in severe human rights violations against the Uyghur people in China's Xinjiang region, Beijing retaliated with counter-sanctions on several European political representatives. These include five members of the European Parliament (EP) and the Subcommittee on Human Rights. Later, the EP voted overwhelmingly to freeze the legislative process for ratifying the CAI until sanctions are lifted.¹⁶

Since then, EU-China relations have significantly deteriorated due to China's ambiguous position on the Russian-Ukrainian war. China only reluctantly supports Moscow since it does not want to face the same kind of sanctions or lose access to the rich European market. This could have been used as leverage to move China to a more neutral position in the conflict but since there is no sign that the human rights sanctions are being lifted, neither one of the parties is seriously considering unfreezing the investment deal anytime soon. Nevertheless, despite this, trade between the two blocks continues to grow as exports hit 472 billion euros in 2021.¹⁷

EU-Australia trade negotiations

A significantly smaller but far more like-minded trade partner is Australia. Since the launch of the trade talks, eleven negotiating rounds have been held with the country. The 12th round took place in February 2022 whereas there is no set date for the 13th round yet. As with India, Australia is certainly not one of the largest trade partners of the EU –ranked as the 19th largest in goods in 2020– but an agreement would again be a geopolitical win given the country's position in the Indo-Pacific theater.¹⁸

A lot has changed since trade talks began in 2018 as Australia became embroiled in a trade war with China. It was the first country to call for an independent

13 Von Der Burchard, Hans. "Merkel pushes EU-China investment deal over the finish line despite criticism." *Politico*, December 29, 2020. Accessed July 20, 2022. <https://www.politico.eu/article/eu-china-investment-deal-angela-merkel-pushes-finish-line-despite-criticism/>.

14 *Ibid.*

15 *Ibid.*

16 European Parliament. "MEPs refuse any agreement with China whilst sanctions are in place." Press release, May 20, 2021. Accessed July 20, 2022. <https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-while-sanctions-are-in-place>.

17 Moens, Barbara. "It's time to trade: 8 free-trade deals Brussels wants to seal." *Politico*, May 26, 2022. Accessed July 20, 2022. <https://www.politico.eu/article/its-time-to-trade-8-free-trade-deals-brussels-wants-to-seal/>.

18 European Commission. *EU trade relations with Australia: facts, figures and latest developments* (Brussels: European Union, 2022). Accessed July 20, 2022. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia_en#:~:text=Australia%20ranked%20as%20the%2019th,japan%20and%20before%20the%20US.

inquiry into the origins of the coronavirus pandemic, which led to China slapping steep tariffs on the country, and it has been quite vocal over Hong Kong's new national security law.¹⁹ This has been a serious problem as China is the destination for over a third of Australia's exports, it buys over 80 percent of iron ore exports and a third of Australian liquefied natural gas (LNG).²⁰ While Australia insisted that the trade war with China has no impact on the EU-Australia trade deal negotiations, what remains a fact is that Australia will have to look for new buyers, especially as a major agricultural exporter.²¹

That might be a problem as market access for agricultural powerhouses such as Australia remains a difficult political discussion and is a very sensitive topic as the standstill of the Mercosur trade agreement has shown. Ultimately, it was the loss of a multibillion-dollar submarine contract by France with Australia that forced the EU to pause negotiations during the French EU presidency.²² Since then, talks have resumed but significant political discussion remains on intellectual property and raw materials. The conclusion of a trade deal with the country, nevertheless, has become a priority for the Czech EU Presidency.²³

The EU-New Zealand trade agreement

More straightforward is the trade agreement concluded between the EU and New Zealand in June 2022, following a four-year negotiation process. The deal intends to remove all tariffs on EU goods, support EU-farmers and protect workers and the environment through enforceable provisions on sustainable development.²⁴

As New Zealand is only the 50th largest trading partner of the EU, this deal first and foremost serves as an important signal about the EU's ability to conclude trade deals with like-minded countries.²⁵ Furthermore, it is part of the move towards so-called "green trade deals" as Brussels is increasingly pressured by European industry to level the playing field by locking its green and social standards into future trade agreements in an enforceable manner. Such trade and sustainable development chapters have been used before and were legally binding but not enforceable. This new generation of green trade agreements would link tariff reductions to the implementation of provisions and would remove such reductions in case of a breach of specific provisions.²⁶

19 Sheftalovich, Zoya. "As Australia clashes with China, the EU lies low." *Politico*, May 31, 2020. Accessed July 20, 2022. <https://www.politico.eu/article/as-australia-clashes-with-china-the-eu-lies-low-pandemic-coronavirus/>.

20 *Ibid.*

21 *Ibid.*

22 See Packham, Collin. "EU postpones trade talks with Australia amid sub deal anger." *Reuters*, October 1, 2021. Accessed August 3, 2022. <https://www.reuters.com/business/eu-postpones-trade-talks-with-australia-amid-submarine-deal-fallout-2021-10-01/>.

23 Hanke, Jakob and Barbara Moens. "EU-Australia trade deal runs aground over submarine furor" *Politico*, September 19, 2021. Accessed July 20, 2022. <https://www.politico.eu/article/eu-australia-trade-deal-runs-aground-over-submarine-furor/>.

24 European Commission. *EU trade relations with New Zealand: facts, figures and latest developments* (Brussels: European Union, 2022). Accessed July 20, 2022. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand_en#:~:text=Following%20a%20four%2Dyear%20negotiation,trade%20agreement%20in%20June%202022.

25 Moens, Barbara and Sarah Anne Aarup. "EU and New Zealand seal trade deal with tougher new green rules." *Politico*, June 30, 2022. Accessed July 27, 2022. <https://www.politico.eu/article/eu-new-zealand-deal-standard-greener-trade/>.

26 *Ibid.*

New impetus under the Czech EU presidency?

Whereas new impetus has been provided to the negotiations with India and Australia, the agreement with China remains effectively dormant for now. The conclusion of the trade agreement with New Zealand, although small in size, has been a win for the EU, especially because of its first generation green dimension.

Whether the Czech EU presidency will really be able to finish a number of outstanding deals remains to be seen. On June 13 and 14, 2022, the High-Level dialogue on the Indo-Pacific took place on the invitation of the Czech minister of Foreign Affairs Jan Lipavský which was the first foreign policy event of the incoming Czech EU presidency. Besides emphasizing that the geographical region would be a priority, the Czech minister made it clear that a faster conclusion of free trade agreements with the Indo-Pacific partners will contribute to the strengthening of economic security.²⁷

The French EU presidency has deliberately held back on the conclusion and ratification of trade agreements –not in the least with agricultural powerhouses such as Mercosur– but that is not the only explanation for the recent slowdown in trade negotiations. Some agreements, such as the one with India, are already frozen since 2013 due to a gap in the level of ambition.

The momentum for free trade is ironically strengthening just as the world is entering a new phase of increased protectionism and rising geopolitical tensions. This paradox has been reinforced because of the Russian-Ukrainian war, which incentivizes the EU to make deals with like-minded partners such as India, and due to rising Chinese assertiveness, which opens new opportunities for trade deals with Australia and New-Zealand who seek to diversify their supplies.

²⁷ Ministry of Foreign Affairs of the Czech Republic. "Prague dialogue on the Indo-Pacific discussed one of the Czech EU Presidency priorities." Press release, June 15, 2022. Accessed July 27, 2022. https://www.mzv.cz/jnp/en/issues_and_press/prague_dialogue_on_the_indo_pacific.htm.



Introduction

SINCE the Lisbon Treaty established the European Union's (EU) Common Security and Defence Policy (CSDP) under the legal framework of the Common Foreign and Security Policy (CFSP), the EU has increased its foreign policy relations concerning defense diplomacy and action. Yet, since the beginning, for different reasons, its efficacy has been under debate. The main issues are represented by the lack of common strategic culture and political will. Words and concepts have different meanings for each member state (MS), for example, which level of "strategic autonomy" EU MSs are willing to reach and to what extent they are disposed to develop their military capability. This paper aims to analyze the realisticness of the "Strategic Compass" and argues for European strategic autonomy in defense. Finally, this paper argues which improvements are necessary to have a more integrated EU defense policy.

CSDP doctrines: from the European Security Strategy (ESS) to the Strategic Compass

The strategies for the European foreign and security policy have changed according to the geopolitical situation. The 2003 European Security Strategy (ESS) and the 2016 European Union Global Strategy

(EUGS) are different in breadth and depth: while the ESS is a short document (14 pages) and sketches the first explicit EU's common security strategic framework in the aftermath of the Amsterdam Treaty (1999), the 60-page EUGS is more comprehensive in scope, aiming at being more in line with the times.¹ Whereas the ESS advanced that it was sufficient to stabilise fragile countries through security and sector reforms (SSR), the Arab Springs (2011 – onwards) and the Ukrainian conflicts (2014 – onwards) have re-opened a phase of concerns for Europe. The EU found itself (and its vision) challenged in its very periphery. It is no coincidence then that the EUGS considers the "State and Societal Resilience to our East and South" and the elaboration of an "Integrated Approach to Conflicts and Crises" (2018) as two of the top priorities.² The EUGS's main goals became the resilience of individuals rather than societies, enhancing the concept of human security.

In March 2022, the EU's Foreign Affairs Council approved the "Strategic Compass" (SC), the implementation of the security and defense aspects of the EUGS. The 46-page document, which offers a clearer direction and a shared vision for the EU's security and defense initiatives over the next five to ten years, is meant to guide the EU security and defense agenda for the next decade. It sets four priority actions:

¹ Baldaro, Edoardo, & Irene Costantini, Fragility and resilience in the European Union's security strategy: comparing policy paradigms. *Italian Political Science Review/Rivista Italiana Di Scienza Politica* 51, no. 3(2020): 305–320.
² *Ibid.*

“crisis management” (ACT), “resilience” (SECURE), “capabilities” (INVEST) and “partnerships” (PARTNER).³ Although it poses many ambitious goals, to be precise fifty to accomplish mostly before 2025, it has received criticism for the lack of objectivity: more than a “compass”, it looks like a “wind chime”.⁴

The change of direction of the EU foreign policy is evident, at least if compared to the EUGS (2016) and the *Integrated Approach* (2018). The *Approach* is “multi-layered” since the intervention over a long period to cover all dimensions of the conflict cycle to contribute to “long-term sustainable peace and development and placed emphasis on the need to act ‘throughout all phases of the conflict’”.⁵ Instead, the *Compass* urges to act “promptly” and emphasizes “rapidity, robustness, and flexibility”, specifically adding: “with partners if possible and alone when necessary”. The creation of an EU Rapid Deployment Capacity (EU RDC) to “swiftly deploy” a modular force of up to 5,000 troops is a distinguishing feature of the *Compass*, is the evidence.

Nevertheless, some aspects stand out as a change from an operational perspective: the increased focus on maritime cooperation and the military applications of new technologies, such as artificial intelligence (AI), the space and cyber domains, including the threat of disinformation spread via social media. However, it is unclear how MSs should improve the response to hybrid threats

and the substantial impact of AI during warfare. The lack of a precise and official definition does not help in this regard.⁶ Still, some important questions remain. Firstly, to what extent will the suggested actions improve the EU’s capacity and initiative to act? Secondly, will the increased expenditure also enhance the defense quality and coordination? Thirdly, how much autonomy will the *Compass* ultimately offer?⁷

Moreover, the SC does not clarify how EU-NATO cooperation should be improved. Contrasting opinions exist about the Alliance. Certain Europeans conceived it as a tool of the United States (US) supremacy; others worry that NATO will be weakened by an intensified EU involvement in security and defense. Nobody thinks that the EU will be able to provide for its defense without the US and NATO’s participation shortly and few think that the US genuinely intends to disengage from Europe: the recent Russia-Ukraine war proved it.⁸ Indeed, the Russia-Ukraine war currently represents the main security danger to Western interests and the international system. This implies that the alliance between Europe and the United States will have to face simultaneously the threat posed by Russia as well as China’s long-term challenge. Since the necessity for naval and maritime resources in the Indo-Pacific, the US will probably prioritize land capabilities in Europe, while air capabilities will need to be split between the two.⁹

3 Koenig, Nicole, Putin’s war and the Strategic Compass, A quantum leap for the EU’s security and defence policy? *Hertie School, Jacques Delors Centre*, 2022. Accessed August 10, 2022. https://hertieschool-f4e6.kxcdn.com/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20220428_Koenig_StrategicCompass.pdf.

4 Bargués, Pol, *The EU Strategic Compass: A Blueprint for a European Defensive and Securitization Policy*. IAI Istituto Affari Internazionali, May 26, 2022. Accessed August 10, 2022. <https://www.iai.it/en/pubblicazioni/eu-strategic-compass-blueprint-european-defensive-and-securitisation-policy>.

5 Macchiarini Crosson, Dylan, Pol Bargués, Zachary Paikin, and Steven Blockmans, “Multi-Layered Actions? Sustaining Partnerships in the EU Integrated Approach to Conflicts and Crises”, in *JOINT Research Papers*, No. 9, December 2021, Accessed August 10, 2022. <https://www.jointproject.eu/?p=835>.

6 Perissich, Riccardo, Europe’s Strategic Compass: Merits and Shortcomings. *Istituto Affari Internazionali (IAI)*, December 2021. Accessed August 10, 2022. <https://www.iai.it/sites/default/files/iaicom2157.pdf>.

7 Koenig, Putin’s war and the Strategic Compass, A quantum leap for the EU’s security and defence policy?

8 Perissich, Europe’s Strategic Compass: Merits and Shortcomings.

9 Polyakova, Alina, Edward Lucas, Lo Bobo, James Lamond, and Lauren Speranza, What Does Europe Look Like 3-7 Years After Russia’s War in Ukraine? *CEPA*, May 24, 2022. Accessed August 10, 2022. <https://cepa.org/what-does-europe-look-like-3-7->

The EU MSs and the European External Action Service (EEAS) adopted the SC's last-minute revisions during the first days of the Russian aggression towards Ukraine. The SC's analysis started in November 2020, therefore the initial version appears obsolete by February 2022.¹⁰ The modified version caused by the Russia-Ukraine war intensified the attention on three aspects: more *focus*, *money*, and *urgency*.¹¹

More *focus*. Firstly, the SC adopts a stronger language towards Russia, condemning the military aggression. Secondly, in a broader sense, the war strengthened the EU's emphasis on its (larger) neighborhood and its function as a regional, as opposed to a global, security provider. Thirdly, the war also enhanced earlier drafts' attention to hybrid and cyber threats. There were forewarnings that Russia would respond with hybrid and cyberattacks when the EU enacted its historic package of sanctions. The Compass uses the word "cyber" 81 times (originally 61) because of the increased risk of assaults that fall under Art. 5 of the Washington Treaty. It also explains why in the final version, the EU made the intentions for a more specific hybrid toolbox.¹²

More *money*. The increase in military expenditure also represents a change of paradigm since the 2020 economic crisis caused by the Covid-19 pandemic implied the reduction of the EDF (2021-2027) by six billion euros. The same thing happened after the 2008 financial crisis. The European Union needed almost ten years to reach the same defence expenditure level.¹³ Significantly, Germany increased its spending to over 2%/GDP, becoming first in Europe for military

expenditure, and third worldwide after the US and China. However, spending more money does not mean spending better. More expenditure on defense does not always equate to better spending. A "reverse post-2008 scenario" might occur if member nations reduce their defense spending without coordination. We could now face uncoordinated increases, driven by national goals, resulting in unnecessary duplication. In the previous six years, even while the EU's defense initiatives clearly focus on fostering more collaboration, the defense budget has been rising, and joint investment has declined.¹⁴ To ensure comprehensive pre- and post-mission monitoring, the EU may need to increase the appropriate staffing levels and technical knowledge within the EEAS. Moreover, an EU platform that enables the impacted public in receiving countries to submit complaints and improvements should be developed.

More *urgency*. The conflict intensified the sense of urgency. The final SC version guarantees a "quantum leap", as opposed to the first draft's call for a "step change" in the EU's security and defense strategy.¹⁵ It emphasizes that implementation must immediately begin. Despite the five to ten year time frame, the majority of Compass commitments are due by 2022, and a few after 2025. For instance, for military mobility, the Compass promises to "immediately" facilitate military and dual-use equipment transport across the continent. Despite the fact that these measures started in 2017, the logistical difficulties of transporting weapons to Ukraine highlight their practical importance and urgency.

years-after-russias-war-in-ukraine/.

10 Witney, Nick, The EU's Strategic Compass: Brand new, already obsolete. *European Council on Foreign Relations*, March 31, 2022. Accessed August 10, 2022. <https://ecfr.eu/article/the-eus-strategic-compass-brand-new-already-obsolete/>.

11 Koenig, Putin's war and the Strategic Compass, A quantum leap for the EU's security and defence policy?

12 *Ibid.*

13 Sabatino Ester, and Alessandro Marrone, Europe of Defence in the new world (dis)order: choices for Italy. *Istituto Affari Internazionali (IAI)*, November 2020. Accessed August 10, 2022. <https://www.iai.it/sites/default/files/iai2020.pdf>.

14 Koenig, Putin's war and the Strategic Compass, A quantum leap for the EU's security and defence policy?

15 *Ibid.*

The importance of having European strategic autonomy and the impossibility of reaching it rapidly

The current international framework has constrained policymakers, researchers, and politicians to debate and discuss again whether the European Union's strategic autonomy in defence will ever be possible. The word, derived from ancient Greek, is composed of *autos*, the "ability of the self", and *nomos*, "law", or "custom".¹⁶ Indeed, the EU does not intend to act as a monad from the defensive point of view, rather it intends to be prepared and organized when military action is required. The US and NATO have guaranteed the security of European citizens since the end of the Second World War. So, why would the EU need strategic autonomy? Firstly, to be prepared in case of activation of the "Mutual Defence Clause" (Art. 42(7) TEU) or the "Solidarity Clause" (art. 222 TFEU). The world has completely changed since the 2003 European Security Strategy (ESS) implementation. The recent Covid-19 pandemic, climate change, terrorism, and unconventional threats such as hybrid and cyber-attacks concretized in the ongoing Russia-Ukraine war demonstrate that we no longer live in the pre-9/11 safe world.

Furthermore, the EUGS (2016) did not significantly detail which level of strategic autonomy the EU should reach. The Compass does not remedy this and equally avoids the controversial notion of strategic autonomy, mentioned only once. However, it is not clear how the EU should act if its partners (the US and NATO) would decide not to engage. The Compass provides for a new EU Rapid Deployment

Capacity (RDC), which should concentrate on rescue, evacuation, and stabilisation operations, but the plan to participate in more robust military operations is not mentioned.¹⁷

That is also one of the reasons why the two Scandinavian countries, Finland and Sweden, applied for NATO membership after years of restraint: they do not feel protected enough by the European security doctrine, and only full-fledged NATO members would benefit from Art. 5 of the Washington Treaty.¹⁸ Both countries issued a letter emphasizing that the EU is also a security community prior to the Versailles Summit in March 2022.

Why is it impossible to reach strategic autonomy, at least in a short time? Firstly, because defence is *not fully embedded in European culture*.¹⁹ Indeed, despite the idea of a European army that would over time include German forces and be governed by a unified military and political European authority was raised as early as at the beginning of the 50s, the idea of a European Defence Community (EDC) plan was rejected by the French National Assembly in August 1954. Secondly, the role the EU wishes to have in the world is ambiguous. Some believe that the EU should be more "power-oriented"²⁰ to compete with big powers such as the United States, China, and Russia. Others, on the contrary, question whether an entity like the EU, which is an international organization rather than a state -an *object politique pas identifié*, as Jacques Delors said- despite sharing common currency, internal market, and supranational legal authority, can create a coherent and successful

16 Tocci, Nathalie, European Strategic Autonomy: What it is, why we need it, how to achieve it, *Istituto Affari Internazionali (IAI)*, 2021. Accessed August 10, 2022. <https://www.iai.it/sites/default/files/9788893681780.pdf>.

17 Koenig, Putin's war and the Strategic Compass, A quantum leap for the EU's security and defence policy?

18 Tafuro Ambrosetti, Eleonora 'Should Finland and Sweden join NATO?', Italian Institute for International Political Studies. April 22, 2022, Accessed August 10, 2022. <https://www.ispionline.it/en/pubblicazione/should-finland-and-sweden-join-nato-34786>.

19 Sabatino and Marrone, Europe of Defence in the new world (dis)order: choices for Italy.

20 Foulon, Michiel, and Jack Thompson, The future of European Strategy in a challenging geopolitical environment: challenges and prospects. *Hague Centre for Strategic Studies*, 2021. Accessed August 10, 2022. <https://www.jstor.org/stable/resrep34844>.

military grand strategy.²¹ Nevertheless, the recent decision by German Chancellor Olaf Scholz to considerably increase defence expenditure, which amounts to the complete rearmament of Germany, is likely to inspire other nations to follow suit. In time, this could result in a more robust EU defense policy. Consequently, the idea of European strategic autonomy or sovereignty, strongly promoted by French President Emmanuel Macron, may soon have more defined boundaries.²²

Conclusions

The EU CSDP does not represent a failure, but many aspects need improvement. With the Russian invasion of Ukraine, the EU has re-discovered unity, above all after imposing seven packages of economic sanctions against Russia and Belarus since February and after reactivating the temporary protection (Council Directive 2001/55/EC) for persons fleeing Ukraine. Nevertheless, the need for military coordination appears fundamental. The Compass is a good starting point, but as remarked above, the document appears outdated and inadequate to face the current Russia-Ukraine war and the next decade's challenges. More expenditure, more focus and more immediacy do not mean more efficiency. The EU should reduce the dependence on external actors through a series of initiatives: more effective military expenditure, modernization and self-production of armaments, expansion of EU armed forces' presence in international missions, and investment in naval capability and intelligence capacity.

It is also necessary to develop and maintain a permanent presence in the Indo-Pacific area to assure the access to raw materials, microchips, pharmaceutical and technological products, as well as acting in advance to competitors in areas of European interests, and making annual reports on the implementation of the various initiatives. The European Parliament should have voice in the decision-making and monitoring process to give military spending more legitimacy. Before making a choice to deliver weapons, risk analysis and a chance to offer feedback should be provided. In the current legal framework, the European Commission is the sole body with the authority to initiate legislation; while the Parliament is limited to making proposals and recommendations. In addition, an EU platform that enables European citizens to lodge complaints might be suggested.²³ The Comparative Eurobarometer by the European Parliament surveys on citizens' opinions and expectations in 2016 and 2018 revealed an increase in the proportion of EU citizens who want the EU to intervene more in security and defense policy, from 66% in 2016 to 68% in 2018.²⁴ Lastly, an online platform could be created for EU citizens to give them a voice in the process.

The EU's response to the Russian invasion that will lead to the predicted "quantum leap" cannot yet be determined, since by the end of 2022, operational scenarios will be created, with a possible 2023 start date for the first live exercise and, finally, by 2025, the EU RDC must be completely operational. Hence, there is still cause for uncertainty due to the concept of strategic autonomy and the spending on defense coordination.

²¹ *Ibid.*

²² Alcaro, Riccardo, The EU and the Ukraine War: Making sense of the rise of a "Geopolitical Union". *Istituto Affari Internazionali (IAI)*, March 2022. Accessed August 10, 2022. <https://www.iai.it/sites/default/files/iaicom2212.pdf>.

²³ Koenig, Putin's war and the Strategic Compass, A quantum leap for the EU's security and defence policy?

²⁴ Lazarou, Elena, and Alina Dobrev, Security and defence, EU policies – Delivering for citizens EPRS, *European Parliamentary Research Service*, Members' Research Service PE 635.533, June, 2019. Accessed August 10, 2022. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635533/EPRS_BRI\(2019\)635533_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635533/EPRS_BRI(2019)635533_EN.pdf).



Shane
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STUCK IN THE MIDDLE WITH EU: NEUTRAL MEMBER STATES AND EU DEFENSE

Introduction

FORMER Finnish President and father of the Helsinki Accords Urho Kekkonen once remarked that there were as many kinds of neutrality as there are neutral states.¹ This adage certainly applies to the militarily neutral EU Member States. As of August 2022, six EU Member States could be characterized as neutral: Austria, Cyprus, Finland, Ireland, Malta, and Sweden, with Denmark as an outlier that, while not neutral *per se*, did not participate in EU defense policy. Each of these Member States has developed their unique conception of neutrality. The Russian war on Ukraine has caused the security architecture of Europe to undergo its most significant set of changes since 1991. This article will respectively address the neutrality of each of these Member States against the backdrop of recent developments. With Finland and Sweden seeking to abandon neutrality in favor of NATO membership and with Denmark agreeing to forego its opt-out for the EU's Common Security and Defense Policy (CSDP), it is worthwhile examining why these Member States pursued or continue to pursue neutrality, how these countries

interpret their neutral status, and whether Austria, Ireland, Cyprus, and Malta could follow in Scandinavian footsteps.

Tides of Change in the Baltic Sea

In the days and weeks preceding the Russian invasion in February 2022, some called for the “Finlandization” of Ukraine as a possible solution to the conflict. “Finlandization” refers to the status given to Finland for the duration of the Cold War.² Established by the Finno-Soviet Treaty in 1948, Finland enjoyed security guarantees from the Soviets, but had to stay out of NATO and allow the Union of Soviet Socialist Republics (USSR) to wield significant influence over both foreign and domestic policy.³ With the Finnish application to join NATO, a term so widely used in February and March has already become defunct and outdated. Like Finland, Sweden also pursued neutrality since the early 19th Century. Neutrality in the two nations has endured a slow death since they joined the EU in 1995. Indeed, despite its formal status, former Finnish Prime Minister Alexander Stubb stated that Finland has not been truly neutral “since

¹ Kekkonen, Urho, *Neutrality and the Finnish Position* (London: William Heinemann Ltd, 1970), 199.

² The Economist, “What is “Finlandisation”?” *The Economist*, February 11, 2022, Accessed July 18, 2022. <https://www.economist.com/the-economist-explains/2022/02/11/what-is-finlandisation>.

³ *Ibid.*

the end of the Cold War”.⁴ Both Finland and Sweden participated in all aspects of the EU’s Common Foreign and Security Policy (CFSP), including the CSDP, as a means of preventing its evolution into a traditional military alliance and by focusing on less controversial aspects of the policy such as crisis management.⁵

One of the most controversial threats to the neutral status of all neutral EU Member States was the introduction of Article 42(7) of the Treaty on European Union, also known as the mutual assistance clause, or more commonly when referring to CSDP matters, the mutual defense clause. Article 42(7) states that if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power.⁶ As will be discussed with Ireland and Austria, some argue that this is incompatible with neutrality. However, both Finland and Sweden readily embraced the mutual defense clause, with Finnish President Sauli Niinistö describing it as the “*true core of European defense*” in 2018.⁷ As a means of preparing for the mutual defense clause, Finland changed its status from “neutral” to “militarily non-aligned” in 2007 to reflect the Treaty more closely.⁸ Before their pivot to NATO

in 2022, both nations appeared to infer a flexible meaning from the word neutrality. While not NATO members *per se*, Finland and Sweden have worked closely with the Alliance on crises and peacekeeping operations in the past.⁹ Their willingness to work within Article 42(7) was also illustrative of this.

Of course, everything changed for the Nordic nations in February 2022. While public opinion had been against explicitly abandoning neutrality by joining NATO up until that point, suddenly Finnish Prime Minister Sanna Marin and her Swedish counterpart Magdalena Andersson found themselves with a tidal wave of public support for joining NATO. As recently as 2012, only 17% of the Swedish public were in support of joining NATO.¹⁰ By May 2022, this figure had shot up to 58%. Similarly, a Finnish poll saw an increase in support for NATO membership in the weeks following the Russian invasion, with 62% of Finns being in favor of joining NATO in March 2022.¹¹ The two countries have robust militaries and in contrast to many other European nations before 2022, will be net contributors to the NATO alliance. Time will tell how Finland and Sweden manage to counter Russia in the Baltic, a new “NATO lake”.

4 Stubb, Alexander. “Nato entry for Finland and Sweden will enhance European security”. *Financial Times*, May 11, 2022, Accessed July 9, 2022. <https://www.ft.com/content/e85825af-5172-44c4-9662-f7ceca40e8ac>.

5 Iso-Markku, Tuomas, and Matti Pesu, “From neutrality to activism: Finland and EU defence”. *European Council on Foreign Relations*, June 28, 2021, Accessed July 9, 2022. <https://ecfr.eu/publication/ambiguous-alliance-neutrality-opt-outs-and-european-defence/#from-neutrality-to-activism-finland-and-eu-defence>.

6 Consolidated version of the Treaty on European Union [2012] OJ C 326 article 42(7).

7 President of the Republic of Finland, “President of the Republic Sauli Niinistö’s speech at the opening of the 227th National Defense Course on 5 November 2018”. Accessed July 20, 2022. <https://www.presidentti.fi/en/speeches/president-of-the-republic-sauli-niinistos-speech-at-the-opening-of-the-227th-national-defence-course-on-5-november-2018/>.

8 Bjereld, Ulrika, and Ulf Möller, “From Nordic neutrals to post-neutral Europeans: Differences in Finnish and Swedish policy transformation”. *Cooperation and Conflict* Vol. 45, No. 4 (December 2010): 363-386. Accessed July 20, 2022. <https://www.jstor.org/stable/45084616>.

9 Forsberg, Robin, Aku Kähkönen, and Janna Öberg, “Implications of a Finnish and Swedish NATO Membership for Security in the Baltic Sea Region”. *Wilson Center*, June 29, 2022, Accessed July 7, 2022. <https://www.wilsoncenter.org/article/implications-finnish-and-swedish-nato-membership-security-baltic-sea-region>.

10 Drobota, Florentina. “Finland and Sweden to Become NATO Allies Soon”. *Beyond the Horizon*, July 4, 2022, Accessed August 16, 2022. <https://behorizon.org/finland-and-sweden-to-become-soon-nato-allies/>.

11 *Ibid.*

Denmark: Contradictory and Conditional Neutrality?

Of all the Member States, Denmark adopted perhaps the most paradoxical approach to neutrality and non-participation in EU defense. Denmark is, simply put, not a neutral country. It was a founding member of NATO in 1949 and support for the alliance has remained high throughout Danish history.¹² Despite this, the Nordic nation was, until June 2022, the only EU Member State with an exemption from all EU military defense cooperation through the CSDP. Denmark narrowly rejected a ratification of the Maastricht Treaty in 1991, with 50.7% of Danes voting against the Treaty and further integration, with defense cooperation being a contentious issue during the referendum.¹³ In order to give effect to the Maastricht Treaty, an opt-out of the EU defense policy was granted to Denmark in the form of the Edinburgh Agreement in 1992. This agreement gave Denmark four “opt-outs” of further integration, with military cooperation and affairs relating to the CSDP being one of them.¹⁴ As a result, the country was the only Member State that did not participate in the elaboration and the implementation of decisions and actions of the Union which have defense implications.

Like its northern neighbors, the Russian war on Ukraine has caused a dramatic shift in attitudes towards neutrality. Given the increasingly important strategic position of nations in the Baltic Sea, Danish Prime Minister Mette Frederiksen announced a referendum on the defense opt-out on 6th March 2022.¹⁵ The referendum, held on June 1st, was a firm rejection of the opt-out as 67% of Danes embraced joining the CSDP.¹⁶ As such, Denmark can no longer be said to be neutral in any sense of the word. This has, alongside the Finnish and Swedish applications to join NATO, contributed to a revolutionary shift in the security architecture of Northern Europe. As such, it appears that the contradictory stance taken by Denmark on NATO membership while recusing itself from the CSDP is coming to an end.

Ireland

The Republic of Ireland has pursued military neutrality since 1938, when the Anglo-Irish Trade Agreement of that year returned key naval ports retained by the British Navy post-independence to Irish control.¹⁷ Contrary to popular belief, the Irish concept of neutrality does not have a firm legal or constitutional basis and merely forms part of a long-standing policy of the Irish government

12 NATO, “Denmark and NATO”. *North Atlantic Treaty Organization*. Accessed July 10, 2022. https://www.nato.int/cps/en/natohq/declassified_162357.html.

13 Hodson, Dermot, and Maher Imelda. “Opinion: Why Denmark is voting on its defence relationship with the EU – and what it says about democracy in Europe”. *University College Dublin*, May 26, 2022, Accessed July 20, 2022. <https://www.ucd.ie/newsandopinion/news/2022/may/26/opinionwhydenmarkisvotingonitsdefencerelationshipwiththeeuandwhatitsaysaboutdemocracyineurope/>.

14 Krunke, Helle, “From Maastricht to Edinburgh: the Danish solution”. *European Constitutional Law Review* 1, no. 3(October 2005): 339 - 356.

15 Milne, Richard, “Denmark votes to end EU defense opt-out in historic referendum”. *Financial Times*, June 1, 2022, Accessed July 7, 2022. <https://www.ft.com/content/b4cad25f-c061-47c9-8d55-9f048805d71f>.

16 *Ibid.*

17 McGee, Owen. *A History of Ireland in International Relations*. Kildare: Irish Academic Press Ltd, 2020.

to avoid membership of military alliances. However, that is not to say that neutrality has not been controversial in Ireland. Echoing the Union-wide turbulence caused by Denmark when voting on the Maastricht Treaty for the first time in 1992, the ratification of the Lisbon Treaty was a fraught process for Ireland, largely due to concerns around the introduction of the mutual defense clause.¹⁸ In June 2008, 53.4% of voters rejected the Lisbon Treaty.¹⁹ Similar to Denmark's Maastricht debacle, concessions were given by the EU to placate Irish concerns. Voters approved the ratification of the Lisbon Treaty in 2009 when the so-called "Irish clause" was introduced. The Irish clause states that Article 42(7) "*shall not prejudice the specific character of the security and defense policy of certain Member States*". This clause has been interpreted by Ireland and Austria as affording their neutral status supremacy over the clause.²⁰ While Ireland remains committed to neutrality, the country has contributed to multilateral peacekeeping operations through both the CSDP and the UN Peacekeeping. Ireland has deployed Defense Forces personnel to the Mediterranean, Mali, Bosnia and Herzegovina, Lebanon, and Cyprus over the years.²¹ Ireland is the only UN Member

State to have a continuous presence on UN and UN-mandated peace support operations since 1958.²² One could thus argue that a foreign policy grounded in neutrality has allowed Ireland to focus more heavily on its response to humanitarian crises through UN Peacekeeping.

The Russian invasion of Ukraine caused the most significant shift in attitudes towards neutrality in decades, particularly in the early days of the war. In March 2022, 48% of Irish citizens wanted to join NATO.²³ However, a month later, this had receded once again, with two-thirds of the population supporting the *status quo* by retaining the policy of military neutrality.²⁴ The main reason given by respondents to the poll was fear of an escalation in the Russian war in Ukraine, with 65% of respondents agreeing that a general fear of escalation was their reason for supporting neutrality.²⁵ In late May, the Irish Taoiseach (Prime Minister) Micheál Martin outlined his expectations for a Citizens' Assembly on neutrality before 2025.²⁶ Such a move has often preceded Irish referenda in the past, and while public support for neutrality may remain high, the door has not yet fully shut on revisiting Ireland's current status.

18 Özlem Atikcan, Ece, "Asking the public twice: why do voters change their minds in second referendums on EU treaties?". *London School of Economics*, October 19, 2015, Accessed July 23, 2022. <https://blogs.lse.ac.uk/europpblog/2015/10/19/asking-the-public-twice-why-do-voters-change-their-minds-in-second-referendums-on-eu-treaties/>.

19 *Ibid.*

20 Quain, Clodagh, "Committed neutrality: Ireland's approach to European defense cooperation". *European Council on Foreign Relations*, June 28, 2021, Accessed July 10, 2022. <https://ecfr.eu/publication/ambiguous-alliance-neutrality-opt-outs-and-european-defence/#committed-neutrality-irelands-approach-to-european-defence-cooperation>.

21 Irish Department of Foreign Affairs. "Peacekeeping". Accessed July 19, 2022. <https://www.dfa.ie/our-role/policies/international-priorities/peace-and-security/peacekeeping/>.

22 *Ibid.*

23 Pogatchnik, Shawn. "Poll: More Irish want to join NATO in wake of Ukraine invasion". *Politico*, March 27, 2022, Accessed July 9, 2022. <https://www.politico.eu/article/poll-more-irish-want-to-join-nato/>.

24 Leahy, Pat, and Dan McLaughlin, "Overwhelming support for retention of Ireland's military neutrality". *Irish Times*, April 15, 2022, Accessed July 10, 2022. <https://www.irishtimes.com/news/politics/overwhelming-support-for-retention-of-ireland-s-military-neutrality-1.4853176>.

25 *Ibid.*

26 IrishTimes, "Taoiseach expects constitutional assembly on Irish neutrality". *Irish Times*, May 29, 2022, Accessed July 10, 2022. <https://www.irishtimes.com/politics/2022/05/29/taoiseach-expects-constitutional-assembly-on-irish-neutrality/>.

Austria

“Austria was neutral, Austria is neutral, and Austria will remain neutral”, such were the words of Austrian Chancellor Karl Nehammer in April 2022.²⁷ The alpine republic’s neutrality is derived from the 1955 Austrian State Treaty, which re-established the country after being divided between the Allied powers after the Second World War. Neutrality was enshrined in the Austrian Constitution shortly after the enactment of the State Treaty. This prevents Austria from allowing any foreign military infrastructure to be based on its territory and prevents the country from joining any military alliance. This includes alliances based around mutual defense clauses, such as NATO’s Article 5 or Article 42(7) TEU.

With a firm constitutional basis, Austria is highly unlikely to abandon neutrality. However, the Member State’s interactions with Article 42(7) prove interesting. When Austria joined the EU alongside Finland and Sweden in 1995, the CFSP, born out of Maastricht, was still in its infancy. As such, there was no military element to this key pillar of EU foreign policy. In terms of the mutual defense clause, Austria has had a similar reaction to Ireland. Austria also interprets the clause to mean that it is exempted from participation in military action in defense of another Member

State.²⁸ Furthermore, Austria can utilize its veto powers to block any European Council decision that doesn’t account for Austrian neutrality. Austria is clearly closer to Ireland than the Nordic countries on the issue of neutrality. There is no real appetite to move closer towards NATO or an EU defense union. However, one may also argue that this is to the world’s benefit. Having a small, neutral nation in the heart of Europe can act as the perfect setting for diplomatic talks.²⁹ For example, the multilateral talks on the Iranian nuclear program have taken place in Vienna, with the Austrian government able to act as a neutral host and mediator. Given their proven respective competencies in peacekeeping and diplomacy, the EU, NATO and perhaps even the wider international community may come to appreciate the role that small, steadfastly neutral EU Member States such as Ireland and Austria can play sooner than one might think.

Malta and Cyprus: Islands of Neutrality

Neutrality remains a core element of foreign policy for both the Cypriot and Maltese governments. Cyprus has pursued neutrality since independence, which is guaranteed by the four guarantor powers: the US, UK, Greece, and Turkey. Given its border disputes and troubled relationship with Turkey, accession to NATO is unlikely.

27 Kurmayer, Nikolaus, “Austria’s neutrality in the spotlight after Sweden-Finland NATO bid”. *Euractiv*, May 18, 2022, Accessed July 10, 2022. https://www.euractiv.com/section/politics/short_news/austrias-neutrality-in-the-spotlight-after-sweden-finland-nato-bid/.

28 Gressel, Gustav, “Free-rider for life: Austria’s inability to fulfill its defense commitments”, *European Council on Foreign Relations*, June 28, 2021, Accessed July 10, 2022. <https://ecfr.eu/publication/ambiguous-alliance-neutrality-opt-outs-and-european-defence/#free-rider-for-life-austrias-inability-to-fulfil-its-defence-commitments>.

29 Gärtner, Heinz, “Austrian neutrality does not mean disengaging from international affairs. Instead, it demands an intense involvement”. *The Parliament Magazine*, May 9, 2022, Accessed July 21, 2022. <https://www.theparliamentmagazine.eu/news/article/austrian-neutrality-does-not-mean-disengaging-from-international-affairs-instead-it-demands-an-intense-involvement>.

Indeed, Cyprus' unique geopolitical situation means that it cannot be anything but neutral.³⁰ It lacks any form of military, it is dependent on the four guarantor powers to ensure its own independence, and it is involved in a precarious dispute with Turkey over the status of the northern half of the island. As a result, Cyprus will remain committed to neutrality for the foreseeable future. In Malta, neutrality has been constitutionally enshrined since 1987. Furthermore, support for neutrality remains high with two-thirds of Maltese citizens signaling robust support for the country's non-aligned status.³¹ Like its eastern counterpart, Malta has shown no real signs of abandoning neutrality in the coming years. Overall, both island states are far more resolutely neutral than their Austrian and Irish counterparts.

the other hand, Austria, Cyprus, Ireland, and Malta show no signs of rescinding their neutrality. Whether for constitutional reasons or due to lack of public support for military alignment, the development of the CSDP and any future defense union will have to evolve with these four Member States in mind. Exceptions to the rule will continue to exist, and in Kekkonen's words, four kinds of neutrality will persist in Europe.

Conclusion

Some have forecasted "the end of neutrality" as a response to the Russian invasion.³² This is, in the author's view, an exaggeration. Admittedly, Sweden and Finland have been slowly dismantling their neutrality since 1995, with the war acting as a catalyst to spur on the potentially inevitable conclusion of joining NATO. Denmark too, in its recent referendum, has given renewed impetus to the CSDP and development of the defense union. On

30 Brzozovski, Alexandra. "The brief – how neutral is neutral?" *Euractiv*, March 29, 2022, Accessed August 17, 10, 2022. <https://www.euractiv.com/section/europe-s-east/opinion/the-brief-how-neutral-is-neutral/>.

31 Martin, Ivan, "Two in three Maltese strongly support neutrality - survey". *Times of Malta*, February 9, 2022, Accessed July 10, 2022. <https://timesofmalta.com/articles/view/two-in-three-maltese-strongly-support-neutrality-survey.933304>.

32 Lynch, Suzanne, and Jacopo Barigazzi, "The End of Neutrality" *Politico*, March 24, 2022, Accessed July 10, 2022. <https://www.politico.eu/article/ukraine-russia-war-end-of-neutrality-europe-ireland-austria-finland-sweden-cyprus-malta-denmark-switzerland/>.



Introduction

CLIMATE change is arguably one of the most pressing challenges of our time. It is a problem that can only be counteracted if there is cooperation across countries and continents.¹ With the “European Green Deal”, presented in December 2019, the European Union (EU) made a first step towards becoming the first climate neutral continent in 2050.² However, this alone will not ensure that global warming will stay below the critical temperature increase of 1.5-2°C degrees. In the fight against global warming, certain EU partnerships are gaining in importance, especially with a focus on sustainable development.³ One of the most important partnerships for the EU in Southeast Asia is the cooperation with the Association of Southeast Asian Nations (ASEAN). Home to more than 1.1 billion people, the ASEAN and the EU are not only responsible for more than twenty percent of the global

CO2 emissions, but also share an interest in minimizing their impact on climate change.⁴

At the same time, the COVID-19 pandemic has forced a drastic development towards more digitalisation in the European Union and the ASEAN regions. The pandemic showed how important digital infrastructure, literacy and the digital economy are to create resilient economies that are able to combine sustainability and economic growth.⁵ Both, the green and the digital transitions can reinforce each other.⁶ However, they are not automatically aligned. It needs innovative ideas, a proactive civil society and integrative approaches to manage the twin transitions, which became priorities for the EU-ASEAN cooperation.⁷ A critical question remains how young people, whose opinions are underrepresented in institutional policy making processes, can be integrated as actors of change

- 1 Unfccc.int. “The Paris Agreement.” Accessed August 17, 2022. <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.
- 2 European Parliament, “EU Responses to Climate Change,” *European Parliament News*, July 8, 2018. Accessed August 17, 2022. <https://www.europarl.europa.eu/news/en/headlines/society/20180703STO07129/eu-responses-to-climate-change>.
- 3 European Commission, “Environment and Climate Change Mainstreaming in EU Development Cooperation,” September 2018. Accessed August 17, 2022. <https://www.oecd.org/dac/EC-Briefing-Note.pdf>
- 4 Eckstein, David, Marie-Lena Hutfils, and Maik Winges. “Global Climate Risk Index 2019.” *GermanWatch* 2018. Accessed August 17, 2022. <https://www.germanwatch.org/en/16046>.
- 5 Almeida, Fernando, Jose Duarte Santos, and Jose Augusto Monteiro. “The Challenges and Opportunities in the Digitalization of Companies in a Post-COVID-19 World.” *IEEE Engineering Management Review* 48, no. 3 (2020): 97–103.
- 6 Muench, Stefan, Eckhard Stoermer, Kathrine Jensen, Tommi Asikainen, Maurizio Salvi, and Fabiana Scapolo, Towards a green and digital future, EUR 31075 EN, Publications Office of the European Union, Luxembourg, 2022.
- 7 Delegation of the European Union to ASEAN, “45 YEARS OF RELATIONS EU-ASEAN STRATEGIC PARTNERSHIP Blue Book 2022,” 2022. Accessed August 17, 2022. <https://euinasean.eu/wp-content/uploads/2022/05/Blue-Book-EU-ASEAN-2022-eDocument-FA.pdf>.

towards the green and digital transitions.⁸ Therefore, this essay discusses the role of the EU-ASEAN youth engagement in the twin green and digital transitions. The purpose of this essay is three-fold. Firstly, it raises awareness regarding the youth's vital role in a thriving green and digital transition. Moreover, it is discussing how the twin transition can be implemented with, by, and for the next generation. Lastly, the essay presents a concrete next step to synergize efforts made by the EU and the ASEAN to increase youth engagement.

Policymakers start to recognise the urgency of youth engagement

The European Union and the Association of Southeast Asian Nations increased their efforts dramatically over the last decades to face climate change.⁹ However, experts and significant parts of civil society are more than sure that the actions taken so far are insufficient.¹⁰ EU and ASEAN citizens under thirty are loud in expressing their concerns about the future of our planet. However, this generation is not only raising its voice but also taking action when it comes to raising awareness and finding innovative solutions to address the climate crisis. Being the first generation growing up with the internet, the generation under thirty is aware of the endless opportunities digital infrastructure, literacy, and the digital economy provide.¹¹ Many young people have ideas on how to use digital technologies as tools in the development

process towards a low-carbon and climate-resilient future. The EU and the ASEAN should create platforms for these ideas wherever possible and consider their young citizens as ambassadors and pioneers in their joint effort to pursue the twin goals of the green and digital transitions.

The year 2022 marks the 45th anniversary of EU-ASEAN relations. Over the last few years, this partnership has been strengthened and was elevated to a Strategic Partnership in December 2020.¹² In 2021, the EU made the next step and recognized the centrality of the Association of Southeast Asian Nations for cooperation in the Indo-Pacific region. In the same year, Commission President Ursula von der Leyen announced that 2022 would be the European Year of Youth. In her State of the Union address, she stated that: *"Europe needs the vision, engagement, and participation of all young people to build a better future that is greener, more inclusive, and digital"*.¹³ The Commission's "Year of the Youth Declaration" acknowledges the need to involve the youth in policy making and in setting political priorities. Moreover, it boosts the "EU Youth Strategy 2019-2027", which aims to ensure that all young people participate in society.¹⁴ Inspired by the European Union and aligned with Cambodia's 2022 chairmanship theme, "ASEAN ACT: Addressing Challenges Together", the ASEAN followed in declaring 2022 as the "Year of ASEAN Youth".¹⁵ The

8 Mims, Rachel. "Speak Youth to Power: Inspiring a New Social Contract." *Ndi.org (blog)*, June 2022. Accessed August 17, 2022. <https://www.ndi.org/our-stories/speak-youth-power-inspiring-new-social-contract>.

9 EEAS, "ASEAN and EU Enhance Cooperation on Environmental Protection and Climate Change (Bangkok, 8 July 2019)." . Accessed August 17, 2022. https://www.eeas.europa.eu/node/65134_en.

10 Dryzek, John, Richard B. Norgaard, and David Schlosberg. "Climate Change and Society: Approaches and Responses." In *The Oxford Handbook of Climate Change and Society The Oxford Handbook of Climate Change and Society*, edited by John Dryzek et al., '3-18'. Oxford, England: Oxford University Press, 2012.

11 Peng, Michelle. "What Gen Z Digital Nomads Can Teach Us about Community in a Remote World." *Time*, March 9, 2022. Accessed August 17, 2022. <https://time.com/charter/6156030/gen-z-nomads/>.

12 Maksimov, Vlad. "EU, ASEAN Upgrade Their Relations to 'Strategic Partnership.'" *EURACTIV*, December 2, 2020. Accessed August 17, 2022. <https://www.euractiv.com/section/global-europe/news/eu-asean-upgrade-their-relations-to-strategic-partnership/>.

13 European Commission. "State of the Union 2021," September 14, 2021. Accessed August 17, 2022. https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2021_en.

14 Council of the European Union. "Council Resolution of 26 November 2018." *Official Journal of the European Union*, C 456, December 2018. Accessed August 17, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2018:456:FULL>.

15 Asean, "#ASEANyouth2022 – ASEAN Declares 2022 as the Year of ASEAN Youth," February 23, 2022. Accessed August 17, 2022. <https://asean.org/aseanyouth2022-asean-declares-2022-as-the-year-of-asean-youth/>.

urgency with which policymakers start to recognize, involve, and engage young people on topics such as climate change and digital transformation stems from an increasing awareness that tomorrow's generation has to live with the decisions made today. This awareness can serve as a basis for youth engagement that goes beyond the traditional EU and ASEAN frameworks and that sets the agenda for synergies for a green and digital world. Additionally, it fosters the recognition that new ways must be found to bring the perspectives of the youth into formal spaces, where the most critical decisions regarding digitalization and the fight against the climate crisis are taken.

Studies show that the ideas and opinions of young people remain underrepresented in political decision-making processes.¹⁶ That leads to the paradox that, especially regarding green and digital policies, the demographic group affected the most by the decisions made is not sufficiently involved in the decision-making processes.¹⁷ Young people represent around 30% of the European population and 34% of the ASEAN population.¹⁸ Behind these numbers are the scientists, farmers, diplomats, politicians, employees, and employers of tomorrow. The twin transitions will not be achievable without sacrifice and behavioral change in their lifestyles. Especially, regarding the fight against climate change, the cut of man-made greenhouse gases, and the phase out of fossil fuels will not be possible without a re-thinking of consumer behaviours.¹⁹

To ensure its successful implementation, young people must stand behind new policies that will lead towards a greener and more sustainable society. This only happens if the young generation feels that it is listened to and that its concerns are acknowledged and considered. So far many of the initiatives like the "Year of the Youth" imply that they see the young people as a chance for the future. However, in such critical times, in which trend-setting decisions are made, that is simply not enough. It needs true opportunities of participation to ensure representation of the interests of young people. Many young EU and ASEAN citizens are aware of the problems regarding climate change and digitalization but are willing to create new and innovative solutions. To involve young people as agents of change and to include them in the decision-making processes on topics they are concerned about, the EU and the ASEAN should provide their youth with a joined platform to exchange ideas, create solutions, and make recommendations that go beyond the already existing forums.

First steps into the right direction

In the last years, the EU and the ASEAN have created multiple opportunities for young citizens to interact with like-minded people. In Europe, some of the most recent examples are the "European Youth Event" in 2021²⁰ and the "Young European Ambassadors", an initiative launched in order to build bridges between young citizens from EU member states and

16 Organization for Economic Cooperation and Development. "Engaging Young People in Open Government," 2018. Accessed August 17, 2022. <https://www.oecd.org/mena/governance/Young-people-in-OG.pdf>.

17 Petmesidou, Maria, and Ana M. Guillén. "Europe's Green, Digital and Demographic Transition: A Social Policy Research Perspective." Transfer: European Review of Labour and Research. July 2022.

18 EEAS, "EU and ASEAN Invite Young Leaders to Take Part in Shaping the Future of EU-ASEAN Relations." February 9, 2022. Accessed August 17, 2022. https://www.eeas.europa.eu/eeas/eu-and-asean-invite-young-leaders-take-part-shaping-future-eu-asean-relations_en.

19 Nicholas, Kimberly A., and Seth Wynes. "Changing Behavior to Help Meet Long-Term Climate Targets." *World Resources Institute*, March 20, 2019. Accessed August 17, 2022. <https://www.wri.org/climate/expert-perspective/changing-behavior-help-meet-long-term-climate-targets>.

20 European Youth Event. "Previous Editions," January 13, 2021. Accessed August 17, 2022. <https://european-youth-event.europarl.europa.eu/en/previous-editions/>.

Eastern partner countries.²¹ In the ASEAN, youth ministers were appointed, and summits with youth delegations and experts were organized.²² Moreover, EU and ASEAN joint efforts were first made to establish an exchange of perspectives between young Europeans and Southeast Asians. With the “ASEAN-EU Youth Forum” in 2017, young farmers were brought together to discuss their approaches to agriculture.²³ With the virtual “EU-ASEAN Young Leader Forum”, held at the beginning of this year, a platform was provided for ninety young leaders to participate in different workshops and discuss the similarities and differences in their perspectives.²⁴ This exchange is a step in the right direction of joint EU-ASEAN youth engagement. However, providing a platform for sharing experiences is not enough. All too often the doors to decision-makers remain closed to young people. Channels and sponsors are needed to bring the ideas of young people from the already established platforms to the negotiating table.

What has to come next?

A representative and problem-based “Young EU-ASEAN Summit” is needed to encourage young people to become part of the twin green and digital transitions, to hear their concerns, and gather their ideas. This summit could gather youth representatives from all the twenty-seven EU member states and the ten ASEAN member states. The summit’s goal could be to foster an exchange of approaches, concerns, ideas, and solutions. Moreover, the representatives could be mandated to draft policy recommendations regarding

digitalization and the fight against climate change in the form of a *communiqué* to be presented at the annual “EU-ASEAN Summit” and to the “EU-ASEAN Joint Cooperation Committee”. The *communiqué* would be handed over to the heads of the delegations at a side-event of the “EU-ASEAN Summit”. After the hand-over, the *communiqué* would be presented to the media, which would give the authors the chance to present their ideas to the public. The presented policy recommendations would have the disadvantage of not being in any form binding to the delegations. However, handing them over and presenting them to the media would create attention and ensure that the voices of young people are being heard in the first place.

Youth representatives are ambassadors of the twin transitions and of the EU-ASEAN collaborations. As a next step, the EU and the ASEAN should support the establishment of youth representatives. These would aim to raise awareness for a green and digital transition and give more young people the opportunity to discuss ideas, solutions, and concerns. In this way, the Summit and the Representatives become a platform that allows young people to be active EU and ASEAN citizens and to make their voices heard. Such a forum, which brings together young people’s ideas in a consistent, structured, and problem-based way, could be the kick-off for a long-lasting and strategic partnership between young people from the EU and the ASEAN. The new platform for youth engagement could be seen as a synergy of political, economic, and socio-cultural cooperation that will advance

21 EU NEIGHBOURS east. “Young European Ambassadors.” Accessed August 17, 2022. <https://euneighbourseast.eu/young-european-ambassadors/>.

22 ASEAN, “ASEAN Youth Ministers Work towards a Cohesive and Responsive Community,” 2020. Accessed August 17, 2022. <https://asean.org/asean-youth-ministers-work-towards-a-cohesive-and-responsive-community/>.

23 ASEAN, “ASEAN EU Youth Forum,” 2016. Accessed August 17, 2022. https://www.aseanfoundation.org/asean_eu_youth_forum.

24 EURAXESS. “EU and ASEAN Invite Young Leaders to Take Part in Shaping the Future of EU-ASEAN Relations,” February 10, 2022. Accessed August 17, 2022. <https://cdn2.euraxess.org/worldwide/asean/eu-and-asean-invite-young-leaders-take-part-shaping-future-eu-asean-relations>.

the twin green and digital transitions and bring young people in the EU and in the ASEAN closer together. The ties developed through such a shared initiative between young people in the EU and the ASEAN have the potential to serve as a basis for future collaborations in all sectors and situations and to foster the EU-ASEAN dialogue.

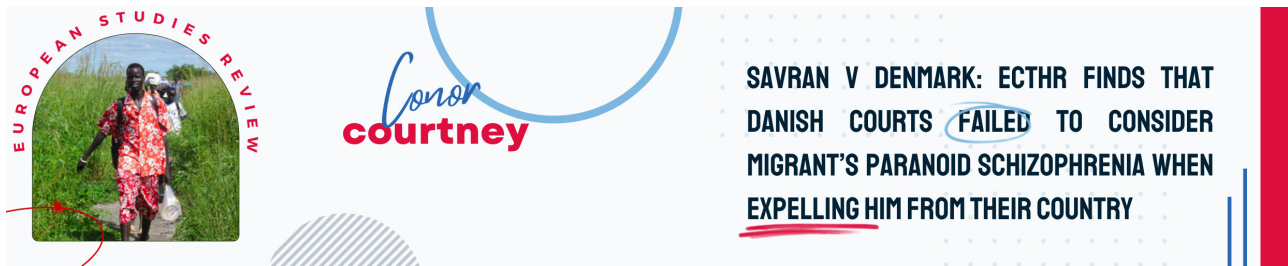
Conclusion

To conclude, this paper discussed the importance of youth engagement in the twin green and digital transitions. The voices of the younger generation are underrepresented in formal spaces where vital decisions are made. However, it is crucial that young people are more represented in formal spaces as it will increase their support for the decisions made.

Young people have the potential to have valuable input and ideas that should not be ignored. Regarding the green and digital transitions, the next generation can bring in its creativity to help society as a whole to become more sustainable through developing new, digital solutions. To empower such processes, the EU and the ASEAN should extend their dialogues to strategic partnership projects focusing on the youth. A concrete step can be made in the form of a representative, "Young

EU-ASEAN Summit" being mandated to formulate recommendations at the "EU-ASEAN Summit" and to the "EU-ASEAN Joint Cooperation Committee". This initiative would acknowledge young people's role in European and Southeast Asian societies. Across the continents, young people are bridge builders and agents for change. To quote Ursula von der Leyen: *"From climate to social to digital, young people are at the heart of our policymaking and political priorities"*.²⁵ A twin transition with, by, and for the next generation is only possible through young people's direct engagement and involvement. It is time to recognize young people's role in the twin transition and to rethink how to include them into the formal decision-making processes.

²⁵ European Commission. "Commission Kick-Starts Work to Make 2022 the European Year of Youth," October 2021. Accessed August 17, 2022. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5226.



Introduction

THE past few months have been a tumultuous period within the borders of the European Union. In response, many Member States have been at the forefront of inviting European refugees and citizens into their borders, and the Migration Policy Institute has argued that *"The Ukrainian Conflict Could Be a Tipping Point for Refugee Protection"*.¹ However, there has also been legal precedence relating to the expulsion of EU citizens. One such case involved a migrant, who was expelled from Denmark following several criminal convictions.

This case, against the Kingdom of Denmark, was lodged with the European Court of Human Rights under Article 34 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, by a Turkish national, Mr Arif Savran (the applicant), on 16 November 2015.²

The applicant complained that his removal from Denmark, to Turkey, constituted a breach of Article 3 of the Convention. Article 3 encompasses the prohibition

against torture, which includes inhuman or degrading treatment or punishment.³ This was invoked because the removal from Denmark prevented him from receiving appropriate and necessary psychiatric treatment, including follow-up and supervision, in connection with his paranoid schizophrenia. He also alleged that his expulsion order had been in breach of Article 8 of the Convention, which encompasses the right to respect for family and private life.⁴ The panel of the Grand Chamber accepted the request to determine the case on 27 January 2020.

Background

The applicant was born in 1985 and now resides in the village of Kuşukuşağı in Turkey. In 1991, when he was six years old, he entered Denmark with his mother and four siblings to join his father.

On 29 May 2006, the applicant, as part of a group of several persons, attacked a man. Several kicks were administered to his head and body, thereby inflicting serious traumatic brain injury that caused his death.

¹ Meghan Benton and Andrew Selee, "The Ukrainian Conflict Could Be a Tipping Point for Refugee Protection", Migration Policy Institute website, May 2022

² <https://www.migrationpolicy.org/news/ukrainian-displacement-refugee-protection>

³ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 3.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 8. Article 8 paragraph 2 goes on to state that, "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society [...] for the prevention of disorder or crime".

Following this, a report was created by the Immigration Service. This noted that on 1 February 1991 the applicant had been granted residence, with a possibility of permanent residence, by reference to his father living in Denmark. On or before 11 May 2004 his residence permit had been made permanent. The applicant had been lawfully resident in Denmark for approximately fourteen years and eight months; his mother and four siblings lived in Denmark; and he had been to Turkey between five and ten times for periods of two months to visit his family. However, he had not been to Turkey since 2000, he had no contact with persons living in Turkey, did not speak Turkish and spoke little Kurdish.

The report also noted that he had stated that he heard voices and suffered from a thought disorder and that he was being administered sedatives. However, in view of the information given by the prosecution on the nature of the crime he committed, the Immigration Service endorsed the prosecution's recommendation of expulsion.

A medical report was also created for the applicant. An examination of the applicant's mental status on 13 March 2008 claimed, in particular, that it was highly likely that he had a slight mental impairment, but he was not found to be suffering from a mental disorder and could not be assumed to have been suffering from a mental disorder at the time when the crime had been committed.

The report also mentioned that, in the context of his medical assessment, the applicant had insisted that he had experienced both visual and auditory hallucinations, but no objective findings

of hallucinations had been made. He had made similar claims in the course of previous medical assessments but those complaints had *"apparently ceased when the applicant had no longer found it relevant to make them"*. The report added that the applicant's description of those symptoms did not correspond to the usual description of hallucinations. However, the report stressed that the applicant needed long-term regular and well-structured therapy, and recommended that he should be committed to a secure unit of a residential institution for the severely mentally impaired.

The ECtHR has previously found that such institutions must be adequately equipped to prevent such patients from being endangered in their care. The 2014 ECtHR decision in *Campeanu v Romania* found that there had been a breach of Article 2 (Right to life) where a patient had been placed:

*"In medical institutions which were not equipped to provide adequate care for his condition; that he had been transferred from one unit to another without proper diagnosis; and, that the authorities had failed to ensure his appropriate treatment with antiretroviral medication."*⁵

Prison systems may also not be adequately equipped for dealing with such patients, and this may amount to a violation of ECHR rights. In *Price v United Kingdom*, the court found that ECHR Article 3 had been violated where a patient, who was missing limbs, had to sleep in their wheelchair in prison, because the beds were not adapted to meet their needs, and had to rely on prison officers to use the bathroom.⁶

⁵ ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpăanu v. Romania*, Application No. 47848/08, Judgment 17.7.2014 [GC].

⁶ ECtHR, *Price v. United Kingdom*. Application No. 33394/96, Judgment 10.07.2001.

Court decisions

On 9 October 2007, the High Court of Eastern Denmark convicted the applicant under Articles 245(1) (serious/aggravated assault) and 246 (highly aggravated assault) of the Penal Code and sentenced him to seven years' imprisonment and expulsion from Denmark with a permanent ban on re-entry.⁷

On appeal, on 22 May 2008 the Supreme Court quashed the judgement and returned the case to the High Court for a fresh examination. With reference to the available medical evidence the court stated, in particular, that it had doubts that the sentence of imprisonment had been justified in the circumstances of the present case.

By a judgement of 17 October 2008, the High Court found that the applicant had violated Articles 245(1) and 246 of the Penal Code but was exempt from punishment. Instead, it sentenced him to committal to the secure unit of a residential institution for the severely mentally impaired for an indefinite period. The court also ordered the applicant's expulsion from Denmark with a permanent ban on his re-entry.

The ECtHR Decision

It was against the backdrop of these court decisions that the European Court of Human Rights found itself considering the applicant's case. A central issue to be determined was, given the applicant's severe mental health issues at the time of the crime, and his subsequent improvement through treatment, whether

his expulsion and permanent ban on re-entry was justified and reasonable.

In the context of the ECHR, any detention of mentally disordered persons relates to the need to provide therapy, medication or other clinical treatment to cure or alleviate their condition(s), or where they require control and supervision to prevent them causing harm to themselves or other persons.⁸ Therefore, the "detention" of a person as a mental-health patient will be "lawful" only if effected in a hospital, clinic, or other appropriate institution. This applies, according to *Hutchison Reid v the United Kingdom*, even when the mental illness or condition is not amenable to treatment.⁹

In assessing any improvement to his mental health following detention, the court began by considering the applicant's life in Denmark. He arrived in Denmark aged six; he was educated and spent his formative years there; he was issued with a residence permit and remained lawfully resident in the country for fourteen years and eight months. He was therefore a "settled migrant" and could engage Article 8 under its "private life" aspect. A "settled migrant" refers to persons who have already been formally granted a right of residence in a host country. Where the rights of settled migrants are subsequently withdrawn, it may be for reasons such as the case here, where the person concerned was convicted of a criminal offence.¹⁰

Prior to his expulsion, he had a close relationship with his mother, his four siblings and their children, who all lived

⁷ Baker McKenzie, 'Fighting Domestic Violence: Denmark' <<https://resourcehub.bakermckenzie.com/en/resources/fighting-domestic-violence/europe/denmark/topics/1legal-provisions>>

⁸ ECtHR, *Hutchison Reid v the United Kingdom*, Application no. 50272/99, § 52, ECHR 2003-IV

⁹ *Ibid.*

¹⁰ ECtHR, *Üner v the Netherlands*, Application no. 46410/99, Judgment 18.10.2006 [GC] (54-60) - The Court discussed this topic and set out the relevant criteria to assess compatibility with Article 8 of the Convention for expulsion of settled migrants.

in Denmark. While he had remained in forensic psychiatric care, they had visited him and he had visited them. He stressed that his mental vulnerability was an additional element of his dependence on them, and argued that he had had a “family life” with them, which had been interrupted by his expulsion.

The court was somewhat sceptical of this account. When the expulsion order became final, he was 24 years old, which the court considered to be the very edge of a ‘young adult’. They also noted that he had been placed in foster care periodically as a child, and therefore had already experienced living away from his family. Here, the court distinguished the similar case of *Pormes v the Netherlands*, which had also involved residency rights being refused due to a series of serious offences. There, the court found there had been a breach of the Article 8 family life rights where the applicant, “at the age of 4 years old, was raised by his aunt and uncle, both Dutch nationals, after his parents passed away”.¹¹

The Court was also not convinced that the applicant’s mental illness, albeit serious, could alone be sufficient evidence of his dependence on his family members to bring the relationship between them within the sphere of “family life” under Article 8 of the Convention. In particular, it had not been demonstrated that the applicant’s health condition incapacitated him to the extent that he was compelled to rely on their care and support in his daily life. Moreover, it was not argued that the applicant was dependent on any of his relatives financially. This can be contrasted with the case of *Emonet and Others v Switzerland*, where the court found that

a paraplegic child should not have their familial ties to their mother severed, just because they had agreed to their adoption by their mother’s boyfriend.¹²

The Court found that the expulsion could not breach his Article 8 Convention rights, as long as it was “in accordance with the law”, and pursuing one or more legitimate aims and “necessary in a democratic society”. So these were the next queries that the court addressed.

1) Lawfulness and legitimate aim

It was not disputed that the impugned interference was “in accordance with the law”, as it had been accomplished through a legislative instrument, and pursued the legitimate aim of preventing disorder and crime. However, the parties disagreed as to whether the interference was “necessary in a democratic society”.

2) “Necessary in a democratic society”

In assessing whether it was necessary, the Court considered the duration and cause of the exclusion order. Further, the Court noted that very serious reasons are required to justify expulsion for a settled migrant who has lawfully spent all, or the major part, of his childhood and youth in the host country. The court considered *Külekci v Austria*, where the Court rejected a complaint concerning the deportation of a Turkish national from Austria, after having lived in Austria his entire life. In *Külekci*, when the applicant was still a minor, he was convicted for a series of violent robberies of elderly women. At the age of nineteen, the applicant was deported to Turkey. There, the court noted that these crimes went beyond

¹¹ ECtHR, *Pormes v the Netherlands*, Application no. 25402/14, Judgment 28.07. 2020, § 48.

¹² ECtHR, *Emonet and Others v Switzerland*, Application no. 39051/03, Judgment 13.12.2007, § 35; *Belli and Arquier- Martinez v. Switzerland*, Application no. 65550/13, Judgment 11.12.2018, § 65; *I.M. v. Switzerland*, Application no. 23887/16, Judgment 9.4.2019, § 62.

mere juvenile delinquency.¹³ The Court's task here was to ascertain whether the impugned measures struck a fair balance between the relevant interests involved, namely the individual's rights protected by the Convention on the one hand, and the community's interests on the other. The Court observed that, because of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion. The state of his health was required to be taken into account as one of the balancing factors.

The question was whether national proceedings adequately took into account the fact that he was suffering from a serious mental illness, namely paranoid schizophrenia, at the moment when he committed the crime. They determined that the High Court made only a limited attempt to consider whether there had been a change in the applicant's personal circumstances since obtaining psychiatric treatment.

Given the immediate and long-term consequences for the applicant of the expulsion order, and the permanent nature of the ban on re-entry, the Court considered that the national authorities did not give a sufficiently thorough and careful consideration to the Article 8 rights of the applicant, and did not carry out an appropriate balancing exercise with a view to establishing whether those applicant's rights outweighed the public interest in his expulsion for the purpose of preventing disorder and crime.

The High Court did not consider any changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the

background of his mental state at the time of the commission of the offence, which had exempted him from punishment, and the apparent beneficial effects of his treatment, which had led to his being discharged from forensic psychiatric care.

Conclusion

Ultimately the Court held that although there had been no violation of his Article 3 Convention rights, there had been a violation of his Article 8 rights. Further, such a violation constituted, in itself, sufficient just satisfaction for an award of non-pecuniary damages to the applicant. The court ordered that the respondent State pay the applicant, within three months, €20,000.

The Court also used this opportunity to issue guidance framed as *How should the Court's judgment be read and what does it imply in practice*, highlighting that it did not find that the expulsion, or rather the refusal to lift the expulsion order, itself constituted a violation of Article 8, or that the permanent ban on re-entry in itself rendered the measure disproportionate. Effectively, the Court did not find a *substantive* violation of Article 8. Rather, the Court identified a number of elements which, in its view, were "*insufficiently assessed by the domestic courts*", in examining the proportionality of refusing to lift the order. Consequently, the Court refrained from taking a stand on how the applicant's case, were he to reopen it in domestic courts, should be decided on the merits.

Here, the Court also refrained from indicating any individual measures in this case, which is sometimes done in

¹³ ECtHR, *Kulekci v Austria*, Application no. 30441/09, Judgment 01.06.2017, § 39.

order to assist States in complying with the Court's judgment.¹⁴ The court neither indicated that the expulsion order should be lifted, nor that the proceedings should be reopened. It was silent on these issues, leaving the initiative for such actions in the hands of the applicant.

Given the limited guidance to domestic courts, there may also need to be another domestic assessment, in light of all the elements addressed in the Court's reasoning. Therefore, the applicant has no guarantee that the expulsion order will be lifted; it may simply be reduced, or lifted in the future, pursuant to what is permissible under domestic legislation. The Court was also cognisant of the possible impact of the delay in hearing the case. The applicant has now been living in Turkey since 2015, and this may affect any arguments as to his community ties; socially, linguistically, and culturally. Finally, the applicant may be affected by administrative issues, and may not necessarily be permitted to enter Denmark while the request to lift his expulsion is being processed.

Ultimately, it will be for the respondent State, under the supervision of the Committee of Ministers under Article 46(2) of the Convention, to adopt the necessary individual and general measures to abide by the Court's judgment.¹⁵

¹⁴ ECtHR, *Mehemi v France (no. 2)*, Application no. 53470/99, § 46-47, ECHR 2003-IV.

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 46: Binding force and execution of judgments, §2.



Introduction

THE conflict in Eastern Europe triggered by the Russian invasion of Ukraine led to far-reaching implications, not only revolutionizing geopolitical tiles and placemarks, but also accelerating underway processes that needed an impetus. The Ukrainian candidacy for the EU is an example. The process of moving closer to the Union dates back to the beginning of this century: obtaining full EU membership status was first declared as a strategic goal by President Yushchenko shortly after his election in 2005.¹ But it was not until 2014 that the process sprinted; following the *Euromaidan* protests, the European Parliament (EP) passed a resolution recognizing Ukraine's right to apply for membership.² This led to the signing of the *European Union-Ukraine Association Agreement*, which commits Ukraine to economic and judicial reforms to align its policies and legislation with those of the EU.³ Thus, in more than a decade since the first EU rapprochement, little or nothing had happened. This situation changed with the 2022 war, which revived

the Ukraine's accession process. Yet, while the conflict has increased enthusiasm for Ukrainian membership, it is necessary to assess whether Ukraine can be considered suitable for EU accession, especially concerning its democratic standards. Given the recent struggles the Union has faced resulting from legal violations by certain of its member States, it would be unwise to prioritize geopolitical interests over meeting fundamental accession criteria.

Hopping on the bandwagon

Four days after Russian invasion, President Zelensky officially signed Ukraine's application for EU membership and addressed the EP to implement a fast-track procedure for a swift admission⁴ – thus strongly believing in the great benefit that the accession would bring to its people.⁵ During its visit to Kyiv, European Commission Chief von der Leyen handed the questionnaire to obtain the status of “candidate country” to Zelensky, pledging a speedier start to Ukraine's bid to become a member.⁶ In just ten days, Zelensky

1 Mefford, Brian. “Rethinking Yushchenko.” *Atlantic Council*, February 23, 2021. Accessed July 21, 2022. <https://www.atlanticcouncil.org/blogs/ukrainealert/rethinking-yushchenko/>.

2 Oleinikova, Olga. “Vladimir Putin is making Ukrainians more Ukrainian.” *Politico*, March 22, 2022. Accessed July 21, 2022. <https://www.politico.eu/article/vladimir-putin-make-ukraine-ukrainian/>.

3 Van der Loo, Guillaume & Peter, Van Elsuwege. “The EU-Ukraine Association Agreement after Ukraine's EU membership application: Still fit for purpose.” *European Policy Centre/Egmont*, March 14, 2022. Accessed July 21, 2021. <https://www.egmontinstitute.be/the-eu-ukraine-association-agreement-after-ukraines-eu-membership-application-still-fit-for-purpose/>.

4 Bélanger, Marie-Eve. “What prospect is there of Ukraine joining the EU?” *European Politics and Policy*, March 16, 2022. Accessed July 21, 2022. <https://blogs.lse.ac.uk/euoppblog/2022/03/16/what-prospect-is-there-of-ukraine-joining-the-eu/>.

5 Schengenvisa. “Ukraine Completes EU Membership Questionnaire.” *Schengen Visa*, April 19, 2022. Accessed July 21, 2022. schengenvisa.info/news/ukraine-completes-eu-membership-questionnaire/.

6 Brzozowski, Alexandra. “Ukraine completes questionnaire for EU membership.” *EURACTIV*, April 19, 2022. Accessed July 21, 2022. euractiv.com/section/enlargement/news/ukraine-completes-questionnaire-for-eu-membership/.

submitted the document –a record time by EU standards, as it generally takes years. In June, the EP adopted a resolution calling for the immediate granting of candidate status to Ukraine, awarded to it by the European Council under the good omens of its President Michel and von der Leyen, who reassured that the Ukrainian people “belong in the European family”.⁷

Ukraines’ accession benefits are indeed numerous, not only given the ongoing conflict against Russia, but also for the country’s long-run future. Short-term gains include EU military support to Ukraine,⁸ as its members are bound by a mutual defense clause –Article 42(7) TEU– that requires other members to aid a country if it is “the victim of armed aggression on its territory”.⁹ Economically, Ukraine could also benefit from favorable rights granted to members –including free movement throughout the bloc and single market access.¹⁰ The Union could benefit from Ukraine’s entry as well, as it would be “a bold, courageous, and meaningful political statement”,¹¹ and a powerful geopolitical message to Moscow.

Yet those great membership perks are counterbalanced by a cumbersome and long accession process. The questionnaire is used to determine whether a country fulfills the requirements to join the EU as defined in the so-called “Copenhagen criteria”, established by the 1993 European Council summit. It involves three key

areas: political, economic, and the EU *acquis* criteria. The first requires stability of democratic institutions guaranteeing the rule of law and human rights; the second demands a functioning market economy; the last checks the ability to take on the membership obligations in implementing the standards and policies of the body of EU law –the *acquis communautaire*.¹² It is the latter that typically yields more difficulties; due to the considerable volume of –steadily increasing– EU legislation each candidate country is required to implement as national law, the negotiations take time to complete. This is indeed not an easy and swift task, even for advanced democracies. Furthermore, prospective members are expected to promote and respects EU values –among which democracy and the rule of law, as listed in Article 2 TEU,¹³ whereas Article 49 TEU states that only EU candidates respecting and promoting these values may become members.¹⁴

Democratic faults and flaws

Although Ukraine has been recognized as a “suitable” candidate, it actually still has a long way to go to adhere to European standards. Over the years, Ukraine has always stood out for issues regarding the quality of the rule of law. Two reports rating the level of political rights, civil liberties and the functioning of governments support this statement. In its latest *Nations in Transit* report, *Freedom*

7 Drozdiak, Natalia & Krasnolutska, Daryna. “Ukraine Belongs in the ‘European Family,’ EU Chief Says on Kyiv Trip.” *Bloomberg*, April 8, 2022. Accessed July 21, 2022. [bloomberg.com/news/articles/2022-04-08/ukraine-belongs-in-european-family-eu-chief-says-on-kyiv-trip](https://www.bloomberg.com/news/articles/2022-04-08/ukraine-belongs-in-european-family-eu-chief-says-on-kyiv-trip).

8 Durkee, Alison. “Will Ukraine Join The EU? After Country Completes Membership Questionnaire, Here’s What Could Come Next.” *Forbes*, April 18, 2022. Accessed July 21, 2022. [forbes.com/sites/alisondurkee/2022/04/18/will-ukraine-join-the-eu-after-country-completes-membership-questionnaire-heres-what-could-come-next/?sh=4ae6b3b319f9](https://www.forbes.com/sites/alisondurkee/2022/04/18/will-ukraine-join-the-eu-after-country-completes-membership-questionnaire-heres-what-could-come-next/?sh=4ae6b3b319f9).

9 European Union. “Mutual defence clause.” *EUR-Lex*. Accessed July 21, 2022. eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:mutual_defence.

10 European Commission. “Free movement – EU nationals.” *European Commission*. Accessed July 21, 2022. ec.europa.eu/social/main.jsp?catId=457.

11 Kwaśniewski, Aleksander, Kaljulaid, Kersti, Bildt, Carl, Fouks, Stéphane, Ischinger, Wolfgang, Pinchuk, Victor, & Rasmussen, Anders Fogh. “What Ukraine needs now.” *Atlantic Council*, February 24, 2022. Accessed July 21, 2022. atlanticcouncil.org/blogs/ukrainealert/what-ukraine-needs-now-2/.

12 European Union. “Accession criteria (Copenhagen criteria).” *EUR-Lex*. Accessed July 21, 2022. eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:accession_criteria_copenhagen.

13 Consolidated version of the Treaty on European Union - Title I Common provisions - Article 2.

14 Consolidated version of the Treaty on European Union - Title VI Final provisions - Article 49 (ex Article 49 TEU).

House classified Ukraine as a *Transitional or Hybrid Regime*,¹⁵ while for the *Freedom in the World* report it is to be considered *Partly Free*: thus, for *Freedom House*, Ukraine “cannot be described as a stable, consolidated democracy” as the country constantly demonstrates back and forth moves in its democratic development.¹⁶ This is also confirmed by the *Bertelsmann Transformation Index* in the 2022 report, which categorizes it as a *Defective Democracy*, noting that the Ukrainian people themselves are dissatisfied with the functioning of democratic processes.¹⁷

The Ukrainian constitution ensures the separation of powers.¹⁸ However, since Zelensky became President and his party won the parliamentary majority in 2019, it appears that the formal division of powers may be weakening. The Office of the President has almost become the single decision-making authority.¹⁹ Lately, Ukraine faced difficulties in the national democratic governance field; mainly due to the Covid-19 pandemic, Ukraine’s Parliament, under pressure from the President, hastily adopted a series of laws in the “turbo mode” legislative process, which consists of a fast and unified manner, frequently violating the legislature’s procedural.²⁰ Zelensky also reorganized key political personnel, replacing the head of the Office of the

President, the Prosecutor General, and rearranging the entire executive branch; the President’s new appointments have been controversial and point to an informal coalition of different influence groups in his party.²¹

Over the past year, even without possessing a solid monolithic majority, the President worked to concentrate the power of security and law-enforcement agencies under the executive’s direct control, including the National Security and Defense Council.²² The latter has become one of the most controversial institutions as it has expanded to combine public and judicial powers and, in the absence of independent oversight, it has appeared selective and opaque in its decision-making.²³ Indeed, it sanctioned a wide range of private companies owned by pro-Russian parliamentarians, including the former President; critics said that such use of sanctions violated Ukraine’s constitution and international treaties, weakened the rule of law’s basic principles and posed a serious threat to citizens’ rights and civil liberties.²⁴ In addition, the *Deoligarchy Law* expanded the agency and the President’s powers to restrict the political, media, and economic activities of alleged oligarchs –or whoever the President considered as such;²⁵ the Parliament Chairman, who questioned

15 Bidenko, Yuliya. “Ukraine: Country Report.” in *Nations in Transit 2022*, *Freedom House*. Accessed July 21, 2022. freedomhouse.org/country/ukraine/nations-transit/2022.

16 Freedom House. “Ukraine: Country Report.” in *Freedom in the World 2022*, *Freedom House*. Accessed July 21, 2022. freedomhouse.org/country/ukraine/freedom-world/2022.

17 BTI Transformation Index. “Ukraine.” in *BTI 2022 Country Report*. Accessed July 21, 2022. bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2022_UKR.pdf.

18 Constitution of Ukraine - Chapter I - Article 6.

19 *Ibid.*

20 Bidenko, Yuliya. “Ukraine: Country Report.” in *Nations in Transit 2022*, *Freedom House*. Accessed July 21, 2022. freedomhouse.org/country/ukraine/nations-transit/2022.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 Polityuke, Pavel & Zinets, Natalia. “Ukrainian lawmakers pass law on oligarchs after assassination attempt.” *Reuters*, September 23, 2021. Accessed July 21, 2022. [reuters.com/world/europe/ukrainian-parliament-passes-law-oligarchs-final-reading-2021-09-23/](https://www.reuters.com/world/europe/ukrainian-parliament-passes-law-oligarchs-final-reading-2021-09-23/).

the constitutionality of the policy in a dissenting opinion, was dismissed from office.²⁶ Also, undermining democratic institutional resilience is the government reshuffle of ten ministers with members loyal to Zelensky's party, with Parliament merely approving presidential candidates without discussing their programs.²⁷

The judicial field and the rule of law are also in a problematic situation, since the judiciary remains perceived as one of the most corrupt and least trusted State institutions: 64% of Ukrainians believe that bribery is standard practice in the courts, and only 10% stated that they fully or mostly trust the judiciary.²⁸ Reforms of this branch have not yet been successful; its independence has not been achieved, primarily due to the country's highly volatile political situation and the lack of a tradition of the rule of law.²⁹ In 2020, Zelensky unsuccessfully attempted to dissolve the Constitutional Court and dismiss the Chief Justice, who proved to be a strong veto player in the reform process,³⁰ arguing that most provisions of Zelensky's judiciary law were unconstitutional.³¹ While the Supreme Court reversed the dismissal, Zelensky attempted to appoint two new judges, which the Court refused to swear in. Last

year, the Constitutional Court declared unconstitutional several provisions of the *Law on the Prevention of Corruption*.³² This decision prohibits gathering, storing, and publishing e-declarations as well as monitoring the lifestyle of public officials; it also restricts open access to its register and abolishes criminal liability for providing false information on assets. Its decision was broadly criticized by the international community, including the Council of Europe's Commission for Democracy through Law – better known as Venice Commission, for its vague reasoning and potentially negative impact on the prevention and investigation of corruption, undermining previous efforts to establish effective control mechanisms.³³ The proposed reform of the Security Services of Ukraine also had worrisome undemocratic provisions, including government checks and balances; human rights observers warned that the new amendments could dangerously increase the security body's powers and threaten citizens' fundamental freedoms and personal data protection, while eliminating courts' power in investigating security issues.³⁴

Indeed, Ukraine's major issue is corruption; public opinion data from 2021 suggest that 49% of Ukrainians consider

26 Зубкова, Даша. "Rada Dismisses Razumkov." *Ukrainian News*, October 7, 2021. Accessed July 21, 2022. ukranews.com/en/news/805957-rada-dismisses-razumkov.

27 "Useless Officials." *Kyiv Post*, November 5, 2021. Accessed July 21, 2022. kyivpost.com/article/opinion/editorial/editorial-useless-officials.html.

28 Bidenko, Yuliya. "Ukraine: Country Report." in *Nations in Transit 2022*, Freedom House. Accessed July 21, 2022. freedomhouse.org/country/ukraine/nations-transit/2022.

29 BTI Transformation Index. "Ukraine." in *BTI 2022 Country Report*. Accessed July 21, 2022. bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2022_UKR.pdf.

30 Freedom house. "Ukraine: Country Report." in *Freedom in the World 2022*, Freedom House. Accessed July 21, 2022. freedomhouse.org/country/ukraine/freedom-world/2022.

31 BTI Transformation Index. "Ukraine." in *BTI 2022 Country Report*. Accessed July 21, 2022. bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2022_UKR.pdf.

32 Bidenko, Yuliya. "Ukraine: Country Report." in *Nations in Transit 2022*, Freedom House. Accessed July 21, 2022. freedomhouse.org/country/ukraine/nations-transit/2022.

33 *Ibid.*

34 *Ibid.*

it the State's most important concern. In 2012, *Ernst & Young* put Ukraine among the three most-corrupt nations among 43 surveyed;³⁵ in 2015 *The Guardian* called Ukraine "the most corrupt nation in Europe";³⁶ according to *Transparency International's* 2021 *Corruption Perceptions Index*, Ukraine ranked 122nd out of 180 countries in 2021, the second most corrupt in Europe.³⁷ By mid-2020, the National Anti-Corruption Bureau of Ukraine had launched around 1.000 investigations and filed 265 cases, but had secured only 41 convictions.³⁸ In 2021, the European Court of Auditors issued a report criticizing the ineffectiveness of the EU's anti-corruption initiatives in Ukraine, stating that the "existing environment puts the sustainability of anti-corruption institutions at risk, as they still rely on the unreformed judicial, prosecution, and law-enforcement sectors".³⁹ The main causes of corruption are a weak justice system and an over-controlling, non-transparent government, combined with business-political ties and a weak civil society. In the political area, Ukrainian politicians have regularly accused each other of corruption –since 2010, 400 politicians⁴⁰ and 500 sitting officials have faced criminal charges: even the President, Prime Minister, Speaker of Parliament and Prosecutor General were prosecuted.⁴¹ As for the legal sector, the

Ukrainian judiciary is widely regarded as corrupt, with little independence of the judiciary from the executive and rampant political pressure exerted on judges; independent lawyers and human rights activists have complained that Ukrainian judges are regularly pressured to deliver a certain verdict.⁴² Although attempts to curb endemic corruption are present, equally numerous are the attempts to stop the work of these anti-corruption agencies; influence and interference have occurred in the High Anti-Corruption Court and the Specialized Anti-Corruption Prosecutor's activities, which have faced attempts to weaken their independence and institutional capacity.⁴³

An unsuitable candidate

It is thus evident that Ukraine cannot yet be considered an established democracy based on a solid conviction in the values of the rule of law and separation of powers. Admitting Ukraine into the EU would certainly be too hasty and rushed, potentially damaging EU future stability and smooth functioning –a scenario which replays the current struggles with Hungary and Poland. After the Soviet Union's dissolution, optimism toward liberal democracy was considered the "end of history", and the precipitous political

35 Pitaro, Vincent. "Ernst & Young's 2012 Global Fraud Survey Highlights Significant Challenges in Dealing with Corruption and Bribery Risks." *Anti-Corruption Report*, July 11, 2012. Accessed July 21, 2022. anti-corruption.com/2572866/ernst-and-young-s-2012-global-fraud-survey-highlights-significant-challenges-in-dealing-with-corruption-and-bribery-risks.html.

36 Bullough, Oliver. "Welcome to Ukraine, the most corrupt nation in Europe." *The Guardian*, February 6, 2015. Accessed July 21, 2022. theguardian.com/news/2015/feb/04/welcome-to-the-most-corrupt-nation-in-europe-ukraine.

37 Transparency International. "Ukraine. Corruption Perceptions Index." *Transparency International*. Accessed July 21, 2022. transparency.org/en/cpi/2021/index/ukr.

38 BTI Transformation Index. "Ukraine." in *BTI 2022 Country Report*. Accessed July 21, 2022. bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2022_UKR.pdf.

39 European Court of Auditors. "Reducing grand corruption in Ukraine: several EU initiatives, but still insufficient results." *Special Report*, 2021. Accessed July 21, 2022. eca.europa.eu/Lists/ECADocuments/SR21_23/SR_fight-against-grand-corruption-in-Ukraine_EN.pdf.

40 "Голова МВС: Найбільше корупціонерів у Партії регіонів." *УКРАЇНСЬКОЇ ПРАВДЫ*, 29 Mar. 2012. Accessed July 21, 2022. pravda.com.ua/news/2012/03/29/6961665/.

41 Reuters. "Ukraine Advances on Anti-Corruption Practices." *Reuters*, June 10, 2011. Accessed July 21, 2022. archive.ph/20130201113900/http://www.reuters.com/article/2011/06/10/idUS173547+10-Jun-2011+PRN20110610#selecti-on-4597.0-4597.45.

42 Reuters. "In Ukraine, scales of justice often imbalanced." *Kyiv Post*, April 9, 2012. Accessed July 21, 2022. kyivpost.com/article/content/ukraine-politics/in-ukraine-scales-of-justice-often-imbalanced-125714.html.

43 Bidenko, Yuliya. "Ukraine: Country Report." in *Nations in Transit 2022*, *Freedom House*. Accessed July 21, 2022. freedomhouse.org/country/ukraine/nations-transit/2022.

upheaval in Hungary and Poland led to an all-too-rapid establishment of formal democratic institutions and only apparent democracy consolidation, which enabled the two countries to join the EU in 2004 –admitted also to expand the Western bloc’s geopolitical influence. Today, analysts agree that the process was too rushed and these democracies didn’t have enough time and fertile ground to take hold intimately in society; western institutions were moved into the region without their socio-cultural environments being ready to accommodate them. Indeed, assimilation understood as merely copying well-designed external models without considering the local capacity and conditions to create them autonomously will not lead to complete conversion; thus, established democracies have not emerged. The process of democratization and Europeanization would prove to be a failure, since the new democratic institutions remained “*empty shells without substance*” in the absence of democratic culture and consensus.⁴⁴

Ukraine’s inability to join the Union is shared among European leaders. Yet, solutions have been put in place to reconcile the help the EU wants to offer with Ukraine’s democratic immaturity, which makes its membership unrealistic. French President Macron proposed a new “*European political community*”, which

would include both EU members and non-members –also in response to the legitimate aspirations of the Ukrainian people. “*This new European organization...*” Macron said in Strasbourg, “*...would allow democratic European nations that subscribe to our shared core values to find a new space for political and security cooperation [and] the free movement of persons*”;⁴⁵ it would thus be a plan for preserving the EU’s strength and ambition of its integration while tightening relationships with partner countries and guaranteeing them the benefits of membership, without granting it.⁴⁶

Although the current international scenario and the sympathetic compassion for the Ukrainian people have taken the spotlight, Ukraine’s level of democratic quality should not be overshadowed. The Union cannot afford to accept into the European framework any more States without having reached the appropriate degree of democratization to be eligible members; the risk is that they could be able to hold –if not roll– back the *acquis communautaire* advancements directly from the heart of Europe. Furthermore, so far, no instruments in the EU institutions’ toolbox proved capable of effectively restraining them –making Ukraine’s access even more hazardous. For Ukraine, therefore, there is still a long way ahead if it wants to be worthy of membership.

44 Dimitrova, Antoaneta. “The new member states of the EU in the aftermath of enlargement: Do new European rules remain empty shells?” *Journal of European Public Policy* 7, 2010, no. 1, 137–148.

45 Macron, Emmanuel. “Speech by Emmanuel Macron at the closing ceremony of the Conference on the Future of Europe.” *French Presidency of the Council of the European Union*, May 10, 2022. Accessed July 21, 2022. presidence-francaise.consilium.europa.eu/en/.

46 Hersenhorn, David M., Von Der Burchard, Hans & De La Baume, Maia. “Macron floats European ‘community’ open to Ukraine and UK.” *Politico*, May 9, 2022. Accessed July 21, 2022. politico.eu/article/emmanuel-macron-proposes-european-political-community-as-alternative-to-eu-membership/.



Introduction

EVER since the second half of 2021, there is increasing debate about an “energy crisis” in Europe and around the world. The imbalance between supply and demand has caused electricity and gas bills to skyrocket, reaching unprecedented peaks in December 2021. The situation has worsened since the beginning of the Russian invasion of Ukraine, as the EU Member States unanimously agreed to stop importing gas from Moscow despite their heavy dependency and the sharp rise in energy prices resulting from the conflict.¹

This article aims to analyze the ongoing crisis from the perspective of the “energy trilemma”, often used in the literature on energy.² This heuristic tool exposes the contradicting nature of three energy policy goals: economic affordability, environmental sustainability, and security of supply. Indeed, there are several trade-offs between these goals, as achievements in one domain often result in drawbacks in another e.g., the green transition requires costly investments that in turn goes against the affordability objective. Therefore, this

article investigates whether the effects of the war in Ukraine aggravate the trilemma or rather offer a window of opportunity to solve it, and gradually advances an argument in favor of the latter. After a brief introduction to the Internal Energy Market (IEM), the article analyzes how the EU has responded to the issues of each of the trilemma’s domains -especially within the framework of the REPowerEU plan-³ looking at both challenges and opportunities.

The IEM background

Although one of the founding moments of the European Communities is often traced back to the creation of a European Coal and Steel Community in 1951, the first 30 years of the Communities did not retrieve much coordination among the Member States on energy matters. Only with the 1986 Single European Act, did energy policy gain recognition thanks to its economic importance for the single market program, as envisaged by the Maastricht Treaty.⁴ Since the Treaty of Lisbon, energy has formally become an EU competence, although shared with

1 European Council, “The Versailles Declaration”, March 11, 2022, Accessed August 10, 2020. <https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf>.

2 David Buchan, “Energy Policy. Sharp Challenges and Rising Ambitions”, in *Policy-Making in the European Union*, eds. Helen Wallace, Mark A. Pollack, Christilla Roeder-Rynning, Alasdair R. Young, (Oxford: Oxford University Press, 2020), 321; Anna Herranz-Surrallés, “Energy Policy and European Union Politics”, *Oxford Research Encyclopedia of Politics* (2019), 1.

3 European Commission, “REPowerEU: affordable, secure and sustainable energy for Europe”, May 18, 2022. Accessed August 10, 2020. https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en.

4 Buchan, “Energy Policy”, 323.

the Member States.⁵ Nevertheless, EU energy policy is significantly restrained by Art 194(2) TFEU which states that national governments shall maintain their right to autonomously decide on the energy mix they want to pursue.

Although energy sovereignty remains a prerogative of the Member States, several events of the last decade have forced energy on the top of today's EU agenda. On the one hand, the increasing salience and attention of the general public to climate change and the environment has been mirrored in the EU's ambition to lead by example by raising its sustainability standards and goals in order to export them worldwide in line with the praised "Brussels effect".⁶ This ambition resulted in the drafting of the European Green Deal by the Von der Leyen Commission which includes several strategies to ultimately phase out fossil fuels and produce cleaner energy.⁷

On the other hand, certain events unfolding across the EU's Eastern border have prompted better coordination among the Member States to face the increasing unreliability of Russia as an energy supplier. The 2014 annexation of Crimea triggered the EU policy shift towards diversification of resources and suppliers, and moreover, led to the design of the Energy Union Strategy by the Juncker Commission in 2015.⁸ The 2022 invasion of Ukraine, however, marks a point of no return in the EU energy partnership with Moscow. As of July 2022, the Member States have agreed

to a partial Russian oil embargo, a two-thirds reduction of gas import by the end of the year with a complete stop by 2027. Furthermore, the ambitious REPowerEU Plan approved in May provides solutions on how to undertake an affordable phase-out of Russian gas while comprehensively tackling the three aspects of the energy trilemma, which shall be described in the following sections.

Affordability

When examining the challenges, the war in Ukraine has led to an increase in energy prices in countries depending on Russian supplies but also in international markets. National governments have implemented several types of measures to shield consumers from the rising energy bills, mainly through price caps and subsidies.⁹ Nonetheless, these measures do not appear financially sustainable in the long run, especially in light of the already large Member States' debts and the ramping global inflation.

On the opportunities side, however, the current situation has shown intensified coordination among national governments to ensure affordable prices for their citizens. In recent weeks, there have been increasing talks among EU leaders on the possibility of establishing price caps on gas and oil, especially in the framework of the G7 summit held in June 2022.¹⁰ Moreover, REPowerEU foresees stronger coordination and the drafting of a specific EU Communication on a

⁵ Art 4(2)(i) TFEU.

⁶ Anu Bradford, "The Brussels Effect." *Northwestern University Law Review* 107 (2012), 1.

⁷ European Commission, "A European Green Deal: striving to be the first climate-neutral continent", December 11, 2019. Accessed August 10, 2020. https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

⁸ European Commission, "Energy Union", February 25, 2015. Accessed August 10, 2020. https://energy.ec.europa.eu/topics/energy-strategy/energy-union_en.

⁹ Giovanni Sgaravatti, Simone Tagliapietra and Georg Zachmann, "National policies to shield consumers from rising energy prices", *Bruegel*, June 13, 2022. Accessed August 10, 2020. <https://www.bruegel.org/publications/datasets/national-policies-to-shield-consumers-from-rising-energy-prices/>.

¹⁰ Hans Von Der Burchard and Giorgio Leali, "G7 agrees to explore price cap on Russian oil", *Politico Europe*, June 28, 2022. Accessed August 10, 2020. <https://www.politico.eu/article/g7-reach-deal-on-price-cap-for-russian-oil/>.

demand-reduction plan for households and businesses in order to contain the rise in energy prices. Furthermore, REPowerEU underscores that the green transition and investments in renewables will ultimately contribute to price decreases in the years to come.

Sustainability

On the one hand, the war's consequences pose several threats to the EU's green ambition. Firstly, subsidies to energy suppliers are currently going to the fossil fuel industry, while the short-term responses of national governments include a return to coal -as is the case for Austria, Germany, Italy, and the Netherlands.¹¹ Consequently, it appears that current measures risk ultimately delaying the EU's green transition while compromising its ability to reach the climate targets it must fulfill. Furthermore, the EU taxonomy debate has been reignited by the current situation, with countries envisaging different roles for gas and nuclear energy in the years to come.¹² Moreover, the crisis has exposed the fact that countries have very different energy mixes with different shares of renewables; thus, given their diverse starting points, it follows that the green transition will be more costly for some countries than for others.

On the other hand, through REPowerEU, the EU has reiterated its commitment to decarbonization, energy efficiency, and

saving. There are several proposals on the table to face the Russian energy challenge. First, the Commission aims to incentivize a rapid rollout of solar and wind energy projects accompanied by new legislation for faster permitting of renewables. Indeed, the lengthy permitting process significantly slows down the green transition since bureaucratic procedures can last from nine months to two years for solar and two to nine years for wind energy.¹³ Moreover, REPowerEU plans to increase the 2030 European targets from 9% to 13% on energy saving, and from 40% to 45% on renewables. Furthermore, it proposes to boost industrial decarbonization with €3 billion under the Innovation Fund.¹⁴ At the same time, since gas will not suddenly disappear from national energy mixes, it has been argued that the EU has the legislative tools to attach green strings to gas investments in order to define the pathway for decarbonization in the longer term.¹⁵

Security of supply

Lastly, the current situation is proving once again that the Member States tend to act independently in the face of crises, especially when security concerns are at play. Overall, the diversification goal has prompted national governments to strike new energy deals with new suppliers -such as the new German-Qatari and Italo-Algerian partnerships-¹⁶ whose reliability is still to be tested. What is more, the

11 Loveday Morris, Sammy Westfall and Reis Thebault, "Russia's chokehold over gas could send Europe back to coal", *Washington Post*, June 22, 2022. Accessed August 10, 2020. <https://www.washingtonpost.com/world/2022/06/22/coal-plant-europe-germany-austria-netherlands-russia-gas/>.

12 Deutsche Welle, "European Parliament backs listing nuclear energy, gas as 'green'", July 6, 2022. Accessed August 10, 2020. <https://www.dw.com/en/european-parliament-backs-listing-nuclear-energy-gas-as-green/a-62377411>.

13 Eurelectric, "RES Permitting", October 2020. Accessed August 10, 2020. https://www.eurelectric.org/media/4750/eurelectric_statement_res_permitting-2020-030-0594-01-e-h-0C9C81A1.pdf.

14 European Commission, "REPowerEU".

15 Pier Paolo Raimondi and Margherita Bianchi, "Reconciling EU Energy Security with Climate Policies: Rethinking European Gas Markets", *IAI Commentaries*, June 14, 2022. Accessed August 10, 2020. <https://www.iai.it/it/pubblicazioni/reconciling-eu-energy-security-climate-policies-rethinking-european-gas-markets>.

16 Miranda Murray, "Germany, Qatar sign energy partnership agreement", *Reuters*, May 20, 2022. Accessed August 10, 2020. <https://www.reuters.com/business/energy/germany-qatar-sign-energy-partnership-agreement-2022-05-20/>; Margherita Montanari, "Italy's energy and Algeria oil giant strike new gas deal", *Euractiv*, May 27, 2022. Accessed August 10, 2020. <https://www.euractiv.com/section/energy-environment/news/italys-energy-and-algeria-oil-giant-strike-new-gas-deal/>.

limited number of suppliers has made the diversification of national energy mixes even more difficult. Furthermore, ending the energy dependency on Russia has proved more challenging for those countries heavily dependent on its supplies, first and foremost the largest net importers of Russian gas, namely, Germany and Italy.

At the same time, the Ukraine war has paved the way for joint purchasing of gas, LNG, and hydrogen through the newly-established EU Energy Platform, something unthinkable only days before the Russian invasion.¹⁷ Moreover, it has made the case for the EU's green strategic autonomy in energy and critical raw materials, tying environmental concerns more closely with the security concerns of the Member States.¹⁸ Furthermore, REPowerEU foresees a mechanism for internal sharing of resources in case of sudden supply disruptions in the future. To this aim, developing a more efficient interconnection between the Member States plays a key role, and Spain in particular -should it improve its gas interconnection with France and Central Europe, thus leaving its status of "energy island"- could become a pivotal player in replacing Russia as the EU's main LNG hub, being the EU country with the largest storage and regasification capacity.¹⁹

Conclusion

Overall, the current crisis has exposed the deep interdependence among the three domains of the energy trilemma. It can thus be argued that further integration between the three goals of energy policy generates a spillover effect that will ultimately fuel the green transition while providing more secure supplies at better prices. At the same time, it is important to distinguish between long- and short-term: while the immediate response to the crisis has been fragmented at the Member State level, the situation offers a wide window of opportunity for enhancing the EU authority in the energy domain and ultimately harmonizing the trilemma. The national leaders' historical reluctance to give the EU competence on the sensitive issue of energy seems to have been mended by the understanding that national responses will retrieve sub-optimal outcomes. To conclude, while until the Russian invasion climate change was considered the potential "great federator of energy policy",²⁰ today it appears that the war in Ukraine has acted as the catalyst for a truly supranational energy policy, thus corroborating the recurrent narrative of "integration-through-crisis" in the EU.²¹

17 European Commission, "EU Energy Platform", April 7, 2022. Accessed August 10, 2020. https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform_en.

18 Céline Charveriat and Tim Gore, "The case for green strategic autonomy", *European Council on Foreign Relations*, March 3, 2022. Accessed August 10, 2020. <https://ecfr.eu/article/the-case-for-green-strategic-autonomy/>.

19 Fernando Heller, "Spain could replace Russia in becoming EU's main natural gas hub", *Euractiv*, March 8, 2022. Accessed August 10, 2020. https://www.euractiv.com/section/politics/short_news/spain-could-replace-russia-in-becoming-eus-main-natural-gas-hub/.

20 Buchan, "Energy Policy", 341.

21 Frank Schimmelfennig, "Theorising crisis in European integration" in *The European Union in Crisis*, eds. Desmond Dinan, Neill Nugent, William E. Paterson (London: Red Globe Press, 2017), 316-336.



Introduction

COMBATING climate change is a universal responsibility that cannot be put off any longer. Implementing environmental reforms is not sufficient to address this urgent crisis: We must also repeal harmful treaties and policies. The Energy Charter Treaty (ECT), a binding international agreement signed in 1994 to protect Western investments,¹ and capitalize on the prospects of free trade,² poses a critical threat to the achievement of the climate goals. This agreement was created due to the need for energy cooperation between Eastern and Western Europe, as the dissolution of the Soviet Union fostered instability in the energy sector. Therefore, the European Union (EU) sought to diversify its energy sources to decrease its energy dependency on others.³

With 54 signatories, the ECT is a tool that applies to cross-border investments and provides a multilateral framework for cooperation in the energy industry.⁴ Its key

provisions include investment protection, energy efficiency, environmental protection, energy transit, and dispute resolutions. Intended to create a 'level playing field' for energy investments,⁵ the framework of the ECT creates a broad scope of protection for foreign investors –so broad that its interpretations in arbitration tribunals are often unclear and contradictory.

Two areas where the ECT draws criticism are the use of investor-state dispute settlements (ISDS) and the sunset clause. Dispute settlements are addressed in the ECT's Articles 26 through 28, with a mechanism providing investors with the ability to use international arbitration in their disputes.⁶ Many fossil fuel investors sue host states using this provision, believing that their profits will be jeopardized by a state's implementation of renewable energy policies and/or the phasing-out of fossil fuels. The sunset clause, detailed in Article 47 of the ECT, stipulates the terms of withdrawal from

1 Peigné, Maxence. "ECT: 'ecocide' treaty puts Member States and EU Commission at odds." *Investigate Europe*. 25 July, 2022. Accessed August 10, 22. <https://www.investigate-europe.eu/en/2022/ect-ecocide-treaty-puts-member-states-and-eu-commission-at-odds/>.

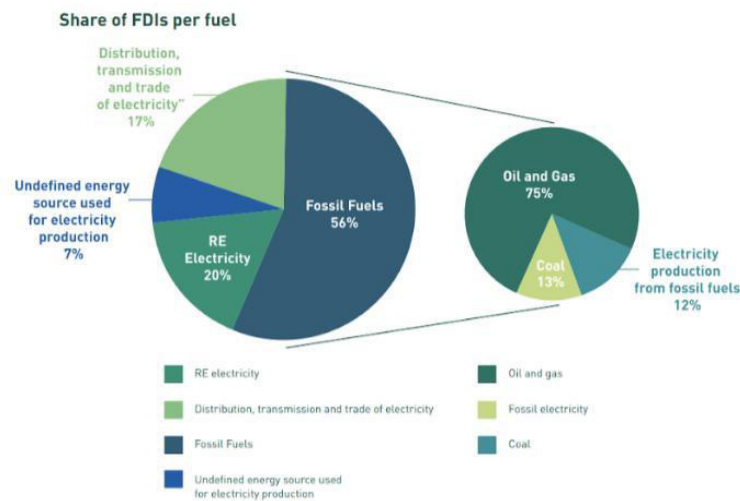
2 Ghantous, Nour. "The Energy Charter Treaty has not aged well." *Energy Monitor*. 13 July, 2022. Accessed August 10, 22. <https://www.energymonitor.ai/policy/international-treaties/the-energy-charter-treaty-has-not-aged-well>.

3 Hobér, Kaj. *Investment Arbitration and the Energy Charter Treaty*. Journal of International Dispute Settlement. Volume 1, Issue 1. February 2010. p. 153–190.

4 Nicolas, Elena Sanchez. "Calls to ditch 'ecocide treaty' after failed reform efforts." *EU Observer*. 23 March, 2022. Accessed August 10, 22. <https://euobserver.com/green-economy/154549>.

5 Hobér, Kaj. *Investment Arbitration and the Energy Charter Treaty*. Journal of International Dispute Settlement. Volume 1, Issue 1. February 2010. p. 153–190.

6 The Energy Charter Treaty. 1994. Accessed August 10, 22. https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf.



Source: Saheb, Yamina. *The Energy Charter Treaty - Assessing its geopolitical, climate, and financial impacts*. OpenEXP. September 2019. p.9 ISBN: 978-2-9564721-6-2

the Treaty. As per Article 47 paragraph 3, the provisions of the Treaty will apply to existing investments for 20 years after withdrawal.⁷ A 20-year protection period for existing investments poses many challenges to those hoping to exit the ECT, as investors could continue using ISDS against states for decades after withdrawal.⁸

Application and Protections

Often dubbed an outdated instrument of ecocide, the ECT has been utilized by fossil fuel investors to penalize states for moving away from unsustainable sources of energy, with a guarantee of long-term protection under the sunset clause.⁹ The ECT is inherently unfriendly to climate policy, as the risks associated with arbitration and the lack of protections for states against investors disincentivize parties to the treaty from introducing ambitious climate policy.¹⁰

Although renewable energy is mentioned in the ECT, its associated provisions are not binding and account for only a fifth of protected investments.¹¹ Fossil fuels, however, make up 56% of the investments that were protected under the ECT in the past decade.¹² Furthermore, there is no evidence to indicate that ISDS attracts any investment at all, let alone in renewables.¹³

As EU member states have been targeted in arbitration processes for the use of renewable energies, it is doubtful that ISDS could be positively applied to renewable energy sources. Most existing energy investments are in fossil fuels so it is evident that the absence of ISDS would not hinder the development of renewable energy; on the contrary, ISDS harms development by making it more risky and difficult for states to introduce ambitious climate initiatives.

⁷ Ibid.

⁸ Kouroutakis, Antonios. *Sunset Clauses in International Law and Their Consequences for EU Law*. Publications Office of the European Union. 2022.

⁹ OpenEXP. *Modernisation of the Energy Charter Treaty: A Global Tragedy at a High Cost for Taxpayers*. January 2020. Accessed August 10, 22. https://www.openexp.eu/sites/default/files/publication/files/modernisation_of_the_energy_charter_treaty_a_global_tragedy_at_a_high_cost_for_taxpayers-final.pdf.

¹⁰ Ibid.

¹¹ Saheb, Yamina. *The Energy Charter Treaty - Assessing its geopolitical, climate, and financial impacts*. OpenEXP. September 2019.

¹² Ibid.

¹³ Pohl, Joachim. *Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence*. OECD Working Papers on International Investment. January 2018.

Recent reports indicate that €344.6 billion of fossil assets in Europe are protected by the ECT which accounts for infrastructure primarily made up of pipelines, gas fields, and oil fields.¹⁴ 61% of protected investments from 2013 to 2019 amounted to fossil fuel investments such as company and operations investments.¹⁵ The threat of retaliation by fossil fuel investors against states is enabled by the ECT and threatens the achievement of a sustainable, green, and just future.

The Question of Withdrawal

The ability of foreign investors to bypass domestic courts and opt for international arbitration using ISDS allows them to sue host nations for enacting policy changes that may jeopardize their investments.¹⁶ The ECT has become the most frequently invoked international agreement and the majority of arbitration cases have been intra-EU cases.¹⁷ This concentration of intra-EU cases may be due to the EU shift to environmentally-friendly policies, with many investors threatening that their decidedly harmful energy sources may stop turning a profit if the EU increases their reliance and use of renewable energy sources rather than fossil fuels.

The economic gains of ISDS are doubtful

and the costs to states acting in the interests of combating climate change could extend beyond what governments can pay.¹⁸ Energy infrastructure compatibility with the Paris Agreement is stressed by the Paris Agreement Compatible Scenarios for Energy Infrastructure (PAC), which outlines possible energy outcomes to guide Europe in the development of a low-carbon, renewable-based system.¹⁹ These goals and the 2030 EU emissions reduction targets are compromised by the provisions of the ECT.²⁰

Calls for withdrawal from the Treaty have increased, notably in the #NoECT campaign as well as pleas from environmental NGOs²¹ and European youth networks²² to withdraw from the agreement. Looking to the future, the ECT seems wholly incompatible with Europe's climate goals. So what is stopping the EU Member States from withdrawing?

Unsurprisingly, fossil fuel settlements have been at the center of the most significant ISDS payouts.²³ Italy has experienced severe pushback since withdrawing in 2015,²⁴ and over fifty lawsuits were launched against Spain due to their policies concerning energy and subsidies,²⁵ deterring many states from taking the initiative to leave the ECT. The

14 Peigné, Maxence. "ECT: 'ecocide' treaty puts Member States and EU Commission at odds." *Investigate Europe*. 25 July, 2022.

15 OpenEXP. *Modernisation of the Energy Charter Treaty: A Global Tragedy at a High Cost for Taxpayers*. January 2020.

16 *Ibid.*

17 Herranz-Surrallés, Anna et al. "The Energy Charter Treaty: Old and New Dilemmas in Global Energy Governance." *Handbook of Energy Governance in Europe*. 2020.

18 Energy Monitor. *States imposing fossil fuel laws risk up to \$340bn in oil and gas settlement costs*. 27 May, 2022. Accessed August 10, 22. <https://www.energymonitor.ai/policy/international-treaties/states-imposing-fossil-fuel-laws-risk-up-to-340bn-in-oil-and-gas-settlement-costs>.

19 PAC Scenarios EU. *Paris Agreement Compatible Scenarios for Energy Infrastructure*. Accessed August 10, 22. <https://www.pac-scenarios.eu/>.

20 Center for International Environmental Law. *The New Energy Charter Treaty in Light of the Climate Emergency*. July 6, 2022. Accessed August 10, 22. <https://www.ciel.org/the-new-energy-charter-treaty-in-light-of-the-climate-emergency/>.

21 Friends of the Earth Europe. Accessed August 10, 22. <https://friendsoftheearth.eu/energy-charter-treaty/>.

22 Generation Climate Europe. *Letter to Heads of State and Ministers*. Accessed August 10, 22. <https://gceurope.org/dear-heads-of-states-and-ministers/>.

23 Ghantous, Nour. "The Energy Charter Treaty has not aged well." *Energy Monitor*. 13 July, 2022.

24 *Ibid.*

25 CAN Europe. *Do not resuscitate. How Energy Charter Treaty reform could resurrect a climate monster*. July 2022. Accessed August 10, 22. https://caneurope.org/content/uploads/2022/07/Energy-Charter-Treaty_Why-withdrawal-is-better-than-adopting-the-reform_July-2022.pdf.

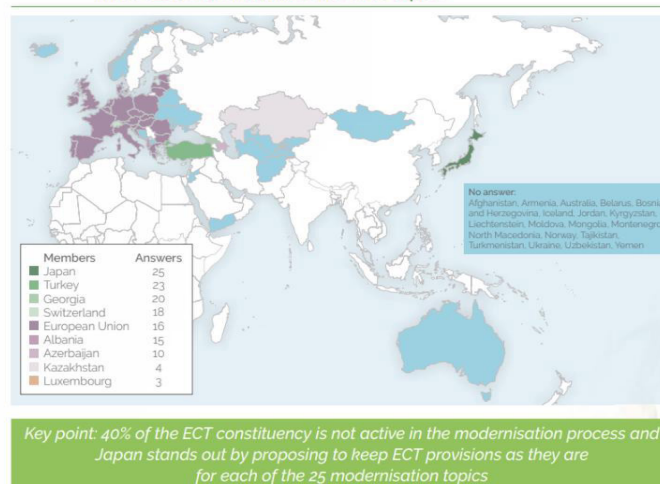
2009 withdrawal of Russia along with the emergence of new global treaties addressing international partnerships have led to many questioning the Treaty's relevance.²⁶ The question of withdrawal has been on the table for years despite the hopes of the European Commission for an acceptable reform of the Treaty.²⁷

It has been suggested that a coordinated withdrawal by the European Union, one of the ECT's largest funders, could succeed in preventing much of the feared backlash in the context of the sunset clause.²⁸ This ideal scenario of collective withdrawal would require a unified commitment by the EU to withdraw from the Treaty, in addition to fully recommitting to phasing out fossil fuels and accelerating the timeline of Europe's decarbonization strategy. The Energy Charter Treaty is foundationally flawed and environmentally harmful; a collective withdrawal from the Treaty is the only way to ensure that the EU gets back on track to meet its climate goals.

Modernization is Moot

Modernization has been hailed as the concept that will "save" the Energy Charter Treaty and update it sufficiently to regain relevance in the international sphere. The modernization process was formally started in 2017 with fifteen rounds of negotiation being held before a tentative agreement was reached.²⁹ Each round was more disappointing than the last due to weak compromises and the failure to reach a consensus on the key issues of the Treaty.³⁰ The bare minimum for the ECT reform is that it should not enable investors to derail states in meeting their climate targets by initiating arbitration over energy diversification and phasing out fossil fuels. If the basic requirement of *not* inflicting or allowing harm is too radical to reflect in the modernization rounds, any extent of meaningful reform to the Treaty is impossible.

Figure 10. Contribution of ECT signatories to the 25 identified modernisation topics



Source: OpenEXP. *Modernisation of the Energy Charter Treaty: A Global Tragedy at a High Cost for Taxpayers*. January 2020. p.23

26 OpenEXP. *Modernisation of the Energy Charter Treaty: A Global Tragedy at a High Cost for Taxpayers*. January 2020.

27 Peigné, Maxence. "ECT: 'ecocide' treaty puts Member States and EU Commission at odds." *Investigate Europe*. 25 July, 2022.

28 CAN Europe. *Do not resuscitate. How Energy Charter Treaty reform could resurrect a climate monster*. July 2022.

29 Energy Charter Treaty Secretariat. *Modernisation of the Treaty*. Updated June 24, 2022. Accessed August 10, 22. <https://www.energychartertreaty.org/modernisation-of-the-treaty/>.

30 Blaylock, Jean. "What is the Energy Charter Treaty and why do we need to exit?" *Global Justice*. 24 June, 2022. Accessed August 10, 22. <https://www.globaljustice.org.uk/blog/2022/06/energy-charter-treaty/>.

Beyond the logistics of modernization, the seemingly endless negotiation process was extended time and time again before it finally concluded in June 2022.³¹ The low engagement rates of members in the modernization process reflects a disconnect in enthusiasm and commitment. In one round, only six signatories commented on the proposal³² and many countries had to be solicited to partake in the negotiations.³³

For a successful modernization process, the most controversial issues requiring reform must be addressed. One is the sunset clause which sets up a long-term obstacle for countries hoping to implement policies aligned with positive climate action.³⁴ Another issue, as per the *Komstroy* and *Achmea* decisions, is that intra-EU arbitration between an EU complainant and an EU respondent is fundamentally incompatible with EU law.³⁵ The ISDS mechanism, thus, cannot continue to be used as it was.

At the core of the need for modernization is that fossil fuel investments cannot be protected if the EU hopes to meet its own emissions targets as well as the goals outlined in the Paris Agreement. Unfortunately, the modernization process conducted does not reflect adequate

consideration of these topics. Without appropriately tackling the outdated and harmful aspects of the ECT, any attempt at a modernization outcome is rendered meaningless.

The Complacent Compromise

In the aftermath of the modernization process, the Contracting Parties of the Energy Charter Treaty came to an agreement. While the full text has not yet been published, it was revealed that existing fossil fuel investments in the EU will remain protected for ten years rather than twenty.³⁶ Some gas projects will continue to be protected until 2040 and other projects will be protected indefinitely on a voluntary basis.³⁷ These 'compromises' pander to investors while disguising the disappointing negotiations as a great deal for the state's party to the ECT. CAN Europe correctly identified the update to the sunset clause as a misleading false promise.³⁸

ISDS was left completely untouched despite the public calls for change.³⁹ The problems associated with the ISDS mechanism were numerous. Among some of the non-environmental concerns were a lack of transparency in how arbitration is conducted, an over-reliance

31 OpenEXP. *Modernisation of the Energy Charter Treaty: A Global Tragedy at a High Cost for Taxpayers*. January 2020.

32 Taylor, Kira. "Leaked diplomatic cables show 'limited progress' in Energy Charter Treaty reform talks." *Euractiv*. 6 July, 2021. Accessed August 10, 22. <https://www.euractiv.com/section/energy/news/leaked-diplomatic-cables-show-limited-progress-in-energy-charter-treaty-reform-talks/>.

33 Generation Climate Europe. *2021: The Year of Energy Regression*. 21 October, 2021. Accessed August 10, 22. <https://gceurope.org/2021-the-year-of-energy-regression/>.

34 Peigné, Maxence. "ECT: 'ecocide' treaty puts Member States and EU Commission at odds." *Investigate Europe*. 25 July, 2022

35 Kouroutakis, Antonios. *Sunset Clauses in International Law and Their Consequences for EU Law*. Publications Office of the European Union. 2022.

36 Center for International Environmental Law. *The New Energy Charter Treaty in Light of the Climate Emergency*. July 6, 2022.

37 Blaylock, Jean. "What is the Energy Charter Treaty and why do we need to exit?" *Global Justice*. 24 June, 2022

38 CAN Europe. *Do not resuscitate. How Energy Charter Treaty reform could resurrect a climate monster*. July 2022.

39 *Ibid.*

on arbitrators, inconsistent decisions, and general costliness to the state.⁴⁰ Although the Intergovernmental Panel on Climate Change recognized the risks of ISDS cases in phasing out fossil fuels,⁴¹ the ECT modernization process has chosen to leave it unresolved and ambiguous.

Even under the modernized ECT, the EU will not be able to meet its net-zero emissions goals. The attempts at greenwashing a failed modernization process are shameful as the European Commission forcefully presents the reformed Treaty as a victory for climate action, falsely claiming that the ECT is now aligned with the objectives of the Paris Agreement.⁴²

The ECT may have worse to come in store for the future. The efforts by the Energy Charter Secretariat to expand its membership, specifically to states in the Global South, pose an immense danger for prospective countries preparing to apply for ECT membership. The risks associated with the Treaty and ISDS have reportedly been concealed by the modernization rounds.⁴³ This paints a worrying picture of how the ECT will jeopardize the safety, security, and prosperity of the world if it is misrepresented as climate-friendly when it is anything but.

Conclusion

All that the “compromise” in the modernization process achieved was a half-hearted attempt at appeasing the activists, organizations, scientists, and leaders calling for either true reform or collective withdrawal. It is clear that the modernization process was not approached with a transformative lens, as it did nothing but water down one of the most dangerous aspects of this legally-binding Treaty and brush over the concerns regarding investor-state dispute settlements.

In light of the UN General Assembly’s recent Resolution declaring that access to a clean, healthy, and sustainable environment is a universal human right,⁴⁴ it is essential that such a right be respected and reflected in the laws and standards upheld in the EU. The Energy Charter Treaty is no less dangerous after modernization. It cannot be branded as an innovative or environmentally-friendly Treaty for as long as it protects and encourages fossil fuel investments.

The adverse effects of the ECT’s continued influence will be felt by every person in the world irrespective of where they live. It is the EU’s responsibility to withdraw from this agreement and mitigate the damages caused by the Energy Charter Treaty before it is too late.

40 Center for International Environmental Law. *The New Energy Charter Treaty in Light of the Climate Emergency*. July 6, 2022.

41 Tienhaara, Kyla et al. “Investor-state disputes threaten the global green energy transition.” *Science*. 5 May, 2022. Accessed August 10, 22. <https://www.science.org/doi/abs/10.1126/science.abo4637>.

42 European Commission. *Agreement in principle reached on Modernised Energy Charter Treaty*. 24 June, 2022. Accessed August 10, 22. https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en.

43 CAN Europe. *Do not resuscitate. How Energy Charter Treaty reform could resurrect a climate monster*. July 2022.

44 UN News. *UN General Assembly declares access to clean and healthy environment a universal human right*. 28 July, 2022. Accessed August 10, 22. <https://news.un.org/en/story/2022/07/1123482>.



Introduction

"THE best clubs. The best players. Every week." Such was the motto of the short-lived European Super League, a football competition which involved twelve of the top European football clubs.¹ The ambitious but controversial project, announced on 18 April 2021, was met with immediate backlash from the public, various national governments, and its would-be competitor UEFA (Union of European Football Associations).² As a result, nine of the clubs involved withdrew from the League almost immediately after announcing their participation.³ When the commercial enterprise behind the League announced that it was suspending operations a mere three days after the launch, many believed that the nascent UEFA challenger would be quickly confined to the history books.⁴ However, the legal dispute resulting from the Super League debacle has now reached the Courts of

Justice of the European Union (CJEU), based in Luxembourg. The eagerly anticipated preliminary ruling could shape how EU competition law deals with professional sports for decades to come.

UEFA/FIFA: A Sports Cartel?

A case was brought before a Spanish court by the European Super League Company S.L. against UEFA and their parent organisation FIFA (Fédération Internationale de Football Association) shortly after the League was suspended. On 27 May 2021, the Commercial Court of Madrid launched a preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU), as the case revolves heavily around the technical details of EU competition law.⁵ When unsettled questions of EU law arise in court proceedings, national courts tend to defer to the CJEU, seeking a preliminary ruling which is designed to

¹ "The Super League." Accessed July 24, 2022. <https://thesuperleague.com/>. Accessed July 24, 2022.

² Sullivan, Helen. "Shameful: how the papers covered European Super League backlash". *The Guardian*, April 20, 2022. Accessed 28 July 2022. <https://www.theguardian.com/football/2021/apr/20/shameful-how-the-papers-covered-european-super-league-backlash>.

³ Hytner, Mike. "Agnelli admits Super League cannot go ahead after nine clubs pull out". *The Guardian*, April 21, 2022, Accessed 28 July 2022. <https://www.theguardian.com/football/2021/apr/21/european-super-league-vows-to-reshape-after-english-clubs-pull-out>.

⁴ Panja, Tariq, and Smith, Rory. "How the Super League Fell Apart". *The New York Times*, April 22, 2021, Accessed 29 July 2022. <https://www.nytimes.com/2021/04/22/sports/soccer/super-league-soccer.html>.

⁵ Case C-333/21 *European Super League Company, S.L. v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)* [2022], Request for a preliminary ruling from the Juzgado de lo Mercantil n.º 17 de Madrid (Spain), Accessed 24 July 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0333>.

issue an authoritative interpretation of EU law. Preliminary rulings are binding on the referring court, but it remains the national court's responsibility to apply the ruling to the facts of the case. Furthermore, the national court must submit specific questions to the Luxembourg court, as the CJEU can only rule on issues pertaining to EU law. In this case, the Spanish court submitted a total of six preliminary questions to the CJEU.⁶

The Spanish court's preliminary questions largely centre around the Super League's claims that the actions and statutes of UEFA/FIFA are in violation of Articles 101 and 102 TFEU. These articles concern the prevention of monopolistic cartels and the abuse of a dominant position in the market respectively. In particular, the Super League sought to convince the Court that UEFA/FIFA's dual role as both a market regulator and participant was a violation of EU competition law. From the perspective of the Super League organizers, why would UEFA/FIFA, as the market regulator, voluntarily allow new competitors into its own exclusive market?

Similarly, supporters of the Super League are hoping that the Court will find a violation of Articles 101 and 102 due to sanctions placed on Super League participants. After the initial announcement, it was predicted that UEFA/FIFA would seek to

punish clubs and players for their role in the Super League.⁷ This could have had a severe effect on both clubs and players alike. Clubs could have been fined, banned from certain matches, or expelled from competitions such as the UEFA Champions League entirely. Likewise, players could have been punished by UEFA/FIFA, as their statutes allow them to ban players from playing for their national teams.⁸ This would prevent Super League players from participating in international tournaments such as the World Cup. UEFA/FIFA had initially been prevented from sanctioning clubs and players by an interim injunction issued by the Madrid court for a period of 12 months.⁹ When the dust settled, peace had been made with the nine clubs who rejoined UEFA's ranks, but the three remaining Super League clubs (Real Madrid, Barcelona, and Juventus) and their players could in theory, still be sanctioned by UEFA/FIFA. The injunction expired in April 2022, although no action has been taken pending the court's decision on this issue.¹⁰

While the case is largely an antitrust matter, the effect of UEFA/FIFA's actions and statutes on the four fundamental EU freedoms was also cited as a potential violation of the TFEU.¹¹ These include the freedom to move capital across borders, to provide services and to establish businesses, which may have been

⁶ *Ibid.*

⁷ Houben, Robby, Jan Blockx, and Steve Nuyts, "UEFA and the Super League: who is calling who a cartel?" *The International Sports Law Journal*, 2022, Accessed 24 July 2022. <https://link.springer.com/article/10.1007/s40318-021-00201-2#Fn11>.

⁸ *Ibid.*

⁹ Juzgado de lo mercantil n° 17 de Madrid 20 April 2021, *European Super League Company S.L. v FIFA and UEFA*, Procedimiento 150/2021.

¹⁰ *Ibid.*

¹¹ Case C-333/21 *European Super League Company, S.L. v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)* [2022], Request for a preliminary ruling from the Juzgado de lo Mercantil n.º 17 de Madrid (Spain), Accessed 24 July 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0333>.

restricted by UEFA/FIFA.¹² Previous case law has established that private undertakings such as companies must also uphold the provisions of the TFEU, and that this does not apply only to Member States. This doctrine of horizontal application is crucial for the Super League's case to succeed, as they are seeking to enforce their rights against another private entity. UEFA and FIFA, despite Member States delegating regulatory functions to them, are still private bodies, governed by the laws of Switzerland.

Some legal analysts have also argued that there may also have been a violation of Article 106 TFEU on UEFA/FIFA's part.¹³ This provision states that where Member States grant special or exclusive rights to companies, they must ensure it does not disproportionately restrict EU citizens' enjoyment of the four fundamental EU freedoms. As a result, delegating regulatory functions to UEFA/FIFA, a private enterprise which owes its position to Member States, could still land national governments in hot water with the EU's top court. In other words, Member States cannot "*wash their hands and escape liability*" by delegating their responsibilities to a private entity, even when such a delegation is justifiable.¹⁴ It has been suggested that alongside an appeal to popular opinion, this could be why Member States have supported UEFA/FIFA so steadfastly throughout the case proceedings, with over twenty Member States defending them in proceedings before the Court.¹⁵

On the other hand, UEFA/FIFA have recently stated that the Super League itself is a "*textbook example of a cartel*" and that allowing only the wealthiest clubs in Europe to compete in the League would lead to "*the death of open competition*".¹⁶ Many have decried the apparently elitist nature of the Super League, which envisions a tournament that is closed to all but the most famous (and financially robust) of clubs. Participating clubs would be in a privileged position within the League, with permanent positions reserved for them in the League and no threat of relegation. As a result, it would be far more difficult if not impossible for smaller clubs to advance through merit. However, the question of whether the Super League itself could also be considered a cartel would have to be examined in separate proceedings.

The Defense: Protecting the 'European Sport Model'

UEFA/FIFA, as a quasi-regulator and open participant in the market, would quite likely meet the definition of a cartel and be found to have engaged in anti-competitive behaviour under Articles 101 and 102 TFEU. As a result, the organizations have based their defense largely upon justifying the existence of this cartel-like market structure. Under EU law, there is a three-step test to justify the existence of a cartel. It is clear from the 2006 CJEU *Meca-Medina* judgment that any sporting rule which restricts competition such as UEFA/FIFA's measures would not constitute a violation of Article 101 TFEU, if they pursue a

¹² Articles 45, 49, 56 and 63 TFEU.

¹³ Drozd, Stanisław. "The Super League case is about ensuring a proper investment climate in the European model of sport, without which the model is doomed". *Wardynski & Partners*, July 18, 2022, Accessed 20 July 2022.

<https://www.lexology.com/library/detail.aspx?g=7b1da43d-ebbd-448c-868f-c8cd62a056f2>.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Walker, Ali. "UEFA battles Super League at EU's top court". *Politico*, July 11, 2022, Accessed 29 July 2022. <https://www.politico.eu/article/super-league-uefa-begin-battle-at-eus-top-court/>.

legitimate objective, are inherent to these objectives, necessary, and proportionate.¹⁷ The need for a legitimate objective is crucial to UEFA/FIFA's defense.¹⁸ Their legitimate objective has come in the form of protecting the so-called 'European sport model'.

On 30 November 2021, sports ministers from across the EU met in Brussels as part of the Council on Education, Youth, Culture and Sport. As part of the meeting, ministers formulated an indirect response to the Super League case, by seeking to defend the merit-based model of UEFA/FIFA. A so-called 'European Sport Model' was defined in a Council resolution.¹⁹ Key features of this model, such as freedom of association, a pyramidal structure, and an open system of promotion and relegation are arguably missing from the Super League. While Member States have both directly and indirectly sought to protect the European sport model, the Commission, which has a right to be heard in all preliminary hearings, has taken a more cautious approach. The Commission has acknowledged that UEFA/FIFA may well have legitimate objectives in defending the European sport model, but it also stated that "*any defense of the European Sports Model must respect European law, in particular with regard to competition law and fundamental freedoms*".²⁰ The Commission also cast doubts over whether the coming ruling would completely exonerate

UEFA/FIFA, as it cast doubts over whether the sanctions that had been threatened against clubs and players could be legal, and whether the measures taken would satisfy the requirement for proportionality.²¹ It remains to be seen how the Court will decide on these issues.

The ISU Precedent

Due to the similar legal issues at play, oral submissions for the Super League case were heard alongside another crucial case for the future of European sports: *International Skating Union v Commission*.²² In December 2020, the CJEU upheld a European Commission decision that the International Skating Union (ISU) had infringed Article 101 of the TFEU. The facts of the case are reminiscent of the Super League. The ISU banned professional skaters from participating in international sporting competitions that were unsanctioned by the ISU. The General Court of the CJEU upheld the Commission's decision that there had been a breach of competition law, but this was appealed to the Grand Chamber. Interestingly, the Court found that the ISU's aim to protect sporting integrity by ensuring "*that any organiser of sporting competitions comply with common standards*" was a 'legitimate objective'.²³ However, the Court also found that the measures taken by ISU were disproportionate, and as such, the Commission's decision was upheld.

17 Case C-519/04 *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR II-3291.

18 Bach, Dawyen. "The Super League and its related issues under EU Competition Law". *Kluwer Competition Law Blog*, April 22, 2022, Accessed 30 July 2022. <http://competitionlawblog.kluwercompetitionlaw.com/2021/04/22/the-super-league-and-its-related-issues-under-eu-competition-law/>.

19 Council of the European Union, "Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model". November 30, 2021, Accessed July 29, 2022. <https://data.consilium.europa.eu/doc/document/ST-14430-2021-INIT/en/pdf>.

20 Bierwagen, Rainer. and Dietmar Reich, "FIFA, UEFA and the Super League - Who is the Bad Guy from a Competition Law Perspective?" *Advant Beiten*, July 20, 2022, Accessed July 28, 2022. <https://www.advant-beiten.com/en/blogs/kbt/fifa-uefa-und-super-league-wer-ist-der-boesewicht-aus-wettbewerbsrechtlicher-sicht>.

21 *Ibid.*

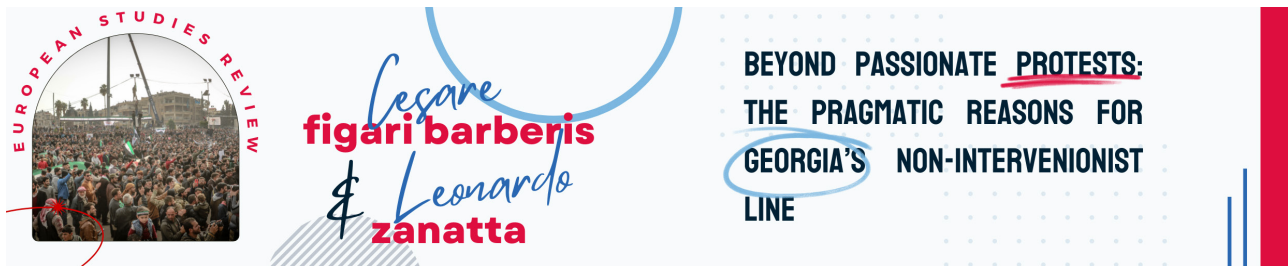
22 Case T-93/18 *International Skating Union v Commission* [2020] EU:T:2020:610.

23 Murphy, Patrick, and Stephen, "CJEU to Consider Whether UEFA Can Control Authorisation for the Proposed European Super League under European Competition Law". *William Fry*, May 17, 2022, Accessed August 11, 2022. <https://www.williamfry.com/newsandinsights/news-article/2021/05/17/cjeu-to-consider-whether-uefa-can-control-authorization-for-the-proposed-european-super-league-under-european-competition-law>.

A 'Red Card' from Luxembourg?

Oral submissions for both the Super League case and the ISU's appeal took place in mid-July 2022. The Super League case was heard by a Grand Chamber composed of 15 judges, rather than the usual three or five, highlighting its importance to European sports law. The advisory opinion of Advocate General Athanasios Rantos on the case is due to be published on 15 December 2022. The final judgment from the Grand Chamber, expected in late 2022 or early 2023, is highly likely -but not guaranteed- to closely mirror the Advocate General's opinion.

On the facts, it would appear that UEFA and FIFA do indeed meet the definition of a cartel. As such, the crucial question for Luxembourg will be whether the defense of the European sporting model is a legitimate objective and if so, whether the actions of UEFA/FIFA in response to the Super League were proportionate. Other issues to be considered, such as the legality of a lack of objective, transparent criteria for approving new leagues, and UEFA/FIFA's dual role as both regulator and market participant, are also to be considered. Alongside *ISU*, the Super League case could define how EU competition law interacts with professional sports for decades to come.



Introduction

EVER since Russia launched its invasion of Ukraine on February 24th, there have been repeated calls for Georgia to seize the opportunity to open a *second front* against Moscow and retake its breakaway regions of Abkhazia and South Ossetia by force. Among the most authoritative ones are the Ukrainian Security Council Secretary, Oleksiy Danilov,¹ and the advisor to Ukrainian President Volodymyr Zelensky, Oleksiy Arestovych.² The latter declared in April that “no Russian troops are left in the two Georgian breakaway regions” and that Tbilisi now has the “*historic opportunity*” to retake them.

Abkhazia and South Ossetia are two disputed territories located in the South Caucasus. Although recognized by the overwhelming majority of the international community as an integral part of Georgia, these two regions proclaimed independence in the 1990s and invoked Russia’s protection. Following the 12-day Russo-Georgian war fought in August 2008, Moscow and a handful of

Kremlin-aligned governments (Venezuela, Nicaragua, Nauru, and Syria) formally recognized their independence. Since then, the two breakaway regions have functioned, albeit to different degrees, as independent quasi-states with Russian security and financial backing.³ According to the supporters of the interventionist line, the conditions for opening a second front would be guaranteed by the fact that the Kremlin was forced to redeploy part of its military stationed in the two Georgian regions to Ukraine.⁴

As noticeable from the several anti-war rallies and Ukrainian flags hanging in the streets and shops of the major Georgian cities, as well as from the presence of some Georgian volunteers fighting alongside the Ukrainian army,⁵ Georgian citizens enthusiastically support Ukraine. Nevertheless, Prime Minister Irakli Garibashvili and other government members have repeatedly reiterated that no second front will be opened.⁶ A March 2022 survey by the National Democratic Institute (NDI) shows that a majority of respondents (55%) actually approved

1 Newsnpr. “Ukrainian Official Urges Georgia to Open ‘Second Front’ with Russia.” *Newsnpr*, March 28, 2022. Accessed August 3, 2022. <https://www.newsnpr.org/ukrainian-official-urges-georgia-to-open-second-front-with-russia/>.

2 Gabritchidze, Nini. “Calls for Georgia to Open a ‘Second Front’ against Russia Fall Flat.” *Eurasianet*, May 10, 2022. Accessed August 3, 2022. <https://eurasianet.org/calls-for-georgia-to-open-a-second-front-against-russia-fall-flat>.

3 Gerrits, Andre W., and Max Bader. “Russian Patronage over Abkhazia and South Ossetia: Implications for Conflict Resolution.” *East European Politics* 32, no. 3 (2016): 297–313.

4 Lomsadze, Giorgi. “Georgians Take up Arms against Russia in Ukraine.” *Eurasianet*, May 9, 2022. Accessed August 3, 2022. <https://eurasianet.org/georgians-take-up-arms-against-russia-in-ukraine>.

5 *Ibid.*

6 Gabritchidze, Nini. “Calls for Georgia to Open a ‘Second Front’ against Russia Fall Flat.” *Eurasianet*, May 10, 2022. Accessed August 3, 2022. <https://eurasianet.org/calls-for-georgia-to-open-a-second-front-against-russia-fall-flat>.

Garibashvili's very cautious response of not putting sanctions and not opening a second front.⁷ With this article, the authors try to summarise both the internal and external economic and political factors that motivate the statements and decisions of the Tbilisi authorities.

Internal Considerations: Economic vs Security Priorities

Let us begin with the internal considerations for not opening a second front in South Ossetia and Abkhazia. First of all, regaining territorial integrity is *not* the main priority for the majority of Georgians. A recent survey conducted by the International Republican Institute (IRI) in March 2022 shows that Georgians believe that the main challenges the country is *currently* facing are unemployment (40% of respondents), inflation (18%) and only in third place conflict and security concerns (13%).⁸ The picture is similar also for expected *future* challenges, with economic development being the first mention (45%) and regaining territorial integrity being a distant second mention (18%). Hence, Georgians are overall mainly concerned with economic issues, and the executive needs to take this into account. Indeed, Prime Minister Garibashvili, on February 25th,⁹ announced that Georgia would not join international sanctions against Russia because *"this will cause even more harm to our country*

and our population". Indeed, as reported by Transparency International (TI), in 2021, Tbilisi's revenues from exports, tourism, and remittances from its northern neighbour amounted to \$1.3 billion.¹⁰ Although Georgia is not over-reliant on Russia for its electricity or gas supply anymore, Moscow is still one of the country's most important trade partners. For example, on the one hand, Russia was the largest importer of Georgian wine last year, as 55% of Georgian wine exports went to Russia.¹¹ On the other hand, the Kremlin sold to Georgia 319,000 tons of wheat (amounting to 94% of the whole Georgian wheat imports) for \$87 million.¹² Finally, although the two countries have not had direct flights since 2019 due to diplomatic tensions, the Ministry of Internal Affairs of Georgia reports that, since the start of the war in Ukraine, almost 94,000 people have entered Georgia from Russian territory.¹³

Internal Considerations: Intra-Party Government Interests

In addition to this, also internal intra-party considerations need to be taken into account. The previously mentioned report by TI discusses how ex-prime minister and Georgian Dream patron, Bidzina Ivanishvili, still owns at least one company in Russia through one of his offshore companies and owned at least ten Russian companies through offshore companies

7 Caucasusbarometer.org. "Ndi: Public Attitudes in Georgia, March 2022." *Caucasusbarometer.org*, March 2022. Accessed August 3, 2022. <https://caucasusbarometer.org/en/nm2022ge/ASREWRGHR-withoutdkra/>.

8 Center for Insights in Survey Research. "Iri Georgia Poll Shows Economic Concerns, Political Polarization, Fears about Russia." *International Republican Institute*, April 27, 2022. Accessed August 3, 2022. <https://www.iri.org/news/iri-georgia-poll-shows-economic-concerns-political-polarization-fears-about-russia/>.

9 JAMnews. "Op-Ed: How Can PM Garibashvili's Statements about Ukraine Affect Georgia?" *English Jamnews*, March 23, 2022. Accessed August 3, 2022. <https://jam-news.net/op-ed-how-can-pm-garibashvilis-statements-about-ukraine-affect-georgia/>.

10 Transparency International Georgia. "Georgia's Economic Dependence on Russia: Trade, Tourism, Remittances, and Russian Companies in Georgia." *Transparency International Georgia*, March 10, 2022. Accessed August 3, 2022. <https://www.transparency.ge/en/post/georgias-economic-dependence-russia-trade-tourism-remittances-and-russian-companies-georgia>.

11 Narimanishvili, Nino. "Lack of Political Will" - Why Georgia Does Not Join Anti- Russian Sanctions?" *English Jamnews*, June 9, 2022. Accessed August 3, 2022. <https://jam-news.net/lack-of-political-will-why-georgia-does-not-join-anti-russian-sanctions/>.

12 Lomsadze, Giorgi. "In Russian War on Ukraine, Georgia's Economy to Be Collateral Damage." *Eurasianet*, April 4, 2022. Accessed August 3, 2022. <https://eurasianet.org/in-russian-war-on-ukraine-georgias-economy-to-be-collateral-damage>.

13 Narimanishvili, Nino. "Lack of Political Will" - Why Georgia Does Not Join Anti- Russian Sanctions?" *English Jamnews*, June 9, 2022. Accessed August 3, 2022. <https://jam-news.net/lack-of-political-will-why-georgia-does-not-join-anti-russian-sanctions/>.

in the 2012-2019 period.¹⁴ The Georgian oligarch had announced in 2011 that he would renounce his Russian citizenship and sell all his businesses in Russia before the 2012 elections, but the TI report clearly shows that he still covertly operated in the Russian economy well beyond 2011. Moreover, the report also shows how family relatives of Ivanishvili have business interests in Russia, among which some involve dealing with US-sanctioned former KGB general and Governor of St. Petersburg Georgy Poltavchenko. While Ivanishvili has officially retired from politics in 2021, the opposition accuses him of being the puppet master of the Georgian Dream from behind the scenes.¹⁵ In conclusion, if these reports and accusations are true, at least to a certain extent, then we cannot exclude that also intra-party economic interests make the scenario of opening a second front in South Ossetia and Abkhazia simply non-desirable for the government and its patron Ivanishvili.

External Considerations: Russian Military Strength

The decision of the Georgian authorities not to open the second front is also dictated by some external considerations. Former Georgian Counterintelligence Department Deputy Director Levan Tabidze, a veteran of the 2008 conflict and nowadays harsh critic of the current

government, told in an interview to Meduza that, after the deployment of troops to Ukraine, there were only 1,500 soldiers left in South Ossetia's capital Tskhinvali.¹⁶ Nevertheless, a military move against South Ossetia would immediately lead to an open confrontation with Russia's Southern Military District -the Russian Armed Forces branch that has operational control over units in the North Caucasus and Russian bases in South Caucasian post-Soviet states. As evidenced by a 2021 study, the Kremlin would immediately prevail by sea (Georgia never replaced its naval losses from the 2008 conflict), by land (Russian forces would enjoy almost a 3-to-1 advantage in armour, an 8-to-1 advantage in armoured personnel carriers and infantry fighting vehicles, and a 5-to-1 advantage in self-propelled artillery) and finally by air (while Georgia has nine Su-25 aircraft, only three are believed to be operational, and Russia has several squadrons ready to be deployed).¹⁷ Tabidze himself admits that, although the 26,000 soldiers available would permit Georgia to take control of South Ossetia in a single day, Tbilisi would not be prepared for the following Russian counterattack.¹⁸ Hence, were the Caucasian Republic to open a second front and take concrete steps towards that objective, it should have strengthened the capacity of its armed forces more significantly in the previous years.

14 Transparency International Georgia. "Georgia's Economic Dependence on Russia: Trade, Tourism, Remittances, and Russian Companies in Georgia." *Transparency International Georgia*, March 10, 2022. Accessed August 3, 2022. <https://www.transparency.ge/en/post/georgias-economic-dependence-russia-trade-tourism-remittances-and-russian-companies-georgia>.

15 Ghoghoberidze, Khatia. "How Does Oligarch Bidzina Ivanishvili De Facto Rule Georgia?" *English Jamnews*, June 28, 2022. Accessed August 3, 2022. <https://jam-news.net/how-does-oligarch-bidzina-ivanishvili-de-facto-rule-georgia/>.

16 Barateli, Ilya. "Russia Would Do Here What They Did in Mariupol' Why Georgia's Response to the War Has Been Feeble - despite Months of pro-Ukraine Protests in Tbilisi." *Meduza*, May 18, 2022. Accessed August 3, 2022. <https://meduza.io/en/feature/2022/05/18/russia-would-do-here-what-it-did-in-mariupol>.

17 Sweeney, Mike. "Assessing Georgia's Prospects for NATO Membership." *Defense Priorities*, June 14, 2022. Accessed August 3, 2022. https://static1.squarespace.com/static/56a146abb204d5878d6f125a/t/621662fb34162f62c1b1a2f0/1645634300521/DEFP_Assessing_Georgias_prospects_for_NATO_membership.pdf.

18 Barateli, Ilya. "Russia Would Do Here What They Did in Mariupol' Why Georgia's Response to the War Has Been Feeble - despite Months of pro-Ukraine Protests in Tbilisi." *Meduza*, May 18, 2022. Accessed August 3, 2022. <https://meduza.io/en/feature/2022/05/18/russia-would-do-here-what-it-did-in-mariupol>.

External Considerations: Between Lack of Western Support and Russian Overpresence

A further consideration can be traced to the statements of Georgian president Salome Zourabishvili in an interview with Deutsche Welle in May.¹⁹ *"We have to be careful because we don't have many means and nobody would be ready to support Georgia in the same way"*. Already in 2008, Tbilisi made the mistake of overestimating the West's political and military support. The plausibility of her statement can be seen in the non-invitation of Georgia to the G7 Leaders' Summit in June 2022 in the Bavarian Alps, where instead Ukrainian and Moldovan foreign ministers participated. With European countries and the USA already financially and militarily backing up Ukraine, there is no guarantee that they would have the will and resources for backing up also Georgia were it to enter a conflict with Russia. Moreover, the diplomatic relations between EU institutions and Georgia have not been particularly idyllic recently. For example, in early June 2022 the EU parliament passed a resolution calling for the EU to consider sanctioning Georgian Dream patron Ivanishvili for his *"destructive role in Georgian politics"*, accusing him in particular of deteriorating free media through *"politically motivated persecution of journalists and political opponents"*.²⁰ In June 2022, the EU Council denied Membership Candidate Status

to Georgia while it granted it to Moldova and Ukraine, providing the Caucasian country with a list of conditions to meet before re-examining its request.²¹ Hence, diplomatic relations between the EU and the Georgian government are strained at the moment, which makes the prospect of European financial and military backing of Tbilisi in case of war with Moscow rather bleak.

Furthermore, any regional initiative in the South Caucasus, especially regarding security issues, can hardly be implemented without Moscow's involvement. Not by chance, the first summit of the 3+3 model, a framework proposed by Turkey in the aftermath of the Second Nagorno-Karabakh War to solve the thorniest issues regarding the future regional outlook, took place in Moscow in December 2021. Russia's military influence in the South Caucasus is not limited to the two Georgian breakaway regions. The Kremlin intervened in the Nagorno-Karabakh conflict, brokering a ceasefire agreement in November 2020 that ended a 44-day war between Armenia and Azerbaijan started in the September of the same year. The treaty confirmed Baku's territorial gains during the conflict, obliged Yerevan to return the remaining districts of the "buffer zone" surrounding Nagorno-Karabakh but, most importantly, paved the way for a 5 years-Russian peacekeeping mission consisting of 1,960 servicemen in the disputed region. Nevertheless, after

19 DW News. "Salome Zourabichvili: A Sense of Solidarity with Ukraine." *Deutsche Welle*, May 3, 2022. Accessed August 3, 2022. <https://www.dw.com/en/salome-zourabichvili-a-sense-of-solidarity-with-ukraine/av-61676753>.

20 Kincha, Shota. "Supporters Question Georgia's EU Aspirations over Ivanishvili Sanctions Threat." *OC Media*, June 10, 2022. Accessed August 4, 2022. <https://oc-media.org/supporters-question-georgias-eu-aspirations-over-ivanishvili-sanctions-threat/>.

21 OC Media. "EU Denies Georgia Candidate Status." *OC Media*, June 23, 2022. <https://oc-media.org/eu-denies-georgia-candidate-status/>.

the beginning of its military campaign in Ukraine, Moscow had to redeploy part of its personnel also from Nagorno-Karabakh. Such a move resulted in new incidents in the region's villages where the Russian peacekeepers' mission has been stationed since March.²² Although Georgia did not participate in the first 3+3 meeting as a sign of protest against Russia's support for Abkhazia and South Ossetia, its flag was hung outside the summit building together with the flags of the other participating countries.²³ This gesture implied a shared desire among the participants for a future Georgian presence in the 3+3 framework. Russia also enjoys cordial ties with Georgia's neighbours. Besides being a member of the Russia-led Collective Security Treaty Organization (CSTO), Armenia hosts Russia's 102nd military base in Gyumri and 3624th airbase in the southwestern outskirts of Yerevan. At the same time, on February 22th, Azerbaijan signed with Russia a 43-point agreement covering bilateral cooperation in several spheres that the same Azerbaijani president Ilham Aliyev commented as an event "*bringing relations to the level of an alliance*".²⁴ In essence, Tbilisi needs to take into consideration the geopolitical reality of the whole region, which still sees Moscow active and present both militarily and diplomatically.

Conclusion

In a nutshell, the authors argue that Georgia would have suffered economically by imposing sanctions on Russia. The same would be true, and surely even worse, in the case of military actions against South Ossetia and Abkhazia. Overall, it would make little political sense for the Georgian government to now open this second front as the silent majority of Georgians would not be willing to face the economic consequences of this decision. Moreover, there are also intra-governmental dynamics, as Georgian Dream patron Ivanishvili may have economic interests in Russia, and the Georgian government itself has strained relations with the EU.

Furthermore, Russia's Southern Military District has a considerable edge over Georgia in terms of air forces, armoured vehicles, and artillery, even without further reinforcements. There is also no guarantee that Georgia would receive the same kind of military and economic assistance that Ukraine received from European countries and the US. In conclusion, some external observers may be somewhat struck by the admittedly big pro-Ukraine and anti-Russia protests in the streets of Tbilisi, and thus conclude that it would now be convenient to open a second front in South Ossetia and Abkhazia. But these impressions need to be balanced with survey data and geopolitical considerations, which combined make the probability of opening this second front minimal.

22 News Wires. "Russia Accuses Azerbaijan of Violating Nagorno-Karabakh Ceasefire." France 24, March 26, 2022. Accessed August 3, 2022. <https://www.france24.com/en/europe/20220326-russia-accuses-azerbaijan-of-violating-nagorno-karabakh-ceasefire>.

23 Kaleji, Vali. "The Impact of the War in Ukraine on Regional Cooperation in the South Caucasus." *Middle East Institute*, June 30, 2022. Accessed August 3, 2022. <https://www.mei.edu/publications/impact-war-ukraine-regional-cooperation-south-caucasus>.

24 AZERTAC. "President Ilham Aliyev: This Declaration Brings Azerbaijan-Russia Relations to the Level of an Alliance." AZERTAC, February 23, 2022. Accessed August 3, 2022. <https://azertag.az/en/xeber/2025989>.



Introduction

MIGRATION has always been a natural part of human development. To describe it with the words of Ban Ki-moon, the former United Nations Secretary-General: *"Migration is an expression of the human aspiration for dignity, safety and a better future".*¹ Throughout history, we perceive three major push and pull factors. Besides socio-political and demographic-economic factors, the constant impulse for motion has been the environment.² There are several types of migrants, and when we speak about the migration caused by environmental disasters, we define the people affected as "forced migrants".³ These people were forced to flee elsewhere when climatic conditions worsened, whether it was a result of forest fires, hurricanes, heat waves, floods, droughts, or storms. In the past, most environmental displacements happened internally, and people could return afterwards. However,

the intensifying impacts of climate change now make certain areas completely uninhabitable; thus, homecoming becomes arduous.⁴ Owing to the climate crisis, the phenomenon of "environmental migration"⁵ is yet expected to accelerate. We have clearly a lot at stake, so what do we do about it?

The threat we are overlooking

In today's world full of struggles, we may easily overlook the threats that are standing out of the main spotlight. One of them is also environmental migration.

The current number of worldwide environment/climate displaced people is difficult to assess for various reasons. One of them is the fact that many different determinants, such as poor governance or armed conflict, may play a role in influencing the worldwide migration.⁶ As a reason for that, the environmental issues

1 United Nation, "Secretary-General's remarks to High-Level Dialogue on International Migration and Development," October 3, 2013. Accessed August 15, 2022. <https://www.un.org/sg/en/content/sg/statement/2013-10-03/secretary-generals-remarks-high-level-dialogue-international>.

2 European Parliament, "Exploring Migration Causes – Why People Migrate." *European Parliament News*, January 7, 2020. Accessed August 15, 2022. <https://www.europarl.europa.eu/news/en/headlines/world/20200624STO81906/exploring-migration-causes-why-people-migrate>.

3 Council of Europe, "Compass Manual for Human Rights Education with Young People", 2020. Accessed August 15, 2022. <https://www.coe.int/en/web/compass>

4 Apap, Joanna, and Capucine du Perron de Revel, "The Concept of 'climate Refugee' Towards a Possible Definition." *European Parliamentary Research Service*, PE 698.753, October 2021. Accessed August 15, 2022. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI\(2021\)698753_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI(2021)698753_EN.pdf).

5 By environmental migration the concept of climate migration is also considered. *Climate migration is a subcategory of environmental migration; it defines a singular type of environmental migration, where the change in the environment is due to climate change.* Migration Data Portal, "Environmental Migration." June 21, 2022. Accessed August 15, 2022. https://www.migrationdataportal.org/themes/environmental_migration_and_statistics.

6 European Parliament, "Exploring Migration Causes – Why People Migrate".

Cumulative population displacement, 2008–2050

At the current rate of global population displacement, 1.2 billion people could be displaced by 2050 due to ecological threats and armed conflict.

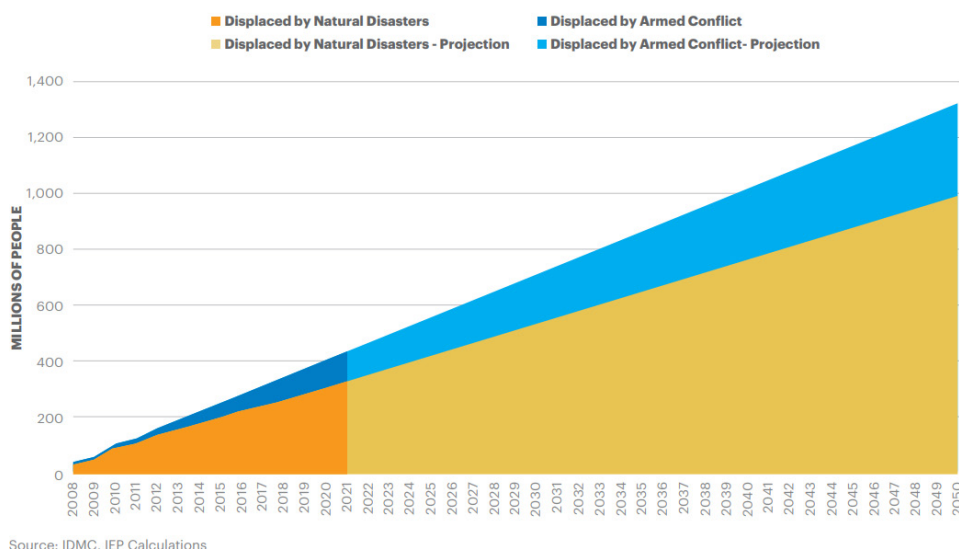


Figure 1: Cumulative population displacement, 2008-2050. Source: ETR 2020⁷

are often not considered the main reason for the dislocations; therefore, they might end up in a different categorization. Furthermore, regardless of the cause for the migration, there has been a dispute among definitions describing people fleeing their homes as such. However, the United Nations High Commissioner for Refugees (UNHCR) defines three primary groups: refugee, asylum-seeker, and internally displaced person (IDP). This classification is often completed with one additional category –stateless person.⁸

At the moment, the discussions rightfully resonate with the topic of migration from Ukraine. Shortly after the start of the war, on March 4, 2022, the European Union (EU) implemented the emergence mechanism called the Temporary Protection Regime, which protects Ukrainians who cannot return to their home. This mechanism is

an “emergency mechanism which can be applied in cases of a mass influx of displaced persons and which aims to provide immediate and collective protection for displaced persons who are not in a position to return to their country of origin”.⁹ However, when speaking of the environment, the recent policy brief concentrated on the country's situation in this area, drawn up in April 2022, shows that “most policies, laws and strategies on the environment, climate change, agriculture, rural development, urban development, gender, and migration do not recognize the interlinkages between migration, environment and climate change”.¹⁰ This statement means that the environmental aspects of migration are not taken into account appropriately, and given the emergency of the situation, should be perhaps treated with a higher level of attention.

⁷ Institute for Economic and Peace, “Ecological Threat Register 2020.” September 2020. ReliefWeb. Accessed August 15, 2022. <https://reliefweb.int/report/world/ecological-threat-register-2020>.

⁸ United Nations High Commissioner for Refugees, “Guiding Principles on Internal Displacement.” UNHCR. 2004. Accessed August 15, 2022. <https://www.unhcr.org/43ce1cff2.html>.

⁹ European Council, “EU Migration Policy.” Accessed August 15, 2022. <https://www.consilium.europa.eu/en/policies/eu-migration-policy/>.

¹⁰ IOM, “Policy Brief on Migration, Environment and Climate Change: Ukraine.” Iom.Int., April 2022. Accessed August 15, 2022. <https://environmentalmigration.iom.int/sites/g/files/tmzbd1411/files/documents/policy-brief-eng.pdf>.

Despite the seriousness of the situation in Ukraine, migration from other parts of the world continues out of the main limelight. Generally, per year, the displacement caused by ecological conditions is, on average, 24 million people. Together with movements caused by armed conflicts, this number extends to 31 million people per year. By the year 2050, estimates of globally displaced people will be between 250 million and one billion by the year 2050.¹¹ And certain findings suggest that this number could even exceed one billion if the current rate continues,¹² whereas the world's overall population by that time can reach almost 10 billion.¹³

Researchers from the Institute for Peace & Economics found in the latest Ecological Threat Register (ETR) Report that between now and 2050, there will be a minimum of 141 countries exposed to at least one ecological threat.¹⁴ However, many areas will face or already face several various environmental hazards. The ETR Report mentioned above shows that countries with the highest number of these threats are among the world's least peaceful countries on the Global Peace Index. These include Afghanistan, Syria, Iraq, Chad, India, and Pakistan. The main "ecological hotspots", i.e. the regions facing the largest number of ecological threats, are the Sahel-Horn belt of Africa (from Mauritania to Somalia), the Southern African belt (from Angola to Madagascar) and the Middle East and

Central Asian belt (from Syria to Pakistan). Speaking of the main and most common ecological threats, the lead takes flooding, which affects 60% of the 157 countries scrutinized by the ETR Report. Flooding is followed by water stress, which is expected to aggravate the situation, especially in the Middle East and North Africa. Among other significant issues are food insecurity and resource scarcity.

The 19 countries, which are most at risk, facing 4 to 6 threats, have a population of 2.1 billion people. Furthermore, it is estimated that more than one billion people live in 31 countries, which are unlikely to withstand the impact of ecological events by 2050 sufficiently.¹⁵ The ability to face such challenges is closely intertwined with socio-economic resilience. Countries with poor socio-economic stability facing a high number of threats are exposed to a lesser chance of successfully overcoming them. On the other hand, the developed countries, such as the United States or most of the European countries, are more resilient to manage the ecological threats, but also must deal with a smaller number of them and at the same time, they experience lower population growth. Altogether, 16 countries are encountering no danger of these kinds, for instance, Sweden, Norway, Ireland, or Iceland.¹⁶ Nevertheless, in the end, neither of these countries is immune to the possibility of environmental migration from other areas with a higher risk level.

11 Institute for Economic and Peace, "Ecological Threat Register 2020".

12 Brzozowski, Alexandra. "Ecology Threats Likely to Send More Climate Refugees towards Europe by 2050." *EURACTIV*. 9 September, 2020. Accessed August 15, 2022. <https://www.euractiv.com/section/global-europe/news/ecology-threats-likely-to-send-more-climate-refugees-towards-europe-by-2050/>.

13 United Nations, "World Population Projected to Reach 9.8 Billion in 2050, and 11.2 Billion in 2100". Accessed August 15, 2022. <https://www.un.org/en/desa/world-population-projected-reach-98-billion-2050-and-112-billion-2100>.

14 *The report is released by leading international think-tank the Institute for Economics & Peace (IEP), which produces indexes such as the Global Peace Index and Global Terrorism Index. Together with cooperation with the Mercy Corps, the Stimson Center, UN75, GCSP, the Institute for Climate and Peace.*

15 Institute for Economic and Peace, "Ecological Threat Register 2020".

16 *Ibid.*

Current legal framework and Addressing the problem

The present Geneva Conventions do not guarantee or enable the climate refugee a refugee status. Therefore, according to many, climate refugee rights should be an emerging human right issue, as long as the only possibility for refugees to get a residence permit is on humanitarian grounds.¹⁷ In the EU, the external migration and asylum policy is laid out by the Global Approach to Migration and Mobility (GAMM). In line with this framework, the responsibility takes the countries' local level, mainly through development cooperation and humanitarian aid.¹⁸ Nevertheless, in the European *acquis* no tool explicitly aims at climate migration, nor is there anywhere considered the term "climate justice". However, the Lisbon Treaty provides the necessary grounds for revising the asylum and immigration policy, which could include an *ad hoc* regulation for environmentally dispersed people.¹⁹ Furthermore, in 2019, the European Commission recognized climate change as "*a factor in migration and instability, conflict and food insecurity*", stating it in the European Green Deal.²⁰

Subsequently, in September 2020, the European Commission introduced the New Pact on Migration and Asylum. This proposal recognizes climate change as one of the "*key societal challenges faced by the world today*"²¹ that will "*have an impact on migration*".²² Still, this document does not formally recognize climate change as a reason for migration, nor are climate disasters listed as a legitimate motive to seek asylum.²³ All things considered, the true origins of climate migration tend to remain unaddressed, and the approach of the EU to the climate migration phenomenon is somewhat reactive.²⁴

Conclusion

And what brings the future? We are already aware of the fact that climate migration is only beginning and expected to lead to extensive migration, especially from vulnerable countries.²⁵ Therefore, we must prepare for the subsequent refugee crisis and ensure minimal disturbances. To achieve this, we must primarily work on mitigation and adaptation together with meeting the Paris Agreement and all our other commitments. The EU is currently one of the leaders in this area,

17 Council of Europe, "Compass Manual for Human Rights Education with Young People".

18 Soddu, Anna Lia Maria, "Environmentally Forced Migrations in the European Policy Framework." *Ifimes.Org*, March 2022. Accessed August 15, 2022. <https://www.ifimes.org/en/researches/environmentally-forced-migrations-in-the-european-policy-framework/5020>.

19 Šedová, Barbora, and Lisa Thalheimer, "How Climate Change and Migration Can Cascade in the EU." *EuropeNowJournal.Org*, February 2022. Accessed August 15, 2022. <https://www.europeNowjournal.org/2022/01/30/how-climate-change-and-migration-can-cascade-in-the-eu/>.

20 Apap, and du Perron de Revel, "The Concept of 'climate Refugee' Towards a Possible Definition".

21 European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum." Brussels, 23.9.2020 COM(2020) 609 final.

22 *Ibid.*

23 Apap, and du Perron de Revel, "The Concept of 'climate Refugee' Towards a Possible Definition".

24 Soddu, "Environmentally Forced Migrations in the European Policy Framework".

25 Noonan, Eamonn, and Ana Rusu, "The Future of Climate Migration." *European Parliamentary Research Service*, PE 729.334, March 2022,

March Accessed August 15, 2022. [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729334/EPRS_ATA\(2022\)729334_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729334/EPRS_ATA(2022)729334_EN.pdf).

with its European Green Deal,²⁶ Fit for 55,²⁷ the EU strategy on adaptation to climate change,²⁸ and the European Climate Law.²⁹ Yet, the Union and its member states must also assure effective, long-term, and thorough implementation of the pledges and promises. On top of that, another essential feature in solving climate migration is environmental peacebuilding in fragile nations. Due to the fact that peace and climate are intertwined factors that influence each other, this step would lead to increasing the overall resilience of exposed communities.³⁰

To sum it up, with certainty, Europe will face massive climate migration, and the prevention depends on adequate action to mitigate climate change. If we could successfully overcome the challenge in the form of a climate crisis, we would also manage the outcomes of it, and by that, environmental migration. In the current setting, there is at risk not only the state of our planet but also the lives of millions.

26 European Commission, "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions The European Green Deal". Brussels, 11.12.2019 COM(2019) 640 final.

27 European Council, "Fit for 55". Consilium.Europa.Eu. 2022. Accessed August 15, 2022. <https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/>.

28 European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Forging a climate-resilient Europe - the new EU Strategy on Adaptation to Climate Change". EBrussels, 24.2.2021 COM(2021) 82 final.

29 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), PE/27/2021/REV/1, OJ L 243, 9.7.2021, p. 1–17.

30 Šedová, and Thalheimer, "How Climate Change and Migration Can Cascade in the EU".



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