Outline

- Energy in international trade regulation – origins
- How energy is different?
- Special disciplines for energy trade?
- ECT – multilateral investment treaty applying WTO rules with respect to energy
International trade rules and energy

- GATT creation – no energy producers among CPs
- WTO rules do not exclude energy but are not specifically designed to deal with it
- Situation is changing – many energy producers are WTO Members
- BUT significant energy turnover is still outside WTO system
- Petroleum crisis of 70ies => attempts to include energy issues in agenda of Tokyo Round:
  - Discussion of export restrictions
- Debate on energy pricing policies of 1980ies
- Dual pricing - addressed during Uruguay Round (Natural Resource-Based Products & SCM negotiations):
  - Compared pricing policies with subsidies;
  - Discussed countervailing “natural resource subsidies”
Special Disciplines for Energy Trade?

ARE ENERGY SPECIFIC TRADE RULES NECESSARY?

Energy is Different:
- Crucial to functioning of other sectors
- Natural monopolies dominate sector
- Production & transportation capacity constraints
- Network-dependent:
  - third-party access to and interconnection with networks and grids
  - transit issues
- Lower energy prices & social/economic development
- Regulation is important
- Impact on environment/climate change
- Energy efficiency
- Security of supply
## ENERGY CHARTER HISTORY

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>June 25, 1990</td>
<td>Lubbers’ initiative on common broader European energy space presented to the European Council</td>
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<tr>
<td>December 17, 1991</td>
<td>European Energy Charter signed</td>
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<tr>
<td>December 17, 1994</td>
<td>Energy Charter Treaty (ECT) and Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) signed</td>
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<tr>
<td>16 April, 1998</td>
<td>ECT enters into force and became an integral part of international law</td>
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<td>As of today</td>
<td>§ ECT signed by 51 states + European Communities = 52 ECT signatories</td>
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<tr>
<td></td>
<td>§ ECT ratified by 46 states + EC (excl. 5 countries: Russia, Belarus, Iceland, Australia, Norway )</td>
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<td>§ Russia and Belarus: provisional application of ECT</td>
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<td>§ Pakistan – invited as 53rd member of ECT in November 2006</td>
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<td>§ Latest observer - Afghanistan</td>
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Focus of International Energy Organisations

- **EU**
- **ECT**
- **OPEC**
- **IEA**
- **IEF**

**Nature of Cooperation**
- Legally binding obligations

**Membership profile**
- Producers / Net exporters
- Transit / Transportation
- Consumers / Net importers
ENERGY CHARTER AND RELATED DOCUMENTS

Political Declaration
EUROPEAN ENERGY CHARTER

Legally Binding Instruments
ENERGY CHARTER TREATY
TRADE AMENDMENT

Energy Efficiency Protocol
Energy Transit Protocol
Energy Charter Treaty

- Multilateral investment treaty in energy field
- 51 Contracting Parties incl. Former Soviet Union states
- Applies by reference WTO rules to all trade in energy materials and products
- Applies MFN to energy trade – also between parties - non-WTO Members
- Integration into global economy / promotion of WTO accession
- Trade Amendment:
  - Possibility of inclusion of energy-related equipment in the ECT
  - Possibility to move to binding tariffs regime
- Investment protection
- Energy efficiency
- Technology cooperation
- Dispute settlement
ECT Key Provisions

- Sovereignty over natural resources (Art. 18)
- Trade (Art. 5, 29)
- Transit (Art. 7)
- Investment (Art. 10-15)
- Environment/energy efficiency (Art. 19)
- Disputes settlement (Art. 26-28)
- Technology transfer, access to technology (Art. 8)

ECT does NOT impose:

- National energy policies
- Privatization
- Third party access
ECT and Sovereignty over Energy Resources

ECT Article 18 (1)
“The Contracting Parties recognise state sovereignty and sovereign rights over energy resources…”

ECT Article 18 (2)
“… the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.”

ECT Article 18 (3)
“Each state continues to hold in particular the rights to decide the geographical areas … to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation …”
Trade in Energy under ECT

- Applies by reference WTO rules to all trade in energy materials and products
- Applies MFN to energy trade – also between CPs - non-WTO Members
- National treatment once energy goods crossed border
- Elimination of quantitative restrictions (GATT XI)

Trade Amendment:

- Possibility of inclusion of energy-related equipment in the ECT
- Possibility to move to binding tariffs regime
Transit

- Energy trade is to large extent grid-bound
- Transit – crucial for cross-border trade
- Barcelona Conventions on Transit (1921, 1923) – facilitate but no right to build facilities
- GATT Art. 5:
  - freedom of transit
  - reasonable, cost-related charges
  - no case law on application of Art. 5
- Many transit states are not WTO Members
- Energy companies-incumbents can obstruct transit
The image contains a slide titled "WTO Transit Rules". The slide discusses the adequacy of Art. V GATT in addressing energy transit and highlights key points from the Doha Negotiations, Trade Facilitation, including:

- Strengthening non-discrimination
- More effective disciplines on fees and charges
- Transit formalities and documentation requirements (reduction, simplification, harmonization, standardization)
- Promotion of regional transit arrangements

It also mentions that energy transit is not discussed separately in accession negotiations.
ECT Transit Provisions

- Art. 7 of ECT
- Freedom of energy transit
- Non-discrimination as to origin, destination or ownership
- Transit treated no less favourably than energy originating in or destined for transit country itself
- Non-interruption of flow (incl. dispute)
- Obligation not to obstruct the establishment of new capacity
- Conciliation procedure for transit disputes
- Negotiations of Transit Protocol
Draft Transit Protocol

Further elaborate and detail the ECT Article 7
Basic text agreed at the end of 2002, subject to resolution of:

- Remaining 3 open issues discussed in bilateral consultations between the EU and RuF

- Considerable progress so far:
  - Definition for available capacity
  - Principles of transit tariffication
  - Transparent and non-discriminatory congestion management rules
  - Detailed provisions for new capacity creation

- Bilateral / plurilateral consultations still underway, focusing on:
  - Avoidance of mismatch between the duration of supply and transit contracts
  - Application of the TP inside the EU
ECT Investment Protection

**Strong Protection for Foreign Investment**
- Binding NT/MFN obligation for post-establishment phase, elimination of QR, TRIMs (e.g. national content)
- Best-endeavors to promote NT/MFN for pre-investment phase
- Freedom of investment-related capital transfers
- Protection of individual investment contracts
- Freedom of employment of key personnel

**Protection Against Political Risks**
- Expropriation and nationalization
- Prompt, effective and adequate compensation for any assets expropriated
- Unjustified restrictions on the transfer of funds
ECT Investment Disputes Rules

- Investment protection reinforced by access to binding international arbitration in case of dispute (except for competition and environmental issues)

- Both investor-state and state-state, based on the WTO model, dispute resolution procedures

- Amicable settlement, failing which international arbitration is an option under Article 26 under
  i. UNCITRAL Rules,
  ii. Stockholm Chamber of Commerce or
  iii. ICSID Rules.

- Countries committed to ensure enforcement and carry out arbitration decisions without delay
ECT Dispute Settlement

- State-state arbitration on the interpretation or application of ECT (except for competition and environmental issues)
- Special provisions, based on the WTO model, for the resolution of inter-state trade issues
- Conciliation procedure for transit disputes
Global Rules of Energy Trade?

- Rules for energy trade are of increasing importance.
- Considerations of security of supply/demand + need for investment => predictability & transparency necessary.
- **Energy is different** from other commodities.
- Some issues need clarification within the existing framework.
- Both prices & position of energy on political agenda high.
- But interests diverge => need of balance.
Thank you