Challenges of international energy trade regulation: WTO and Energy Charter

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Outline

- Energy in international trade regulation
- How energy is different?
- To what extent WTO covers energy?
- Beyond trade rules – energy-specific challenges
- ECT – multilateral investment treaty applying WTO rules with respect to energy
- Special disciplines for energy trade?
Multilateral trade rules and energy - origins

- GATT creation – no energy producers among CPs
- WTO rules do not exclude energy but are not specifically designed to deal with it
- 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”
- Situation is changing – many energy producers are WTO Members
- BUT significant energy turnover is still outside WTO system
- Energy addressed in accession negotiations
- Doha agenda deals with energy issues in negotiations on
  - energy services
  - environmental goods and services
  - trade facilitation (transit issues)
Difference of Energy from Other Goods

- Vital for economic and social development
- Resources are distributed very unevenly
- Security of supply
- Energy prices & social/economic development
- Production and transportation capacity constraints
- Network-dependent:
  - third-party access to and interconnection with networks and grids
  - transit issues
  - need for large investment in infrastructure
- Natural monopolies dominate sector
- Regulation is important
- Impact on environment/climate change
- Energy efficiency
- Interests of consuming and producing countries are very different, finding common ground - challenging
WTO Design and Energy Trade

- Traditional focus of GATT – market access
- WTO addresses import barriers to a larger extent than export barriers
- Manufactured goods – traditional focus, but they don’t encounter natural endowment constraints => different policy considerations as drivers for development and exploration of energy resources
- Trade restrictive practices in energy field are found on export side
- Most important challenges are linked to dependence of energy trade on fixed infrastructure
Challenges for Existing Multilateral Framework – Fixed Infrastructure

- Reliance of energy trade on fixed infrastructure – built specifically for transporting energy
- Transportation remains very expensive - significant share of the overall cost of energy
- Access to pipelines – controlled often by incumbent companies and STEs disciplines do not address it
- => elimination of import barriers is not enough for liberalization of energy trade
- => conditions of access + importance of investment framework to ensure construction of additional networks
Challenges for Existing Multilateral Framework - Transit

- Energy trade is grid bound => different from other goods’ transit
- Energy transportation is capacity restricted and energy is difficult to store => time aspect matters
- GATT Art. V:
  - freedom of transit
  - reasonable, cost-related charges
  - no customs duties on transited goods
  - MFN treatment of like products being transported on the same routes under like conditions
- Art. V does not address important for energy transit issues:
  - Non-interruption of flow (incl. dispute)
  - Obligation not to obstruct the establishment of new capacity
- Many transit states are not WTO Members
- Energy companies-incumbents often manage infrastructure
- Doha Negotiations, Trade Facilitation: clarifying GATT transit provisions
Is the Multilateral Framework Effective to Regulate Energy Trade?

- Energy trade is covered by general WTO rules
- These rules are not designed to tackle energy issues:
  - energy transit
  - creation of fixed infrastructure and access to it
+ climate challenges
- The effectiveness of legal framework depends on participation of all groups of stakeholders
- Positions of energy consuming and producing countries are very different
- To what extent regional agreements could help?
Energy Charter Treaty Constituency

- Signatory
- Observer
## 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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<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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**As of today**

- ECT signed by 51 states + European Communities = 52 ECT signatories
- ECT ratified by 46 states + EC (excl. 5 countries: Russia, Belarus, Iceland, Australia, Norway)
- Russia and Belarus: provisional application of ECT
- Latest observer - Indonesia
ENERGY CHARTER AND RELATED DOCUMENTS

Political Declaration
EUROPEAN ENERGY CHARTER

Legally Binding Instruments
ENERGY CHARTER TREATY
TRADE AMENDMENT

Energy Efficiency Protocol
Energy Transit Protocol
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 …”
Focus of International Energy Organisations

- **Legally binding obligations**
  - EU
  - ECT
  - IEA
  - OPEC

- **Political cooperation**
  - IEF

- **Nature of Cooperation**
  - Producers / Net exporters
  - Transit / Transportation
  - Consumers / Net importers
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
- Transit
- Investment protection
- Sovereignty over natural resources
- Environment/energy efficiency
- Technology transfer, access to technology
- Dispute settlement

**ECT does NOT impose:**
- National energy policies
- Privatization
- Third party access
ECT Trade Regime

- Applies by reference WTO rules to all trade in energy materials and products
- Applies MFN to energy trade – also between CPs - non-WTO Members
- Integration into global economy / promotion of WTO accession
- 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 bound tariffs regime
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 (including in a case of 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 Dispute Settlement

- 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

- Special provisions, based on the WTO model, for the resolution of inter-state trade issues

- Investor-state international arbitration is an option under Article 26 under
  i. UNCITRAL Rules,
  ii. Stockholm Chamber of Commerce or
  iii. ICSID Rules.

- Conciliation procedure for transit disputes
The Role of ECT in Regulation of Energy Trade and Investment

- The only energy-specific multilateral agreement covering all major aspects of international energy trade:
  - Trade
  - Transit
  - Investment
  - Energy efficiency

- Includes producing, consuming and transit countries

- The ECT’s value added compared to WTO are in transit and investment
Global Rules of Energy Trade?

- Considerations of security of supply/demand + need for investment => predictability and transparency necessary
- Rules for energy trade are of increasing importance
- Some issues need clarification within the existing framework:
  - Transit
  - Access to grids
  - Practices of energy enterprises
  - Climate change
- **Energy is different** from other commodities – finite non-renewable resources vital for economic and social development
- Energy resources are under the sovereign control of a relatively small number of countries
- Need to address concerns of different stakeholders
- Interests diverge => need of balance
Thank you