Challenges for International Energy Trade Regulation

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Outline

- Why energy trade is different?
- Energy in international trade regulation
- Beyond trade rules – energy-specific challenges
- Energy Charter Treaty and its role in climate change mitigation
Energy is a Special Commodity

- Vital for economic and social development
- Resources are distributed very unevenly
  - Security of supply concerns
  - Resource rent optimisation
  - Energy prices & social/economic development
- Production and transportation capacity constraints
- Network-dependent:
  - third-party access to and interconnection with networks and grids
  - need for large investment in infrastructure
- Natural monopolies dominate sector
- Regulation is important
- Impact on environment/ climate change => international action needed
  - today energy consumption largely relies on fossil fuels (80 %)
  - more than 2/3 of GHG emissions stem from burning fossil fuels
- Interests of consuming and producing countries are very different, finding common ground – challenging
WTO Design and Energy Trade

- WTO rules do not exclude energy but are not specifically designed to deal with it
- Traditional focus of GATT – market access
- WTO addresses import barriers to a larger extent than export barriers
- No natural endowment constraints in case of manufactured goods
- => 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 energy trade’s dependence on fixed infrastructure
Contentious Issues

- Export price measures
  - Export duties remained largely unbound, serve as revenue tool
- Do production quotas de facto amount to quantitative export restrictions?
- Behavior of energy monopolies – state trading enterprises
- Use of price subsidies to promote downstream industries
- Climate change measures that have trade effects
Challenges for Existing Multilateral Framework – Fixed Infrastructure

- Reliance of energy trade on fixed infrastructure – built specifically for energy transportation
- Issues of expropriation/eminent domain
- Energy transportation remains very expensive - significant share of the overall cost/large economy of scale – natural monopoly
- Pipelines – controlled often by incumbents
- => elimination of import barriers is not enough for liberalization of energy trade
- => conditions of access + importance of investment framework to ensure construction of additional network capacity
- Attempt to negotiate a Reference Paper on Energy Services
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 issues for energy transit:
  - Access to infrastructure and conditions of access, tariffs
  - Creation of new infrastructure
  - Non-interruption of flow (incl. dispute), etc.
- Doha Negotiations, Trade Facilitation: clarifying GATT transit provisions
Is it Possible to Tackle Energy in Multilateral Trade Framework?

- Energy trade is covered by general WTO rules
- Rules are not designed to tackle:
  - energy transit
  - creation of fixed infrastructure and access to it
- Considerations of sovereignty over energy resources
- Interests of energy consuming and producing countries are very different => plurilateral agreement option
- The effectiveness of legal framework depends on participation of all groups of stakeholders
Energy Charter Treaty Constituency

- **Signatory**
- **Observer**
Energy Charter Treaty

- Multilateral investment treaty in energy field
- 53 Contracting Parties incl. Former Soviet Union states + 30 observers (10 int. organizations)
- 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
- Mandatory third party access
ECT Trade Regime

- Applies by reference WTO rules to trade in energy materials and products – in relations between CPs one of which is non-WTO Member
- Integration into global economy / promotion of WTO accession
- MFN to cross-border energy trade
- National treatment on internal market
- Elimination of quantitative restrictions
- Special provisions, based on the WTO model, for the resolution of inter-state trade issues

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, based on GATT +
- 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 – to complement and extend provisions of the Treaty
  - Utilisation of available capacity, creation of new capacity
  - Transit tariffs
  - Congestion management
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
  - Protection of individual investment contracts
  - Freedom of investment-related capital transfers
  - Freedom of employment of key personnel

- **Protection Against Political Risks**
  - Expropriation and nationalization
  - Prompt, effective and adequate compensation for any assets expropriated

- Binding international arbitration in case of dispute under
  - UNCITRAL Rules,
  - Stockholm Chamber of Commerce or
  - ICSID Rules
Important Role for ECT Investment Rules in Climate Change Mitigation

- How much investment is needed to address climate change?

- UNFCCC “Investment and Financial Flows to Address Climate Change”, 2007:
  - to return to current emissions levels by 2030
  - annual investment of $150 billion in 2030 in EE
    - Of this, $60 billion in developing/transition countries
    - On top of $400 billion p/y in clean energy supply

- IEA “Energy Technology Perspectives 2008” - to halve emissions by 2050: $45 trillion in investment to 2050

- Where will investment come from?

- Private investment is required for mitigation and adaptation of clean technologies (Poznan Strategic Programme on Technology Transfer)
Global Savings in Energy-Related CO₂ Emissions (IEA’s WEO)

Improved end-use efficiency of electricity & fossil fuels accounts for two-thirds of avoided emissions in 2030.
Energy Efficiency and Environmental Framework of ECT

- Minimize harmful environmental impacts
- Improve energy efficiency
- Developing and using renewable energy sources
- Promoting the use of cleaner fuels and technologies

Protocol on Energy Efficiency and Environmental Aspects (PEEREA):

- Formulate and implement energy efficiency strategies and policies
- Create appropriate legal, regulatory and institutional frameworks
- Develop, implement, and update energy efficiency programmes
- Encourage new approaches of financing energy efficiency
- Co-operate internationally and assist each other
Technology Transfer in ECT

ECT Art. 8:
- promote access to technology and technology transfer on commercial and non-discriminatory basis
- eliminate existing and create no new obstacles to technology transfer

Art. 19:
Encourages favourable conditions for transfer and dissemination of energy efficient and environmentally sound technologies

Studying experience on enhancing technology transfer and promoting access to state-of-art technology

Cooperation on technology development in Energy Charter:
- Case studies
- Exchange experience of policies enabling development of renewable energies
- Cooperation in the development of new technologies
- Focus on renewable energy
Conclusions

- **Energy requires special approach – it is different**
- Energy resources are under the sovereign control of a relatively small number of countries
- Difficult to address concerns of different stakeholders
- BUT climate change mitigation is a common goal
- International solution to climate change is crucial
- ECT has synergies with both WTO and UNFCCC
  - The only energy-specific multilateral agreement
  - Covering all major aspects of international energy trade
  - Including producing, consuming and transit countries
- The ECT’s value added - transit and investment + energy efficiency framework – key for climate change mitigation
- Role of ECT for investments in clean technologies and energy efficiency, transfer of technology and technical assistance - crucial for
  - Climate change mitigation
  - Engagement of developing countries
Thank you

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