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REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW

WTO, NAFTA AND ENERGY CHARTER

Edited by
Yulia Selivanova



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Foreword

Energy is the backbone of our economies. It shapes our world more than anything else: our movements, our production capacities, our climate, and our daily lives. If abundant, it has the power to facilitate development. If scarce, it makes the development challenge even more complex.

The energy debate is of crucial importance to trade. Without energy, there is no manufacturing, no transportation, no economic activity, no growth. The price of energy ranks among the main shaping factors of international trade. Yet, multilateral trade rules on energy are, in many respects, incomplete. The WTO rulebook does contain a number of disciplines related to energy, but these remain scattered, with little overarching coherence and policy goal, leading some to wrongly believe that energy remains outside the scope of the WTO.

The current round of negotiations, once completed, will bring another stone to the edifice of rules that is being built. It will reduce tariffs on various renewable fuels and equipment involved in energy production and distribution; will improve WTO subsidy disciplines and rules for transit; will further open energy services markets and will accelerate trade opening in energy-efficient and climate friendly technologies. But more is required to adjust trade rules to the challenges of development, energy security and climate change that our world is facing.

This book comes at a critical juncture: at a time marked by severe fluctuations of oil prices, increased tensions over the supply of fossil fuels, heightened efforts to move to clean energy, and heated debates over the production of biofuels. It delves into the implications of multilateral trade rules for trade in energy and provides valuable insight into an issue that remains insufficiently studied, but whose importance is bound to grow in the years to come. The changing composition of the WTO's membership, with energy exporting countries having recently joined the

Foreword

Organization or negotiating their accession, will increase the relevance of multi-lateral trade rules on energy. More and more voices are already calling for the WTO to tackle the energy issue more comprehensively. This book will be a precious contribution to the debates to come.

Pascal Lamy

Preface

The recent decades have marked unprecedented challenges with respect to energy trade, including supply crisis of 1970s, increased demand and price fluctuations. Moreover, production, distribution and use of conventional energy types such as fossil fuels created concerns related to their negative impact on climate change, which necessitates switching to cleaner methods of production and energy efficiency. Considering increased volumes of energy materials and products traded across border, the above challenges provide a new incentive to revisit the present institutional structure of energy governance, which consists of multilateral, plurilateral, regional, and bilateral treaties covering differing and sometimes overlapping spheres of energy trade and investment.

Energy is different from any other commodities. No doubt that it is more than any other commodity important for development of modern world. Indeed no other sector than energy has such a tremendous significance for development of other industries, both manufacturing of goods and provision of services. Moreover, availability of energy and conditions of energy supply have a direct impact on the social development and quality of life.

Manufactured products could be normally produced without limitation in many countries, due account being made to the theory of comparative advantage. Such goods do not encounter natural endowment constraints as energy resources do. Hydrocarbon resources are finite and have been distributed unevenly throughout the world. These resources are under sovereign control of a limited number of resource-owning countries. Countries that possess such finite resources are usually driven in their decisions about their development, exploration and sale by policy considerations different from traditional trade policy. These countries want to exploit their natural wealth for the benefit of their population and national economy. When exporting, these countries strive to derive maximum rent for depletion of finite resources. Export taxes on energy exports are a common

means of revenue generation for these countries. Importing countries are interested in secure energy supply at the lowest possible price.

Furthermore, energy trade is often linked to the fixed infrastructure necessary for the transportation of hydrocarbons and electricity. Network dependence of significant share of energy trade implies that the elimination of import barriers alone is not enough for effective liberalization of energy trade. Pipelines and transmission grids require substantial investments, and transportation networks can only be used for transportation of specified energy products. This dependency of energy trade on fixed infrastructure puts an additional emphasis on two issues: the framework for investment in highly capital-intensive infrastructure projects; and the conditions for access to these networks.

The distinctive features of energy lead to the question of whether energy trade and investment can be effectively regulated by a general international legal framework or whether a more specialized framework is needed. The regulation of the cross-border energy trade has to take into account the difference of energy from other internationally traded commodity. At the same time, it is a real challenge to negotiate multilateral rules for energy trade, as energy markets and trade are constantly evolving. In addition, despite clear interdependence, the interests of consuming and producing countries differ significantly and this makes negotiations of international binding rules covering energy very difficult. There is an irreducible political and strategic component to international energy trade and many countries have been hesitant about creating international legally binding rules on energy. The effectiveness of an energy-specific international agreement would however depend on the extent it could attract different types of stakeholders along the energy supply chain.

To large extent energy relations, including trade and investment in the sector, have been subject to bilateral treaties. However in order to create predictability in the sector the enforceable multilateral rules are increasingly important. Multilateral legal framework can best ensure predictability and transparency required in conditions of increasing reliance on internationally traded energy and the need for adequate investment.

The rules of the multilateral system embodied in WTO have been in the past perceived by some to leave energy sector outside WTO scope. Possible reason for this belief might have been the fact that discussions on creation of specific rules for energy in GATT faced difficulties. There is no doubt that these general rules cover trade in energy. Some may argue however that existing WTO agreements are not designed to specifically tackle major issues pertinent for energy trade as they are oriented towards tackling market access issues and thus do not address to the full extent the issues of export restrictions and investment protection, commonly regarded as the most crucial aspects of oil and gas trade.

The above issues are addressed by this book that aims at shading light on the implications of existing international rules for trade and investment in energy. The majority of contributions are related to application of WTO agreements to energy trade as well as energy related issues addressed in the current WTO negotiations. Furthermore, a chapter on North American Free Trade Agreement will discuss to

what extent NAFTA negotiators managed to address issues pertinent to energy trade. Finally, the Energy Charter Treaty – the only existing international treaty specific to energy will be discussed. The latter is based on the WTO framework applicable for energy trade, also among ECT states that are outside the WTO. The Energy Charter Treaty however contains valuable additions to WTO framework on transit and investment protection in the energy sector.

This book is a product of collective efforts of its authors who wish to thank all persons who contributed to discussion of issues addressed in its chapters, provided comments and feedback. In addition, the following persons receive special thanks for helping, in different ways, to realize this project: Roderick Abbott, Professor Gabrielle Marceau, Peter Milthorp, Emmanuelle Ganne, Carol George and Jacek Wojcik.

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