

WTO Public Forum
Session of the Energy Charter Secretariat
‘International Governance of Energy Trade:
WTO and the Energy Charter Treaty’

**21 September 2011, at 14.15, Room D in the WTO building at the Centre William Rappard
(Rue de Lausanne 154, Geneva)**

Speech by Ambassador André Mernier, Energy Charter Secretary General

I am very pleased, as Secretary General of the Energy Charter, to have this opportunity to discuss with you the question of international governance of energy trade.

I would like to commend the WTO for their interest in the issue of trade in natural resources. Last year's World Trade Report which was devoted to this topic made an invaluable and timely contribution to the debate on the application of multilateral trade rules to trade in energy. As a result trade in natural resources is one of the core themes of this Public Forum, and I see that several sessions focus on energy. The first question I would like to address is: "Why does the application of WTO rules to such trade receive more and more attention?"

I believe the reason for this is that the present trends towards tighter supply on energy markets and the emergence of new consumers require a reliable framework for trade and investment in oil and gas. Considerations of energy supply and demand security and the needs of investment require predictability and transparency. This can be achieved most effectively through a multilateral legal framework. The rules and disciplines that apply to energy trade are thus of great strategic significance.

At the same time energy markets and trade are constantly evolving. It is therefore a real challenge to negotiate multilateral rules for trade in energy. The space for negotiation is defined by the extent to which interests overlap; that space is not always very large. This is particularly true for the energy sector, where the interests of the players are more and more diverse. Given that negotiating new rules is likely to be difficult, let us therefore appreciate and value what is already in place. To what extent can issues pertinent to energy trade be tackled through existing rules?

The WTO rules that govern international trade are fully applicable to trade in energy and energy products. Some might argue that these rules were not specifically designed to tackle energy issues. There is a certain perception that WTO rules entail a traditional bias towards market access and do not address to a sufficient extent the issues of export restrictions and investment protection. These are commonly regarded as the most crucial challenges in oil and gas trade. It is true that trade restrictive practices related to energy are mainly found on the exports side. At the same time, the multilateral trade rules have been devised to address import barriers to a larger extent than export barriers.

It is however important to stress that the WTO provides a very effective and elaborate framework, including for the settlement of disputes. This system is flexible enough to address major issues in most sectors, including energy. There are however some distinctive features of the energy sector, where energy-specific rules may be needed.

The most important challenges, in my view, are related to the fact that a significant part of international energy trade is linked to fixed infrastructure, built specifically for the purpose of carrying hydrocarbons or electricity. This link between energy trade and fixed infrastructure puts an additional premium on two issues: the framework for investment in highly capital-intensive infrastructure projects; and the conditions for access to these networks.

The WTO already has experience in negotiating specific rules for another network industry – the telecommunications sector. Here too, international trade may involve transmission by wires, although the fixed grid is now contested by wireless telecommunications. While I am sure some lessons from these negotiations can be learned, the energy sector has some differences, especially with respect to security of supply and environmental concerns.

In addition, the right of transit through the territory of other states has a significant impact on cross-border trade in energy. GATT Article V establishes a general rule of freedom of transit. But energy transit – when it is linked to fixed infrastructure – is very different from transit of other goods. In addition, many of the states where energy transit problems occur are not yet WTO members.

These issues, of specific relevance to energy trade, are addressed by the ECT. The Energy Charter Treaty is unique as a stand-alone international agreement that is specific to the energy sector. What is distinctive about the Energy Charter Treaty?

1) First of all, it is the first multilateral investment protection treaty that contains binding provisions on the protection of investment, specifically in relation to the energy sector.

The ECT protects foreign investors against the main non-commercial risks such as discriminatory treatment, direct or indirect expropriation, or the breach of individual investment contracts.

The investment provisions are further strengthened by the dispute settlement provisions of the ECT, covering both state-to-state arbitration and investor-state dispute settlement.

2) Secondly, the ECT incorporates WTO rules with respect to energy trade and extends them to non-WTO countries that are members of the ECT. This has proved to be a useful stepping stone for countries towards the WTO. It retains value for our constituency since a significant volume of Eurasian energy trade and transit still takes place through countries that are not yet members of the WTO. The Trade Amendment that entered into force last year expands the ECT trade regime to cover energy-related equipment. It also provides for the possibility to introduce a binding customs tariff standstill on covered products. An expert meeting will be held tomorrow in Geneva in order to address this question.

3) With respect to the strategically important issue of transit, the ECT lays down the principle of freedom of energy transit and non-discrimination, on the basis of origin, destination, ownership or pricing of energy materials and products.

The Treaty's transit provisions are more detailed and concrete than those in the GATT. For instance, in the event of a transit dispute, the ECT establishes the principle that transit flows should not be disrupted. The Treaty also provides for a unique conciliation procedure. Moreover, the ECT stipulates non-impediment for building new capacity, in case transit cannot be carried out through existing capacity.

4) I would also like to mention what the ECT does not do – in order to correct some misconceptions that might exist: the ECT does not determine the structure of national energy markets, nor does it dictate national energy policies, or oblige member countries to open up their energy sector to foreign investors. Each member state is free to decide how, and to what extent, its national and sovereign energy resources will be developed, and also the extent to which it will open its energy sector to foreign investments. Lastly, it does not impose mandatory third-party access to energy infrastructure.

One can therefore argue about whether this framework is as complete as it could be, and whether certain provisions could have been improved with some re-drafting, or whether they really reflect

the intentions of the negotiators, but it is – at the very least – a functioning instrument of international law.

The key issue to remember is the need for a balance between interests of different stakeholders. This is difficult to achieve. A necessary condition for reaching this consensus, and an area where the Charter process contributes, is the dialogue between different groups of players: consuming, producing, transit countries at all stages of economic development. From this point of view, the ECT has a distinct role – no other energy-related organisation provides a common platform for the development and implementation of binding disciplines among these different groups of stakeholders.

But, despite the challenges, what about the possibility for new rules for the energy sector? Here I would like to make the following, concluding remarks:

1) Efforts to regulate the international energy sector in the same way as any other internationally traded commodity are likely to face difficulties. Energy is different, because in the case of hydrocarbons we are dealing with finite non-renewable resources that are: a) vital to our modern way of life and b) under the sovereign control of a relatively small number of resource-owning countries. This means that there is an irreducible political and strategic component to international energy trade.

2) In addressing trade-related rules in the energy sector, some politically sensitive areas are likely to be encountered, including questions of State sovereignty over natural resources. The principle of sovereignty over energy resources is enshrined in the Energy Charter Treaty. Decisions on depletion policy, that is, on whether and how fast national resources are to be developed, are matters for resource-owning governments. International regulation is unlikely to succeed if it tries to encroach in a binding way on these national prerogatives.

This was in fact the experience during the preceding rounds of trade negotiations. Resource-owning countries objected on several occasions to the creation of trade rules affecting ownership over natural resources. In the WTO negotiations a number of countries made it clear that the access to, and use of, natural resources as well as the right to regulate should remain outside the scope of negotiations.

3) A starting point in negotiations of any additional rules on energy must be to look at the principles and interests that are shared by countries along the energy value chain, including both producers and consumers. As well as the generalised principles of the international trading system, the St Petersburg and Heiligendamm G8 Conclusions are a good place to look. These are close in spirit and in substance to the principles underpinning the ECT – in fact they specifically endorse the Energy Charter principles as a basis for international energy cooperation.

The Energy Charter Treaty has a unique role as the only energy-specific multilateral agreement that covers all major aspects of international energy turnover: trade, transit, investment and energy efficiency. The ECT provides a useful value added to existing general WTO framework that covers much larger constituency. The investment framework and more elaborate transit rules are valuable features of the ECT that have not been negotiated in a detailed manner within the WTO. The cornerstone of the ECT is non-derogation from the WTO. Both ECT and WTO frameworks complement each other, creating synergies without unnecessary duplications. On behalf of the Energy Charter, I can only say that we would greatly welcome the opportunity for dialogue with the WTO and its Members on this topic.