

WORKSHOP ON THE ROLE OF INTERGOVERNMENTAL AGREEMENTS IN ENERGY POLICY

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Rue de Lausanne 154

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Ambassador Urban Rusnák, Secretary General of the Energy Charter

Good morning, Excellencies, Director General, ladies and gentlemen,

I am grateful for this opportunity to organise this event at the WTO and for the interest you all expressed to this initiative.

I would like to commend the growing interest of the WTO in the issue of trade in natural resources and energy in particular. Two years ago the World Trade Report devoted to this topic made an invaluable and timely contribution to the debate on the application of multilateral trade rules to trade in energy. That report included a chapter on the Energy Charter. The Energy Charter Secretariat also had an opportunity to organise a session during the WTO Public Forum of 2011 on “International governance of energy trade”. During this event it became clear that the interest in energy trade and interaction between rules in the Energy Charter Treaty with WTO Agreements is really high.

Why does the application of multilateral trade rules to energy receive more and more attention?

I believe the reason for this is that current concerns over energy supply and demand security and uncertainties in the energy markets require a reliable framework for trade and investment in the sector. This could be achieved most effectively through a multilateral legal framework. The rules and disciplines that apply to energy trade are thus of great strategic significance.

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 argue that these rules were not specifically designed to tackle energy issues. There has been a certain perception that WTO rules entail a traditional bias towards market access. It is said that they do not sufficiently address the issues of export restrictions and investment protection, commonly regarded as the most crucial challenges in oil and gas.

It is however important to stress that the WTO provides a very effective and detailed 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.

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 in relation specifically to the energy sector.

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

- 2) Secondly, the ECT integrates WTO rules with respect to energy trade and extends them to non-WTO countries that are members of the ECT, for instance such important energy producers as Azerbaijan, Kazakhstan and Turkmenistan. This has proved to be a useful stepping stone for countries towards the WTO, and 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.
- 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 designed to tackle energy transit matters than those in the GATT.
- 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 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. Moreover, the members of the Energy Charter decided to start a modernisation process to address certain alleged shortcomings of the Energy Charter.

The objective of modernisation is to secure the full adherence of all the Treaty's parties to the common rules and to attract new members, particularly major energy producing and consuming countries. As part of the modernisation process, the member states remain open to discuss initiatives coming from members, observers or interested states to improve international energy governance. A particular importance in the modernisation process is given to the assessment of the ECT provisions with regard to low-carbon investment. Some of the possible actions which are being considered to promote transition to low carbon economy concern the fossil fuel subsidy reform in the ECT constituency.

The key issue to remember in this process 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, you may ask, 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 (and ever smaller) number of resource-owning countries. This means that there is an unavoidable 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. The Energy Charter provides a forum for energy policy discussion for these different groups of countries.
- 4) In conclusion, 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 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 on this topic.