

ICTSD Series on Climate Change Architecture



# The Nexus between the WTO and the Energy Charter Treaty in Sustainable Global Energy Governance

Analysis and Policy Implications

By Anna Marhold, Assistant Professor, Tilburg Law and Economics Center (TILEC), Tilburg Law School

ICTSD Global Platform on Climate Change, Trade and Sustainable Energy



International Centre for Trade  
and Sustainable Development

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ICTSD welcomes feedback on this document. These can be forwarded to Ingrid Jegou, [ijegou@ictsd.ch](mailto:ijegou@ictsd.ch)

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## FOREWORD

Climate change is an unprecedented challenge for all of humanity. The COP21 Paris Agreement that was concluded under the United Nations Framework Convention on Climate Change (UNFCCC) in December 2015 marks the first formal multilateral climate agreement in eighteen years. Under the Agreement, Parties aim to stabilise global average temperatures well below a 2 degree Celsius rise from pre-industrial levels, while pursuing best efforts to limit these to 1.5 degrees Celsius. Countries will present increasingly ambitious ‘nationally determined contributions’ (NDCs) every five years, outlining their mitigation pledges. Much of climate change mitigation effort and financing will on the ground need to be driven by private sector activity that will shape NDCs and in turn be shaped by governance frameworks, domestic as well as international.

Given that fossil fuel-based energy use is the biggest contributor to anthropogenic greenhouse gas emissions, a rapid scale-up and deployment of renewable or sustainable energy sources will be a critical component in climate change mitigation, including through the pursuit of countries’ NDCs. A switch to cleaner and low-carbon transport fuels and technologies as well as greater energy efficiency measures are also necessary to achieve a 1.5 to 2 degree Celsius goal.

A scale-up of sustainable energy will also contribute to enhancing access to energy for millions of people in the developing world and power rapid economic growth in emerging countries through increasingly sustainable means, enabling them to move further away from carbon-intensive growth trajectories. It will also enhance energy security by reducing the reliance of countries on fossil-fuel imports.

Expanding sustainable energy, however, requires a holistic approach to global energy governance, including energy trade, investment and climate policy, presently very fragmented among a number of regimes and intergovernmental institutional frameworks. For instance, trade in clean energy equipment and services is governed by the World Trade Organization (WTO), cross-border energy investment activity is governed by numerous bilateral investment treaties as well as by the Energy Charter Treaty (ECT), while broader emissions-related domestic policies and targets that condition fossil-fuel as well as clean energy use are governed by the UNFCCC’s Paris Agreement. Although constructed to be complementary, it must be acknowledged that overlapping areas of jurisdiction as well as the de facto impact of multiple rules may lead to conflicting interpretations and disputes with regard to which governance regime would prevail or apply.

The ECT and the WTO are two important treaty regimes that affect trade and investment activity in the energy sector - in both fossil-fuel and clean energy - with consequent implications for climate change mitigation efforts. This paper examines the evolution of the relationship between both institutions since their establishment, aims to identify the nature of the ever-changing nexus between the two treaties and discusses three possible scenarios for their interaction with an eye to strengthening future energy governance.

The author of this paper, Anna Marhold, is Assistant Professor in Energy Markets Regulation at the Tilburg Law School in the Netherlands. She was previously a Marie Curie Research Fellow at the Centre for Trade and Economic Integration at the Graduate Institute in Geneva. She holds a PhD in Law from the European University Institute in Florence and parallel degrees in Law (LLB, LLM) and Russian (BA, MA) from the University of Amsterdam. This paper was conceived by ICTSD and developed by ICTSD’s Global Platform on Climate Change, Trade and Sustainable Energy. The concept of the research originates in ICTSD’s work on a Sustainable Energy Trade Agreement (SETA), and has been

further informed by a joint event, 'The Evolving Landscape of Clean Energy Governance: Implications for International Trade', by ICTSD and the Energy Charter Secretariat taking place in Geneva in April 2015.

As a valuable piece of research, it has the potential to inform innovative policy responses on sustainable energy trade initiatives as well as more broadly on global sustainable energy, climate change and trade governance and will be an important reference tool for policymakers involved with energy access as well as trade negotiators. We hope that you will find the paper to be a thought-provoking, stimulating, and informative piece of reading material and that it proves useful for your work.

A handwritten signature in black ink, appearing to read 'R-M-O', with a horizontal line underneath.

Ricardo Meléndez-Ortiz  
Chief Executive, ICTSD

## EXECUTIVE SUMMARY

Sustainable energy policy is one of the biggest challenges the world faces today. The necessity of mitigating climate change and shifting to cleaner energy sources points to the need for a far more coherent approach to today's fragmented global energy governance. This approach has to take into account the linkages between the different pillars of energy governance, including climate change mitigation and energy trade and investment.

This issue paper explores the nexus between the World Trade Organization (WTO) and the Energy Charter Treaty (ECT) in light of this need, since the two treaty-based systems cover an important area of the energy governance patchwork. It examines how the relationship between these institutions has evolved from their establishment roughly twenty years ago. Both treaties intersect and overlap in several places. Moreover, vast changes in membership of both treaties have far-reaching implications for the place of the energy debate in the WTO and the relevance of the trade rules of the ECT. The future of the ECT trade provisions, once all WTO Observers who are simultaneously Parties to the ECT accede to the WTO, is especially unclear. The goal of this paper is to scrutinise the origins of the resulting overlap between these two treaty regimes and to determine their future place in an integrated system of energy governance that contributes to sustainable development and climate change mitigation.

The paper aims to identify the nature of the ever-changing nexus between the two treaties and discuss three possible scenarios for their interaction. It discusses the unproductive scenario of competition, but also looks into the more productive options of the (partial) integration and complementarity of both treaties in the context of strengthening global energy governance. It discusses the WTO/ECT relationship against the background of wider bilateral, regional and sector-specific developments, in light of promoting renewable energy, sustainable development and climate change mitigation. Cooperation between the WTO and the ECT could, for instance, lead to the creation of a common working group on energy trade and transit. But efforts in this direction may also go a step further and lay the foundations for a wider energy agreement covering all aspects of a modern and sustainable system of energy governance. In that case, initiatives such as the Sustainable Energy Trade Agreement and the new International Energy Charter should be taken into account.

With an eye on future energy governance, both treaty regimes would highly benefit from increased cooperation and coordination. This would be particularly useful considering the ambitions of the Energy Charter Secretariat - in view of the 2015 International Energy Charter - to function as a hub in modern international energy regulation, with or without the involvement of the WTO. Or, alternatively, it would be a helpful exercise for the WTO in tackling energy issues more proactively.



## INTRODUCTION

Achieving a global sustainable energy policy is one of the biggest challenges the world faces today. The necessity of mitigating climate change and shifting to cleaner energy sources points to the need for a far more coherent approach to today's fragmented global energy governance. This approach takes into account the linkages between the different pillars of energy governance, including climate change mitigation and energy trade and investment.

This issue paper explores the nexus between the World Trade Organization (WTO) and the Energy Charter Treaty (ECT) in light of this need. It examines how the relationship between these institutions has evolved from their establishment roughly twenty years ago. The two treaty-based regimes each cover an area of the global energy governance patchwork and are additionally connected to one another in substance.<sup>1</sup> While the WTO is concerned with providing a framework for the regulation of trade in most goods and services among its Members, the ECT offers a specialised regime for energy trade and investment regulation.

Overlap between the instruments and changes in the WTO and ECT over the past two decades - for instance, regarding membership - invites a re-evaluation of the place of both regimes.<sup>2</sup> The goal of this exercise is to assess where overlap and possible tension remain and to see what course both instruments could take to achieve better outcomes for sustainable development through a more integrated and modern approach to energy governance.

Improved energy governance with regard to both non-renewable and renewable energy is crucial in fostering sustainable development. The gains from the former are clearer rules contributing to, inter alia, increased energy efficiency. The scale-up in clean energy technologies, on the other hand, results in lower carbon emissions, thereby directly contributing to climate change mitigation. Parallel gains, such as improved energy

security through the use of alternative energies, strengthen this need for improving global energy governance. Taking into account the pressing environmental and energy challenges the world is facing, it becomes clear that a more holistic approach to energy regulation is inevitable.

To attain these goals, one has to look further than just the WTO and ECT. It proves essential to keep track of wider bilateral, regional and sector-specific trade developments in a rapidly changing energy trading landscape. Many of these initiatives are incorporating a more modern view on comprehensive and sustainable energy governance. Two levels of developments are particularly relevant here:

- 1 The proliferation of bilateral and regional trade and investment initiatives, which are flourishing in parallel with the difficult Doha negotiations. They often include energy and environmental provisions or chapters. Examples are the EU-Singapore Free Trade Agreement, the Comprehensive Economic and Trade Agreement (CETA), the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) negotiations.
- 2 Sector-specific developments in the field of environment and energy, such as the Environmental Goods Agreement (EGA), the ECT-led 2015 International Energy Charter (IEC) and new policy proposals such as the Sustainable Energy Trade Agreement put forward by the International Centre for Trade and Sustainable Development (ICTSD).<sup>3</sup> The emergence of these phenomena marks the dawn of a new era of a more all-inclusive regulatory approach to trade, energy and sustainable development.<sup>4</sup>

The paper will first briefly explain the need for a sustainable global energy governance. Then, section 2 will focus on the relationship between the ECT and the WTO, roughly twenty

years after their establishment. The aim of this exercise is to identify what has changed and where tension could potentially arise. Section 3 will subsequently provide policy options and

address three modes of possible interaction between the two regimes. Section 4 places these into the bigger picture of bilateral, regional and sector-specific trade developments.

## 1. UNDERSTANDING THE NEED FOR SUSTAINABLE GLOBAL ENERGY GOVERNANCE

The energy landscape today is radically different than a couple of decades ago. Although fossil fuels still make up the largest share of the global energy mix, they are being forced to give way to clean energies that are quickly gaining ground. The international community has realised the urgency of mitigating climate change and actively contributing to sustainable development, as confirmed by the outcomes of the Conference of Parties to the United Nations Framework Convention on Climate Change (COP21) Paris Agreement in late 2015.<sup>5</sup> We are witnessing a shift in priorities as countries increasingly implement energy policies that favour clean energy technologies, thereby additionally seeking new avenues to guarantee energy security.

The possible gains from these positive developments are evident. However, climate change remains a grave threat and we are far from managing our energy resources in a sustainable manner. What adds to the problem is that the way we govern our energy resources globally remains highly fragmented at present.<sup>6</sup> The reasons for this are manifold, and can be explained by (1) the lack of cohesiveness of the energy governance system, (2) the rise of a multitude of treaty regimes significant for energy governance in various ways, (3) a corresponding plethora of relevant entities, (4) the diversity and continuous development of energy sources, both fossil and non-fossil, and finally (5) the pursuit of national interest.<sup>7</sup>

Global energy governance generally revolves around the five main pillars of (1) trade; (2) energy security; (3) climate change mitigation; (4) transit; and (5) investment.<sup>8</sup> It is clear that they all link together: for instance, policies in the non-trade pillars affect trade and are themselves affected by trade-related policies, including WTO rules. Modern and sustainable global energy governance would reflect these

linkages in a comprehensive and coherent way. As of today, however, most of these pillars are dealt with separately. A wide variety of actors, institutions and stakeholders are involved in energy policymaking. Yet, more often than not, they do not interact in the coordinated way we need. For instance, there is a lack of engagement between developed and developing countries on the energy policies that should underpin agreements on climate change mitigation.<sup>9</sup> Also, the many bodies tasked with various areas of energy regulation, technology and policy do not interact and coordinate sufficiently to tackle problems of common interest and prevent duplication.<sup>10</sup>

With a growing world population and a higher level of development, the demand for energy is only likely to increase in the decades to come. It is crucial that we facilitate cooperation between institutions and consumers. In order to capitalise the gains of climate change mitigation and sustainable development, we have to make sure the systems that regulate both non-renewable and renewable energy are more coherent and up to date. This implies an all-inclusive and sustainable approach to global energy governance, linking the various pillars together, along with cooperation and coordination between stakeholders. An improved structure would thus involve linking domestic and international policies to climate change, technological aspects, energy security and crisis management.<sup>11</sup>

This issue paper is intended to contribute to this idea of a holistic approach to energy regulation by focusing on two institutions, each covering an important area of the global energy governance patchwork: the World Trade Organization and the Energy Charter Treaty. As this paper will set out, these two treaty regimes would highly benefit from more cooperation to ensure sustainable global energy governance.

## 2. ANALYSING THE WTO/ECT RELATIONSHIP TWENTY YEARS LATER: MEMBERSHIP, ISSUE-AREA AND DISPUTE SETTLEMENT

### 2.1 The Origins of the WTO/ECT Institutional Relationship

The General Agreement on Tariffs and Trade (GATT) was originally set up to regulate the international trade in goods. Its successor, the WTO, took on a broader set of responsibilities in 1995, adding to its portfolio the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMs) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), among others.<sup>12</sup> The objective of the WTO is to promote free(er) trade by reducing tariffs and other trade barriers and eliminating discriminatory treatment in international trade relations.<sup>13</sup> Simply put, it is an organisation that administers trade rules and a specialised dispute settlement system. It additionally provides a Trade Policy Review Mechanism, which is a monitoring mechanism allowing Members to address various trade-related issues.

Energy products have been de jure covered by the GATT/WTO system since 1947 and energy products have been taken up in Members' Schedules of Concessions (for instance, petroleum products can be found under Chapter 27 of the Harmonized System (HS) Convention).<sup>14</sup> Services, including those relevant for energy (such as extraction and distribution), were added after the establishment of the WTO. There have additionally been attempts to negotiate energy services as a separate sector in the Doha Round, although the list of energy services remains provisional.<sup>15</sup> Thus, while WTO agreements cover various aspects of energy trade, the rules have not been designed with the peculiarities of energy in mind. As a result, fitting energy trade into the multilateral trading framework has proved to be anything but a problem-free exercise and this continues to pose a plethora of challenges today.<sup>16</sup>

The Energy Charter Treaty was set up with a somewhat different objective in mind. It

was signed in Lisbon in 1994, just before the establishment of the World Trade Organization and entered into force in 1998.<sup>17</sup> The ECT is a similar treaty regime to the WTO, but specifically tailored to energy trade, in addition to incorporating a significant investment part and an environmental protocol, the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA).<sup>18</sup>

In essence, the ECT was born as an alternative to concluding an energy-specific agreement within the GATT/WTO framework after the Cold War ended.<sup>19</sup> The trade provisions of the ECT draw largely upon the GATT, but are better adapted to the needs of energy trade, for instance by providing extensive definitions of energy products ('Energy Materials and Products') and including services (in the form of 'Economic Activity in the Energy Sector').<sup>20</sup> Also, the Treaty clearly incorporates gas pipelines as a means of transport in Article 7 ECT on Transit, which remains a much-contested issue in the WTO context (GATT Article V on Transit). The objective of the Treaty is to provide a stable and predictable framework for trade and investment in energy materials, products and energy-related equipment, based on GATT/WTO rules.<sup>21</sup> Additionally, it serves as one of the few fora where stakeholders can actively discuss international energy transit issues.<sup>22</sup>

To assume that the ECT is a completely separate treaty regime from the WTO would be a mistake. With regard to the trade provisions of the ECT, the purpose of its establishment seems to have been to introduce GATT-type standards in the energy sector to former Communist countries that had not become party to the GATT, integrating their energy markets along the way.<sup>23</sup> The ECT was intended to promote reform towards GATT compatibility and, consequently, help with WTO accession.<sup>24</sup> Thus, while being a separate treaty on paper, there were clear intentions to introduce the multilateral trading system to countries that had not yet acceded to the WTO. This is visible

in the way ECT trade rules are set up: the ECT incorporates WTO rules on the multilateral trade in goods ‘by reference’ in Article 4.<sup>25</sup> It should be noted that WTO rules on services, by means of the GATS, are not covered by Article 4 ECT, although the ECT itself does apply to ‘economic activity in the energy sector’ (Article 1(5) ECT).

Overlap between the WTO and ECT regimes occurs both in the substantive sense (i.e., energy goods, related services and with regard to membership of both organisations) and in the procedural sense (with respect to the settlement of disputes in the area of both trade and investment). The WTO and ECT have largely concurring memberships and this has evolved significantly since the establishment of both treaty regimes. More importantly, both treaties deal with partially coinciding issues: the WTO sets out rules for the trade of goods and services, of which energy products and related services are a subcategory; the ECT, on the other hand, primarily aims to regulate trade and investment in energy materials and products and related services.<sup>26</sup>

The following section will first discuss changes in membership, after which it will focus on overlaps in issue-area and procedure between the two regimes.

## 2.2 Changes in Membership and Implications

### WTO

Since its creation in 1995, WTO membership has expanded drastically. With the approval of Kazakhstan’s accession in November July 2015, the WTO reached 162 Members.<sup>27</sup> Among them are major fossil fuel producing, exporting and transporting countries such as Angola, Bahrain, Brazil, Canada, China, Ecuador, Indonesia, Kazakhstan, Kuwait, Nigeria, Oman, Qatar, Russia, Saudi Arabia, Ukraine, United Arab Emirates, the United States and Venezuela, many of which joined the WTO only after its establishment in 1995.<sup>28</sup> Other major players in the energy field such as Algeria, Azerbaijan, Iran, Iraq, Libya and Sudan are in the process

of negotiating accession.<sup>29</sup> Additionally, nine of the thirteen Members of the Organization of the Oil Exporting Countries (OPEC) are WTO Members.<sup>30</sup> It is thus evident that major stakeholders in the global energy landscape are full-fledged participants in the multilateral trading system.

### ECT

The WTO’s wide-ranging membership is in stark contrast to the membership of the ECT. It entered into force in 1998 with forty Parties to the Treaty. By 2015 the numbers had changed, but the number of countries that have acceded to the ECT is still far less comprehensive than that of the WTO: a mere forty-six countries have ratified the ECT.<sup>31</sup> Major energy producing and exporting countries are only Observers to the ECT. These include, among others, Canada, Indonesia, the United States, Algeria, Bahrain, China, Kuwait, Nigeria, Oman, Qatar, Saudi Arabia, United Arab Emirates and Venezuela.<sup>32</sup> Russia stepped back from the agreement altogether in 2009, after applying it provisionally since its signature in 1994. And last but not least, Italy withdrew from the ECT in 2016.

### *Changes in membership and implications, 1998-2015*

It becomes clear that vast changes have taken place in the membership of the WTO and ECT alike. The main development admittedly is the great number of accessions to the WTO of a considerable number of former WTO Observers. The number of WTO Observers was reduced from fifty in 1998 to only twenty-two in 2015. Prominent non-ECT energy players in this category are Russia, China, Saudi Arabia and Oman.

The increase indicates that a substantial number of countries that were *only* ECT Parties in 1998 have indeed acceded to the WTO over the past twenty years. Hence, the ECT’s partial objective of functioning as a step towards WTO accession seems to have been successful. Russia, as *the* major Eurasian energy producing and exporting country, proves to be a special case and the

only country to effectively ‘swap’ (provisional) ECT membership for WTO accession, while minimising unwanted commitments on energy along the way. It acceded to the WTO in August 2012, after protracted negotiations over almost two decades.

Overlapping membership between the two treaty regimes became an instant reality with the entry into force of the ECT in 1998. This de facto resulted into two ‘tiers’ of ECT membership:

- 1 Countries which are simultaneously WTO Members and ECT Parties, so-called ‘WTO/ECT Members’.
- 2 ECT Parties that have not acceded to the WTO (yet), so-called ‘non-WTO ECT Parties’.

Therefore, there are three possible modes of membership interaction within the legal framework of the ECT: (a) among ECT/WTO Members, (b) between ECT/WTO Members and non-WTO ECT Parties, and (c) among non-WTO ECT Parties.

### 2.3 Issue-Area: Trade and Investment

#### *Trade*

The WTO and the ECT partially overlap in issue-area as both instruments are relevant for promoting free(er) trade in energy products and related services.<sup>33</sup> Moreover, the treaties are connected in substance through Articles 4 and 29 ECT, providing for incorporation of GATT trade rules in the ECT.<sup>34</sup>

As regards the WTO, it provides rules for trade in goods (GATT), services (GATS), intellectual property (TRIPS) and trade-related investment measures (TRIMs) between its Members. Energy falls within the WTO’s remit because energy products are taken up in Members’ GATT Article II Schedules. Additionally, energy services are being negotiated as a separate services sector in the Doha Round and disputes involving energy are being settled in the WTO Dispute Settlement System.

Note, however, that many services which are essential for the delivery of clean energy are not necessarily classified as energy services (construction services, legal services, engineering, training, among others).

The WTO estimates that at least 18 per cent of intra-WTO trade involves energy goods such as fossil fuels.<sup>35</sup> If one adds to this the trade in related materials, such as equipment for the production of clean energy, this number is undoubtedly even higher. Energy is either classified as a good, regulated by the GATT (energy products such as crude petroleum or natural gas), or a service, regulated by the GATS (such as the transportation of an energy product). Sometimes, it possesses elements of both.<sup>36</sup>

In comparison to the WTO, the ECT in Articles 4-6 and 29 deals *only* with trade in energy goods and related economic activity (read: services), with the exception that the ECT deals with investment in addition to trade.<sup>37</sup> The definition of ‘energy’ under the ECT trade chapter is very wide: it relates to trade in energy, energy products and energy-related equipment, all of which are specified under Annex EM of the ECT.<sup>38</sup>

The ECT generally focuses on five broad areas:

- 1 Protection and promotion of foreign energy investments, based on most-favoured-nation treatment or national treatment, whichever is more favourable, set out in Article 10(3) ECT.
- 2 Free trade in energy materials, products and energy-related equipment, based on WTO rules, in Articles 4, 5, 6, and 29 ECT.<sup>39</sup>
- 3 Freedom of energy transit through pipelines and grids in Article 7, based on GATT Article V on ‘Transit’ (but the ECT is much more specific on what energy transit exactly entails than the GATT 1994 rules, e.g. gas pipelines are clearly a means of ‘Transit’).<sup>40</sup>
- 4 Reducing the negative environmental impact of the energy cycle through improving energy efficiency, set out in Article 19 ECT and the PEEREA.<sup>41</sup>

- 5 Mechanisms for the resolution of various disputes, such as trade-related disputes, state-to-state and/or investor-to-state disputes - set out in Part V, Articles 26 to 32 of the ECT - and transit disputes, in Article 7 ECT.

The ECT has incorporated the rules of the GATT in its trade part by means of Article 4 ECT.<sup>42</sup> Overlap with respect to the trade provisions of both treaty regimes therefore occurs where the trade provisions of the WTO (GATT) meet the energy trade provisions of the ECT (Articles 4, 5, 6, 7 and 29).

To foster transparency concerning the GATT and the ECT trade rules, the Energy Charter Secretariat (ECS) issued two extensive guides with a referencing mechanism, in 2001 and 2003.<sup>43</sup> They pre-emptively set out rules of conflict to reconcile both treaties. The basic principles incorporating GATT rules 'by reference' in the ECT are the following:<sup>44</sup>

- 1 Trade in energy materials and products (i.e. goods) between ECT Parties that are also WTO Members are regulated by the trade provisions of the WTO and the ECT.<sup>45</sup> However, by virtue of Article 4 of the ECT the provisions of the latter should not be interpreted as derogating from the provisions of the former.
- 2 Trade between ECT Members, of which at least one is not a WTO Member, is, with some exceptions, governed by WTO rules incorporated into the ECT through Article 29(2)(a) ECT, in addition to those of the ECT. In that case, Article 4 of the ECT does not apply.<sup>46</sup>
- 3 The ECT uses a 'negative' reference listing technique and incorporates all WTO provisions, unless they are listed in Annex W(A) to the ECT.<sup>47</sup>

There are a couple of important exceptions with regard to WTO rules integrated in the ECT. First, bindings on customs duties as set out in Article II of the GATT are not automatically taken over. Instead, they are replaced by

a softer, 'best endeavours' commitment discouraging Parties to the ECT from increasing custom duties or importation and exportation charges of any kind.<sup>48</sup>

Additionally, Article 7 ECT on Transit goes further than Article V GATT and explicitly incorporates gas pipelines as a means of transport. This is important, because in WTO law it is still debated whether Article V GATT covers fixed infrastructures such as gas pipelines.<sup>49</sup> Article 7 ECT thereby creates additional obligations for ECT Parties which are also WTO Members. This in essence entails that Article 7 ECT, to the extent that its provisions are broader than those of the GATT, imposes disciplines additional to those of GATT Article V, binding *all* parties to the ECT. This can be seen as a so-called 'WTO-plus effect of the ECT'.<sup>50</sup> Finally, it is also worth mentioning that negotiations on an ECT Protocol on Transit are ongoing since 1999 but inactive since 2010, although they foster the same 'WTO-plus' ambitions: complementing the ECT while being in accordance with Article 7 ECT.<sup>51</sup> Nevertheless, the exact relationship between GATT Article V and Article 7 ECT remains in need of further elaboration, even when taking into account the ECS rules of conflict.

#### *Investment*

Another important issue-area where tension between the rules of the WTO and the ECT remains unsolved is where investment protection in the WTO (through GATS Mode 3)<sup>52</sup> meets protection of energy services investments in the ECT (Part III ECT). Trade in services is covered in the ECT by means of Article 1(5) ECT, but the GATS is not incorporated into the ECT as such.<sup>53</sup> This leads to a parallel applicability of WTO rules and ECT rules concerning the protection of energy investments in the following manner.

The ECT protects investments in the energy sector in a direct way by granting them National Treatment and Most Favoured Nation treatment in Article 10(3) in Part III of the ECT. 'Investment in the energy sector' in the sense of the ECT in this case refers to any investment associated

with an ‘Economic Activity in the Energy Sector’, that is, concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products covered in the ECT.<sup>54</sup>

Conversely, investment in the WTO comes into play *indirectly* and becomes relevant when we look at the modes of supply of services in the GATS. WTO Members take up market access commitments in their GATS Schedules of Specific Commitments.<sup>55</sup> There are horizontal commitments, which apply to all commitments in the schedules, and sector-specific commitments affecting only the sector in question. They may additionally apply only to one or more of the four modes of supply of the GATS. These are:

- Mode 1, when neither the service supplier nor the service consumer has to move across borders;
- Mode 2, when the consumer moves to the country from where the service is supplied;
- Mode 3, when the service supplier establishes a commercial presence in the country where the service is consumed;
- Mode 4, when the service supplier is established in a different country but moves temporarily to a different country to supply the service.<sup>56</sup>

In principle, GATS rules apply to all energy-related services.<sup>57</sup> Some sectors are particularly relevant to energy:<sup>58</sup> These are, for instance, construction and related engineering services, distribution services, environmental services, financial services, transport services and other services not included elsewhere.<sup>59</sup>

WTO Members have to grant Most Favoured Nation treatment to all foreign services, and National Treatment to GATS commitments made in their Schedules.<sup>60</sup> It figures that investments in services, and particularly investments in energy services, can in fact be covered in the GATS through Article 1.2 under Mode 3, when

the service supplier establishes a commercial presence in the country where the service is consumed (i.e. a foreign company setting up subsidiaries or branches to provide services in another country).<sup>61</sup>

Moreover, since the start of the Doha Round (2001-present), energy services have been under negotiation as a separate sector under the GATS. While the list remains provisional, sector-specific commitments in energy services have been made so far by forty-five Members concerning ‘services incidental to mining’,<sup>62</sup> twenty-seven on ‘site preparation work for mining’,<sup>63</sup> eighteen on services ‘incidental to energy distribution’,<sup>64</sup> and twelve Members have undertaken specific commitments ‘on pipeline transportation of fuels’.<sup>65</sup>

This category of energy services, however, is focused on services in the traditional fossil fuel sector. Services relevant for clean energy generation have proven to be more challenging to classify as they cut across a broad variety of sectors.<sup>66</sup> Think, for instance, about the necessary services involved in the construction of wind turbines or solar panel fields. The relevant services are scattered across various categories such as environmental services, construction services and financial and other professional, technical and business services.<sup>67</sup> It is to be hoped that a more comprehensive approach to such services will materialise, for instance as a follow-up to the Environmental Goods Agreement that is currently under negotiation.<sup>68</sup>

All in all, the ECS rules of conflict with respect to services do not take the WTO/ECT interaction into account adequately here, presumably since the complete exclusion of the GATS from the ECT left this scenario unforeseen. One matter has to be addressed in this respect, though: the ECT does not provide for pre-establishment or market access obligations, in contrast to GATS Articles II and XVI.<sup>69</sup> Any tension between the ECT and the GATS is therefore likely to arise only in the post-establishment phase.<sup>70</sup> The result, however, is that both treaties can apply with respect to protection of investments in the energy sector. This means that with respect to



dispute resolution in energy investments, the procedures from both the ECT and the WTO could apply. This will be discussed in more detail below.

## 2.4 Dispute Settlement in the WTO versus the ECT

Parallel competences in the issue-area of the WTO and the ECT are also found in the area of settling trade as well as investment disputes. The first has mostly been accounted for by ECT rules of conflict, the latter has not. This section will briefly discuss both.

### *Trade*

A central function of the WTO is the Dispute Settlement System, governed by the rules of the Dispute Settlement Understanding (DSU).<sup>71</sup> Article 3.2 of the DSU designates the dispute settlement mechanism as a central element in providing security and predictability to the multilateral trading system. Members to the WTO should settle any trade dispute among themselves, including the disputes on energy trade, *exclusively* in the WTO forum.<sup>72</sup> The function of this is twofold: it provides Members with a multilateral forum for the settlement of their disputes to the exclusion of any other, and at the same time it prevents them from having recourse to unilateral determinations of a breach of WTO law.<sup>73</sup> The system is without doubt one of the success stories of the WTO.

The ECT provides mechanisms for the settlement of both energy trade and investment disputes. More precisely, it offers state-state,<sup>74</sup> investor-state,<sup>75</sup> transit,<sup>76</sup> energy trade<sup>77</sup> and environment and competition<sup>78</sup> dispute settlement.

Following Article 4 ECT, the WTO Dispute Settlement Understanding applies to the resolution of energy trade disputes between ECT Parties that are simultaneously WTO Members.<sup>79</sup> Since the DSU is not available to non-WTO Members, it is replaced by a dispute resolution mechanism in Annex D for trade disputes between an ECT/WTO Member and

a non-WTO ECT Party or a dispute among non-WTO ECT Parties.<sup>80</sup> It follows the WTO dispute settlement model closely, but the ECT mechanism is more informal in nature, that is, less detailed and legalistic.<sup>81</sup> Concerning energy trade and energy transit disputes, it should be added, though, that no disputes have actually been submitted to the ECT for resolution so far.

Transit disputes are treated differently from the rules of conflict for 'regular' trade disputes between the ECT and WTO.<sup>82</sup> Resolution of transit disputes under the ECT is accounted for in Article 7(7) ECT. It prescribes that in case of an energy transit dispute, ECT parties will have recourse to the mechanism under Article 7(7) ECT, after exhausting any other relevant contractual remedies between them.<sup>83</sup> The procedure for dispute resolution itself is conciliatory in nature and largely takes place along diplomatic channels, with the appointment of a conciliator by the Secretary General of the ECT, who 'shall seek the agreement of the parties to the dispute.'<sup>84</sup>

There is no apparent overlap between Article V GATT and the procedure set out in Article 7(7) ECT, since the commitment in this article goes back to what is called the 'WTO-plus nature of the ECT'.<sup>85</sup> For energy transit disputes between all shades of ECT membership interaction (among ECT/WTO Members, between an ECT/WTO Member and a non-WTO ECT Party and among non-WTO ECT parties), the obligations in this article thus go beyond those in Article V GATT for energy transit disputes. This article, including its dispute resolution mechanism, thus proves to be an elaboration on the obligations set out in Article V GATT.<sup>86</sup>

### *Investment*

With regard to the resolution of energy investment disputes in the ECT and WTO, the parallelism stemming from issue-area overlap in this field continues to hold in the area of dispute settlement. Article 26 ECT provides for investor-state dispute settlement, while Article 27 covers state-to-state disputes (non-trade issues only).<sup>87</sup>

This overlap in energy investment dispute resolution stems from overlap in ECT energy investment protection and protection of such investments through GATS Mode 3. However, this only concerns state-to-state dispute resolution as set out in Article 27 ECT.

In other words, there may be overlap and tension between the dispute settlement mechanisms if they are available to the *same* parties, that is, states that are simultaneously ECT and WTO Members. Where Article 27 of Part V of the ECT offers a route for resolution of such disputes for ECT Members, the DSU arguably simultaneously applies to disputes of energy investment protection stemming from violation of GATS Mode 3 for WTO Members. This observation theoretically opens up a route for forum shopping for WTO/ECT Members in case of an energy investment dispute. However, whether this is a real risk in practice as well remains open to question.

The fact that the WTO does not provide for investor-state dispute resolution is a key difference compared to the ECT. The practical effect of this is that, as opposed to the WTO, the ECT offers private parties a direct route to resolution and enables them to win monetary claims. On the other hand, the WTO arguably has more ‘teeth’ in terms of ensuring more compliance and remedies in its dispute settlement mechanism.

One provision worth mentioning with regard to ECT investment protection in relation to other agreements, though, is Article 16 ECT (‘Relation to Other Agreements’). The article comes closest to being a conflict prevention/coordination tool. In essence, the provision - in a somewhat cumbersome manner - prescribes that those provisions which are more favourable to the investor or the investment of either the ECT or the other Agreement concerning the same subject matter should prevail.

## 2.5 The WTO/ECT Relationship Today: Unresolved Issues

One element that stands out in particular after analysing the membership situation is the fading relevance of the ECT provisions on energy trade. The fundamental question that arises from this is what will happen to the trade provisions of the ECT once all WTO Observers who are ECT Parties have acceded to the WTO. Will they become obsolete, with the exception of the ‘WTO-plus’ style provisions such as Article 7 ECT on Transit (especially relevant for natural gas)? Will the other trade provisions of the ECT still have a legitimate purpose? This remains to be seen.

The main risk of WTO and ECT overlap is evidently one of parallel applicability and potential tension in issue-area and procedure with no clear hierarchy between the treaties, except for Article 16 ECT mentioned above. While introducing ECT rules of conflict from the start has averted tension between the main trade provisions of the WTO and the ECT, certain matters remain unresolved even two decades later. This is a problem, because it results in an inefficient system of energy governance. It is particularly harmful when considering the need for a well-functioning trade framework that reflects modern energy and sustainable development needs.

There is no ‘real’ normative conflict between WTO and ECT rules in that they are not contradictory in nature and both the WTO and the ECT aim to transmit a similar message. Rather, the problem here is that in certain instances the WTO and the ECT are applicable in parallel. Which of the norms prevails? It appears that absent a legal hierarchy, there is no straightforward answer in this case.

For instance, WTO/ECT overlap concerning both issue-area and procedure stems from the

unresolved parallel applicability of the WTO and the ECT with regard to the protection and dispute settlement of energy investments. This overlap is not an exclusive problem of the WTO and the ECT, but part of a wider discourse on the gaps and overlaps between trade and investment law in general.<sup>88</sup> If both the WTO and the ECT have competence in resolving disputes concerning energy investment disputes, which dispute settlement forum has precedence? Here, there are two possible lines of argument. Nonetheless, neither of these scenarios provides conclusive legal answers to the question of which treaty regime should have priority.

With respect to the WTO, it could be claimed that a dispute in the energy sector stemming from a violation of the GATS in connection with Mode 3 (commercial presence) should be litigated first and foremost between WTO Members before a WTO panel. A strong case in favour of this is that the WTO offers an exclusive forum for dispute resolution for its Members and they are precluded from going elsewhere. Furthermore, GATS Mode 3 is evidently a part of the agreements of the WTO (namely the GATS), and consequently falls within the jurisdiction

of WTO panels. Nevertheless, GATS Mode 3 has not been used to settle an investment-related dispute to date.<sup>89</sup>

Conversely, there is a case to be made that settling state-to-state energy investment disputes through Article 27 ECT has precedence over the WTO. The ECT offers a specialised regime for the settlement of energy investment disputes, both investor-state and state-to-state. It should be mentioned, however, that while the ECT has been used very frequently for investor-state dispute resolution, no state-to-state disputes have been settled through the ECT.<sup>90</sup> Additionally, there is nothing in the wording of the ECT that prescribes exclusive settlement of energy investment disputes under the ECT.<sup>91</sup>

Another possible solution in such circumstances is to resort to the text of Article 16 ECT, and decide which provision of what agreement (WTO or ECT) is more favourable to the case at hand.<sup>92</sup> Either way, the current state of affairs certainly puts the perceived 'exclusivity' of the WTO dispute settlement system in question, as a parallel route of settlement for energy investment disputes is available through the ECT.

### 3. COMPETITION, INTEGRATION OR COMPLEMENTARITY? EXPLORING POLICY OPTIONS FOR FUTURE INTERACTION

From the above it is obvious that parallel applicability causes some tension between the WTO and the ECT. But how can these institutions best manage the unsolved discrepancies stemming from overlap in substance and procedure? This largely depends on the course both treaty regimes aim to take in the future, not only in view of the interaction between them, but more importantly with regard to strengthening global energy trade governance, through which the WTO and the ECT can both actively contribute to promoting sustainable development and climate change mitigation.

This section will discuss the dynamic nexus between the treaties as it has developed over time, but more importantly, also explore three potential scenarios for their relationship and place in the future. One thing is clear, however: no matter what path forward the regimes decide to take, it should happen against the background of greater cooperation and coordination to minimise governance gaps and duplication.

#### 3.1 Three Possible Scenarios for WTO/ECT Interaction

After examining overlap and potential tension between the two regimes in the previous section, the question remains: What is the actual nature of the nexus between the two treaties?

The original objective of the ECT initiative in 1994 was to function as a 'stepping-stone' for WTO accession. Furthermore, the treaty regimes are connected in substance through Articles 4 and 29 ECT. But it seems difficult to put a conclusive label on the relationship between the two treaties.<sup>93</sup> Nevertheless, in order to set out possible future scenarios of cooperation, we must understand their relationship.

Undoubtedly, the WTO offers a 'general' trade regime, and the ECT a 'specialised' energy treaty.<sup>94</sup> Yet, to label the ECT as merely a *lex specialis* (that is, a treaty of a specific subject

matter that overrides the more general rule) to the WTO would not do justice to either the WTO or the ECT, for each institution possesses vital elements that the other does not: The WTO regulates trade in virtually all goods and services, and the ECT deals extensively with investment in addition to trade. As far as substance is concerned, the ECT's trade provisions lean heavily on WTO rules, but they also provide an elaboration ('WTO-plus' effect of the ECT) on them in certain instances, for example as discussed in Article 7 ECT on Transit.

Perhaps the only way to construct the nexus between the WTO and the ECT is to accept that it has transformed from what it was in the beginning, and might change again in the future. In this context it is helpful to view both regimes as a product of their time and place and assess the transformation that has taken place since their inception. In the author's view, it is worth discussing three types of nexuses that mark the relationship between the WTO and the ECT in this respect: *competition*, *integration* and *complementarity*. While the first is unproductive and untenable for the future, the latter two offer different - yet not mutually exclusive - avenues for successful interaction.

#### 3.2 The Unproductive Scenario: Competition

While it was clear from the outset of the WTO's establishment in 1995 that the multilateral trading system would be an undertaking for the long term, the feasibility of such ambitions by the ECT were questioned by some from the start. Already in April 1996, even before the entry into force of the ECT, Thomas Wälde expressed his concern about the future success of the ECT in the preface to his edited volume on the Energy Charter:

There is serious *competition* [to the potential of the ECT], mainly from the European Union's further integration and

association strategies eastwards, but also from the US, the expansion of the GATT/WTO, the International Energy Agency and a talked-about global investment code. Perhaps these forces will overshadow and deny to the Energy Charter Treaty any significant future growth.<sup>95</sup>

Wälde thus saw the relationship between the WTO and the ECT as one of *competition* and threat rather than anything else. This is remarkable, since from the inception of the ECT regime one of the main objectives of the treaty has been to acquaint non-WTO countries with the rules of the multilateral trading system. It is therefore unclear why Wälde saw the WTO as a danger to the ECT rather than as an opportunity to kill two birds with one stone: (1) familiarising new countries with the WTO through the ECT, and (2) vice versa, introducing WTO-type laws to the energy sector in a comprehensive manner. This view is especially surprising when we take into account that the WTO was only marginally interested in actively engaging in energy issues at the time.<sup>96</sup>

For these reasons, it seems unconstructive and undesirable to view the relationship between the WTO and the ECT in this way, whether in hindsight or in looking ahead. In fact, to be in competition is something the treaties can simply not afford in the context of a modern and effective energy trade governance architecture: it would unnecessarily duplicate the work, moreover with doubtful results. Competition as a basis underlying their relationship would therefore be a missed opportunity and an unproductive way forward. Rather, the treaties would benefit much more from recognising the unique potential each regime possesses and drawing out their strengths to reach wider common objectives.

### 3.3 Productive Scenario I: (Partial) Integration

Instead of *competition*, it seems more fruitful to identify the historical nexus between the WTO and the ECT as one of (partial) *integration* on the side of the ECT. At the time of the ECT's inception, the objective was a nexus

of integration to introduce former socialist countries to the global trading system of the WTO through the Treaty. Undoubtedly, the practical difficulties of this expressed themselves in competing competence and parallel applicability, although the Energy Charter Secretariat's publication suggesting rules of conflict was an attempt to partially mitigate this.

In the same vein, the nexus of a 'second phase' type of integration between the WTO and ECT seems a much more promising one, especially when looking ahead. Two decades have brought vast changes in membership to both treaties, not to mention the trading landscape they operate in. When the WTO and the ECT were established, renewable energy was merely on the fringe of the energy debate. By 2016, however, this view has become outdated. A shift has occurred: in view of sustainable development and climate change mitigation, clean energy technologies are claiming their much deserved place centre stage.

In this proposed second phase integration, the two regimes should not shy away from reassessing the situation and taking steps towards regulatory reform where needed. This could mean crossing out those parts where the treaties are in duplication and collaborating where they can both contribute to a common goal. One should, for instance, critically assess the remaining relevance of the trade provisions of the ECT, if most ECT Parties have joined the WTO (which they have). Will these rules then still have added value, or only be relevant to the few non-WTO ECT parties? To the other WTO/ECT Members, maybe only those trade articles of the ECT incorporating extra obligations, such as Article 7 ECT on Transit, should remain, though it has to be carefully considered in what form.

But apart from preventing duplication, integration between the regimes should even go a step further towards a truly fruitful cooperation. It is here that the WTO and the ECT should join efforts in tackling issues of common interest. Energy trade and transit will

remain pertinent issues that are in need of further clarification sooner rather than later. Enhanced energy governance with a view to promoting sustainable development should also be in everybody's interest. The minimum threshold and starting point for this would be to first accommodate energy as an official topic of discussion in the WTO. As former WTO Director-General Pascal Lamy put it:

When thinking about how the WTO can most effectively contribute to the energy goals of the international community, the question is not whether the WTO legal framework is relevant and applicable to trade in energy goods and services, for it clearly is. Instead, we need to ask ourselves how the WTO's contribution can be further improved, given rapid changes in the energy policy landscape and the international community's goals regarding energy.<sup>97</sup>

What is lacking at present in order to begin realising this potential of the WTO in the energy field is the embracing of energy at the official and informal level in policy discussions; also, the technical expertise needed to navigate this complex field and support from stakeholders, including the energy industry, seems absent. Multilateral trade rules with respect to energy will work only if they are sensitive to the issues faced by energy companies and the industry, while at the same time addressing the overarching policy objectives such as sustainable development and energy security.<sup>98</sup>

To reap the maximum benefits of its contribution in enhanced energy regulation, the WTO should involve the ECT in this endeavour. The WTO and ECT made a careful step in the direction of increased cooperation and coordination by organising a common conference at the WTO headquarters in Geneva in 2013. The event concentrated on legal challenges concerning energy in the WTO and the ECT and the interaction of the legal instruments.<sup>99</sup> This is just the beginning

of what predictably will be a long journey if both institutions aspire to take trade and regulation of the energy sector seriously. More effort is needed to realise the gains from cooperation between the WTO and the ECT.

Therefore, a logical next move would be to solidify the collaboration between the WTO and the ECT. A first step could be to grant the ECT observer status in the WTO Council for Trade in Goods, Trade in Services and/or the Committee on Trade and Environment. After this, more specific cooperation can be fostered between the ECT and WTO, rather than the one-off common event in 2013. We can, for instance, think of establishing a joint WTO/ECT working group on Energy Trade and Transit to elaborate on pressing issues of common interest. These issues could range from harmonising WTO and ECT concepts and policies on energy trade, to venturing into crucial new areas such as addressing clean energy trade more comprehensively. Last but not least, such a platform could function as an accelerator for parties to try and find common ground on more politically sensitive issues, such as defining the relationship between transit obligations under both treaties and the imbalance between subsidies on fossil fuels and renewables.

The WTO offers a broad membership, which includes most major energy producing and exporting countries, something the ECT lacks. The WTO additionally offers a forum for trade negotiations and an avenue for reflecting on market access gains (reflected in Members' schedules of bound tariff concessions). The ECT, on the other hand, has offered a platform for energy trade and transit discussions in addition to offering an investor-state dispute resolution mechanism. Although the WTO has rules on transit, these rules are not fully developed with respect to energy. Combining these two elements into one joint exercise would benefit both treaty regimes, not to mention the Members they each represent, while working towards common goals and preventing overlap along the way.

### 3.4 Productive Scenario II: Complementarity in Global Energy Governance

The second productive scenario builds on this idea but places it in the bigger picture of global energy governance, because another, not mutually exclusive, way to see the nexus between the ECT and the WTO is one of *complementarity*. This means that the WTO and the ECT can each contribute to strengthening energy architecture in its own way. As noted, global energy governance generally revolves around the five main pillars of trade; energy security; climate change mitigation; transit, and investment.<sup>100</sup>

Up until now, a plethora of different regimes have largely dealt with these five main elements of energy governance separately. Aside from the WTO and the ECT, one could, for instance, think of the United Nations Sustainable Energy for All initiative and the International Energy Agency's engagement with energy security. However, all five pillars are obviously interlinked and not hermetically closed-off fields. A more coherent and comprehensive energy governance architecture, which would take into account all these aspects, would undoubtedly play a pertinent role in contributing to sustainable development, including climate change mitigation. The pressing environmental and energy challenges we are facing now are only likely to grow and it becomes clear that a more holistic approach to energy regulation is inevitable.

In the complementarity scenario, the WTO and the ECT, as well as other treaty regimes and mechanisms, each would do their part in actively adding to a more coherent system of global energy and environmental resources management. The WTO's emphasis obviously is on trade. The ECT, on the other hand, has been central to the investment pillar of energy governance, due to its investment protection and dispute resolution capacities. Apart from that, it has also played an active role in energy transit negotiations. The ECT is thus

complementary in energy governance to the WTO where it deals with energy investment and energy transit, valuable elements in which the WTO falls short.

However, when thinking of a holistic approach, for instance in the form of a multilateral and multi-stakeholder instrument covering the whole spectrum of energy regulation, one has to make sure that the additional elements of energy governance (climate change mitigation and energy security) are sufficiently covered as well. It is important to address both non-renewable and renewable energy governance, as gains for sustainable development lie in better regulation of both. Certain features of the WTO and the ECT that are not sufficiently elaborated on at present would easily link to other pillars and instruments of energy governance. An example connecting energy and climate change mitigation is the ECT Protocol on Energy Efficiency and Related Environmental Aspects. The provisions of the PEEREA are mostly soft in nature, providing signatories with a menu of good practices on energy efficiency and environmental policies. But one could undoubtedly see how bridges could be built to link the fundamentals set out in this Protocol to work in other relevant fora, such as the UN Sustainable Energy for All initiative and a potential future Environmental Goods Agreement. Some of the best practices set out in the PEEREA could be solidified into harder commitments in the field of climate change mitigation.

But it is only through cooperation and coordination that the true potential of contributing to sustainable development through better energy governance is unlocked. If the objective is to create a holistic framework with solid rules for energy governance, covering all of the five main pillars, such efforts have to cut across the various regimes. A multifaceted framework for energy governance could take place under the WTO or the ECT umbrella, but not necessarily so.

#### 4. ECT/WTO INTERACTION IN LIGHT OF CURRENT BILATERAL, REGIONAL AND SECTOR-SPECIFIC DEVELOPMENTS RELEVANT FOR SUSTAINABLE GLOBAL ENERGY GOVERNANCE

The scenarios of (partial) integration and complementarity in global energy governance discussed in the previous section are two possible, not mutually exclusive paths forward for the ECT and the WTO. They can take place in parallel and should moreover take into account the recent developments discussed in this section.

One thing is evident: the need for a new approach incorporating one or more pillars of energy governance is already materialising through a new generation of agreements that have recently been concluded or are currently being negotiated. There are two relevant developments that have to be discussed in this respect. The first is the proliferation of bilateral and regional initiatives. The second development is the emergence of sector-specific agreements. Both incorporate a more all-inclusive approach to energy governance in one way or another and will briefly be touched upon here.

##### 4.1 Bilateral and Regional Developments

Regarding developments on the bilateral level, one can think of the sustainable development chapters with a renewable energy focus that the European Union has been including in its trade agreements. A good example of this is the recently concluded EU-Singapore FTA dealing with both trade and investment, which contains a chapter on 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation'. Article 7.1 reflects the spirit of the chapter well:

In line with global efforts to reduce greenhouse gas emissions, the Parties share the objective of promoting, developing and increasing the generation of energy from renewable and sustainable non-fossil sources, particularly through facilitating trade and investment.<sup>101</sup>

Instead of viewing the objectives of promoting trade and investment flows and environmental protection, including renewable energy promo-

tion, as irreconcilable, the provisions of the chapters do the opposite. The effort of reducing greenhouse gas emissions is directly linked to the scale-up in renewable energy generation through facilitating trade and investment flows. This shows us that these objectives can be perfectly united into one instrument and cover more than just one pillar of energy governance. Better yet: they form a synergy in pursuing both trade, investment and sustainable development objectives and strengthening all simultaneously.

The EU-Canada Comprehensive Economic and Trade Agreement also includes chapters on Trade and Sustainable Development and Trade and Environment.<sup>102</sup> These chapters emphasise the need for more cooperation in these fields and commit parties to facilitate trade and investment in environmental goods and services.<sup>103</sup> In particular, CETA encourages the removal of obstacles to trade and investment regarding goods and services of specific relevance to climate change mitigation, such as renewable energy goods and related services.<sup>104</sup>

We witness similar development in mega-regional initiatives such as the ongoing Transatlantic Trade and Investment Partnership negotiations and the recently concluded Trans Pacific Partnership. The European Union in its initial position paper on Trade and Sustainable Development in the TTIP context emphasised the contribution that trade can make to sustainable development.<sup>105</sup> The EU sees the TTIP as offering 'a comprehensive and ambitious approach to trade and sustainable issues'.<sup>106</sup> As has become practice by now, the EU therefore also aims to add a Trade and Sustainable Development (TSD) chapter into the TTIP, focusing on labour and environmental aspects, including climate change and their interlinkages.<sup>107</sup> It aims to reflect Parties' commitments as set out in international investment agreements, such as the UN Framework Convention on Climate Change,<sup>108</sup> and agencies such as UNEP. To contribute to sustainable development through trade and investment, the negotiations of the TSD chapter



are therefore focusing on (1) environmental goods and services and climate-friendly technologies; (2) the use of sustainability assurance schemes; and (3) corporate social responsibility practices.<sup>109</sup> Last but not least, the focus of a potential TSD chapter should be on the sustainable use and management of natural resources.

The TPP, the trendsetting mega-regional trade agreement at the moment, has not included a separate chapter on energy and sustainable development, but does contain an environmental chapter.<sup>110</sup> The chapter promotes the scale-up of environmental goods and services and cooperation in the field of renewable energy (Articles 20.18 and 20.15). It additionally obliges Parties to establish national environmental committees, whose purpose it is to oversee the implementation of this chapter.

#### 4.2 Sector-Specific Developments

Apart from bilateral and multilateral trade and investment treaties containing chapters and provisions that deal with energy governance in a more holistic manner, there are also sector-specific developments that point in this direction. When thinking of the Energy Charter Treaty and the WTO and their complementary contribution to strengthening energy governance through increased cooperation and/or a potential agreement, the sector-specific developments considered in this section cannot go unnoticed.

We should see the future complementarity between the WTO and the ECT (and other relevant energy governance such as the United Nations) in light of these developments. One should avoid thinking in 'either/or' terms, but rather accept that different processes of integration and complementarity may take place in parallel. The focus should be on how these platforms can each contribute to strengthening global energy governance and where they can bundle their powers in order to reach larger objectives.

#### *The Sustainable Energy Trade Agreement initiative*

One of the proposals exemplary in this respect is the ICTSD initiative to conclude a Sustainable Energy Trade Agreement (SETA).<sup>111</sup> The initiative suggests concluding an agreement on energy trade and sustainable development that could set a standard for what a more holistic energy governance agreement could look like. There are many possible forms the SETA agreement could take. One of the options is a plurilateral type of agreement, to which like-minded countries could accede. Such agreements usually have a narrower group of signatories and are sector specific.<sup>112</sup> It could exist under the WTO umbrella, but also, for instance, in the broader Energy Charter Treaty framework, where it could conceivably be placed under the newly established International Energy Charter Initiative, which especially wishes to focus on sustainable development. Alternatively, it could be a stand-alone agreement.

But, better yet, if a more holistic energy agreement were to materialise, it might be a good idea pursue such a joint initiative under three international organisations (WTO-ECT-UN). This way, all vital pillars of energy governance could be covered, while simultaneously fostering much-needed cooperation between these agencies. This could lead to a more multifaceted and better coordinated instrument covering all the energy pillars of energy governance (trade, investment, climate change mitigation, energy security, and transit). The result could be the synergy of a more efficiently regulated energy sector, while also contributing to sustainable development and climate change mitigation.

Since a project of this kind will inevitably be ambitious and complex, a bottom-up approach may be the most realistic way forward. Rather than emanating from the highest levels, the starting point for such a joint initiative should be through informal meetings.<sup>113</sup> We can observe

that attempts to formalise negotiations, for example at the WTO level, consistently spawn new forms of informality that may be more effective, for instance because they do not necessarily require the adoption of an official agenda. Informal meetings can provide opportunities for more productive interventions, alliances, and performances that are precluded in more formal settings.<sup>114</sup> Such informal meetings on a holistic energy governance approach could, for example, take the shape of consultations between the chairpersons of relevant divisions in each organisation, cross-organisational ‘informal chats’, or annual conferences, all themed around the contents of the SETA initiative.

#### *The Environmental Goods Agreement and APEC initiatives*

Other related developments that are important in this respect are the ongoing negotiations to liberalise environmental goods in the form of an Environmental Goods Agreement. As is well known, a large part of the environmental goods on the negotiating table (such as solar panels) are goods which are directly relevant for the scale-up of renewable energies. In this respect, what is also worth mentioning are the activities of the Asia-Pacific Economic Cooperation (APEC) countries. Although only a voluntary initiative, they include, inter alia, an Energy Working Group and an Energy Trade and Investment Task Force, where stakeholders from various APEC members cooperate and coordinate their policies.<sup>115</sup> This platform may also provide fertile ground for (informal discussions on) a holistic sustainable energy initiative.

#### *The International Energy Charter*

Last but not least on the list of these more comprehensive approaches to energy governance is the new 2015 International Energy Charter (IEC). Interestingly, this is a product from the Energy Charter Secretariat itself, indicating that the ECT has realised this pressing need for a new and updated approach to current energy rules. While the WTO may

house more major energy players among its Members, the ECT may be a step ahead of the WTO in that it is being more proactive in this respect. This is one more argument in favour of the ECT and the WTO bundling their powers in pursuing common objectives.

In short, the IEC is a political declaration on global cooperation in the field of energy which was issued in the course of 2015 and negotiated under the auspices of the Energy Charter Secretariat in The Hague.<sup>116</sup> While this declaration is a soft law instrument that does not bind the parties to undertake any hard obligations, it is a positive sign that ECT members, signatories as well as non-signatories, gathered around the table to discuss the global energy challenges ahead. Its purpose was to produce an updated document to the founding document of the ECT, the European Energy Charter, concluded in 1991.<sup>117</sup> The concept of the International Energy Charter

aims at enhancing international cooperation in order to meet common challenges related to energy at national, regional and international levels, including the evolution of global energy architecture.<sup>118</sup>

Additionally, the document hints at more cooperation and coordination between multilateral agreements in the field of energy, a message that has been reiterated throughout this paper. Its signatories have agreed to foster synergies among energy-related multilateral fora and stated that they are willing to take full advantage of the expertise of existing international organisations in the energy field.<sup>119</sup> More importantly, regarding cooperation between the ECT and WTO, the signatories to the 2015 Charter aim to ensure that the development of trade in energy is consistent ‘with major multilateral agreements such as the WTO Agreement and its related instruments [...]’.<sup>120</sup> These goals should be achieved by means of, for instance, guaranteeing an open and competitive market for energy products, materials, equipment and services, access to energy resources and access to national, regional and international markets.<sup>121</sup>

One pressing issue that is not fully covered by either the WTO, ECT or regional trade agreements and that could be fitted into a modern energy governance framework as proposed by the IEC, would be the (im)balance between fossil fuel

subsidies and clean energy subsidies. An up-to-date approach has to abandon the outdated notions of eternal fossil fuel dominance for an approach that gives clean(er) energies the place they deserve in the regulatory framework.

## CONCLUSION: COORDINATION AND INCREASED COOPERATION IS KEY

Whether the nexus of ETC/WTO interaction will take on the form of (partial) integration and/or complementarity, one thing is absolutely clear: no matter what path both instruments wish to take in the future, coordination and increased cooperation between the WTO and the ECT on energy and sustainable development matters is key. This is vital both in preventing tension and duplications between the two instruments, as well as constructively tackling energy and climate-change mitigation challenges ahead.

One of the foremost functions of the WTO is to offer an inclusive platform for trade negotiations between its Members.<sup>122</sup> Everything the Organization does is based on negotiations: from commitments to lower tariffs and other trade barriers to opening up service markets.<sup>123</sup> The WTO is not in a static mode though, meaning that existing agreements can be renegotiated and new agreements can be added. The platform offered by the WTO can be beneficial for energy negotiations aimed, for example, at lowering barriers in energy trade or concluding a plurilateral agreement on energy, trade and sustainable development. Hard commitments in this field may be difficult to reach (at least at the initial stages), but weaker commitments at the outset might be better than no commitments at all - they at least have the potential to crystallise into something stronger in the long term.

The ECT on the other hand, brings into the picture a specialised set of rules governing energy trade in a WTO-plus style manner and also offers investment protection. To see the WTO as merely *competition* to the ECT would be a missed opportunity. Both treaty regimes could learn from each other through closer cooperation and coordination while simultaneously overcoming the tensions created by their overlap along the way. One issue that inevitably will have to be dealt with is the question of what will happen to the trade provisions of the ECT once all WTO Observers that are ECT Parties have acceded to the WTO.

For inspiration on how such closer cooperation and coordination between the ECT and the WTO may be administered, one could look at how things are done in the related field of international environmental law.<sup>124</sup> Voluntary and coordinated action between stakeholders of both institutions is vital.<sup>125</sup> Additionally, to make coordination and cooperation successful, it seems that both institutions have to have a common objective in mind. With regard to the WTO and the ECT this could be a more optimal regime to regulate economic activity in the energy sector. The larger goal underlying this would be to strengthen the global energy governance architecture with a view to mitigating climate change and to fostering sustainable development by predictable and modern rules. It has been shown in the context of international environmental law that fruitful cooperation does not only concern active involvement of institutions, for there are two crucial aspects: (1) interaction of states in the work of international institutions, and (2) cooperation between different institutions.<sup>126</sup>

Increased coordination and closer cooperation between the WTO and the ECT can solve existing overlapping competence and tension more efficiently.<sup>127</sup> This should not be in the form of a one-time event, however, but has to be part of a continuing process.<sup>128</sup> In part, this was attempted in the early 2000s, with the Energy Charter Secretariat providing rules of coordination for the WTO and the ECT. But this alone is not enough: as this paper has pointed out, gaps and overlaps continue to exist. To add to this, conflict resolution between the WTO and the ECT based on the ECS guides as it stands now seems quite complex and perhaps unnecessarily so. Maybe it is not unthinkable that coordination between the two treaty regimes could happen in a simpler manner in the future. The overall objective that has to be kept in mind in this respect is to work towards a sustainable global energy governance.

## ENDNOTES

- 1 The World Trade Organization (WTO) was established on 1 January 1995; the Energy Charter Treaty (ECT) was adopted 17 December 1994 and entered into force on 18 April 1998 (2080 UNTS 100).
- 2 Russia stepped back from the ECT in 2009, but acceded to the WTO in 2012: WTO, 'Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization', WT/ACC/RUS/70, WT/MIN(11)/2 (17 November 2011).
- 3 See ICTSD, *Fostering Low Carbon Growth*.
- 4 See Conference on the International Energy Charter, 'Agreed Text'. The International Energy Charter is a political declaration that was formally adopted and signed at the Ministerial Conference in May 2015. It maps out common principles and areas for international cooperation in the field of energy but it does not bear any legally binding obligation or financial commitment.
- 5 'Adoption of the Paris Agreement', UN Doc. FCCC/CP/2015/L.9/Rev.1 (12 December 2015).
- 6 See generally Cottier et al., 'Energy in WTO Law and Policy'; Meyer, 'The Architecture of International Energy Governance'.
- 7 For a more elaborate analysis see Leal-Arcas and Filis, 'The Fragmented Governance of the Global Energy Economy'; Leal-Arcas, Filis and Gosh, 'A Fragmented Energy Governance'.
- 8 Leal-Arcas and Filis, 'The Fragmented Governance of the Global Energy Economy', 19.
- 9 Hirst and Froggatt, *The Reform of Global Energy Governance*, 9.
- 10 Hirst and Froggatt, *The Reform of Global Energy Governance*, 9.
- 11 Hirst and Froggatt, *The Reform of Global Energy Governance*, 10.
- 12 GATS, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994); TRIMs, 15 April 1994, Marrakesh Agreement, Annex 1A, 1868 UNTS 186; TRIPS, 15 April 1994, Marrakesh Agreement, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994), all published in WTO, *The Legal Texts*.
- 13 Preamble, Marrakesh Agreement.
- 14 Energy products are taken up in WTO Members' Schedules of Concessions, based on the Harmonized System Convention (Harmonized Commodity Description and Coding System) (adopted 14 June 1983, entered into force 1 January 1988), 1503 UNTS 167, see e.g. Chapter 27, 'Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes'.
- 15 Negotiations on Energy Services as a separate sector were added at the outset of the Doha Round of Multilateral Trade Negotiations in 2001, see [https://www.wto.org/english/tratop\\_e/serv\\_e/energy\\_e/energy\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/energy_e/energy_e.htm) (accessed March 2016).
- 16 For an overview of challenges with respect to energy regulation in the WTO, see Marhold, 'The World Trade Organization and Energy'. Unresolved issues concern e.g. the not always clear goods and services distinction for energy in the WTO, energy dual pricing, transit under GATT Article V, the 'likeness' of non-renewables and renewables, subsidies and the non-applicability of Article XX(g) exceptions with regard to commitments made in WTO Accession Protocols, which may be in tension with the notion of permanent sovereignty over natural resources.

- 17 For the Energy Charter Treaty in general, see <http://www.energycharter.org/> (accessed March 2016).
- 18 Investment and its dispute settlement are regulated in Parts III and V of the ECT.
- 19 Leal-Arcas and Filis, 'The Fragmented Governance of the Global Energy Economy', 24.
- 20 'Energy Materials and Products' are taken up in Annex EM ECT; Article 1(5) ECT incorporates 'Economic Activity in the Energy Sector' and Article 7(10)(b) ECT explicitly groups gas pipelines as 'Energy Transport Facilities'.
- 21 See Energy Charter Secretariat, *Applicable Trade Provisions*, vii. On the ECT website, the ECS explains the objective of the ECT as follows: 'The Energy Charter Treaty provides a multilateral framework for energy cooperation that is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources'; at <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> (accessed March 2016).
- 22 The ECT houses a Trade and Transit Group, which facilitates transit talks between the ECT Parties. This might in fact be the only international platform where transit of energy is discussed, see e.g. L. Ehring and Y. Selivanova, 'Energy Transit', in Selivanova, *Regulation of Energy in International Trade Law*.
- 23 Frasl, 'The Trade Rules', 459, 460-461.
- 24 Frasl, 'The Trade Rules', 459, 460-461.
- 25 Article 4 ECT, 'Non-derogation from GATT and Related Instruments'; see also Article 29 ECT, 'Interim Provisions on Trade-Related Matters'.
- 26 ECT Annex EM, 'Energy Materials and Products'.
- 27 See WTO, Members and Observers, at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (accessed March 2016).
- 28 Major energy producing, exporting and/or transporting states which joined the WTO after 1995 are Angola (1996), China (2001), Ecuador (1996), Kazakhstan (2015), Oman (2000), Qatar (1996), Russia (2012), Saudi Arabia (2005), Ukraine (2008) and the United Arab Emirates (1996).
- 29 WTO, Members and Observers.
- 30 See OPEC, Member Countries, at [http://www.opec.org/opec\\_web/en/about\\_us/25.htm](http://www.opec.org/opec_web/en/about_us/25.htm) (accessed March 2016).
- 31 ECT, Members and Observers, at <http://www.energycharter.org/who-we-are/members-observers/> (accessed March 2016).
- 32 ECT, Members and Observers
- 33 See Desta, 'The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements'.
- 34 ECT, Article 4, 'Non-derogation from GATT and Related Instruments', and Article 29, 'Transitional Arrangements'.
- 35 WTO, *World Trade Report 2010*, 54.

- 36 A case in point here is electricity. There is still no conclusive categorisation of electricity in the WTO, although ‘electrical energy’ is registered under code 2716 of the HS Convention. In EU law, however, electricity is explicitly considered a ‘good’ and not a ‘service’: in ECJ Case C-393/92 *Almelo v Energiebedrijf Ijsselmij* [1994] ECR-I-1477 [28] and Case C-158/94 *Commission v Italy* [1997] ECR I-5789 [17], the European Court of Justice ruled that electricity, despite its intangible character, should be treated as a ‘good’.
- 37 Konoplaynik and Wälde, ‘Energy Charter Treaty and its Role in International Energy’, 529. For more information on the background and legal provisions of the ECT see generally Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*.
- 38 ECT Annex EM, ‘Energy Materials and Products’.
- 39 Article 29 ECT, ‘Interim Provisions on Trade-Related Matters’ sets out temporary trade rules for ECT Parties in the process of WTO accession.
- 40 See Article 7(10)(ii)(b) ECT, at 1: “‘Energy Transport Facilities’ consist of high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products.’ Note: negotiations on a Transit Protocol, intended to be an elaboration on Article 7 ECT and the ECT, have come to a standstill.
- 41 Article 19 ECT and Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA).
- 42 Article 4 ECT reads ‘Nothing in this Treaty shall derogate, as between particular Contracting Parties which are parties to the GATT, from the provisions of the GATT and Related Instruments as they are applied between those Contracting Parties.’
- 43 Energy Charter Secretariat, *Applicable Trade Provisions and Trade in Energy*.
- 44 Energy Charter Secretariat, *Applicable Trade Provisions*, viii.
- 45 Article 4 ECT, ‘Non-derogation from GATT’ for GATT Members.
- 46 Article 29(2)(a) ECT; the exceptions are listed partly in Annex W of the ECT Trade Amendment and partly in Article 29(2)(b) of the ECT and most importantly relate to the Dispute Settlement System of the WTO, which cannot be used for non-WTO Members and is replaced in Annex D by a panel-based dispute resolution mechanism which is inspired by the DSU, but is less ‘heavy’ (no standing appellate body is foreseen). Note, however, that Japan and Turkey did not ratify the ECT Trade Amendment, while some other countries only apply it provisionally, see ECT, ‘Signatories and Contracting Parties, Energy Charter Treaty and Related Documents’, 223-225: the ECT only refers to the GATT, and it is the ECT Trade Amendment that introduces reference to the WTO and the commitment to protect intellectual property rights.
- 47 Annex W(A) ECT, ‘Exceptions and Rules Governing the Application of the Provisions of the WTO Agreement - in Accordance with Article 29(2)(a)’. Neither the ECT Interim Provisions on Trade-Related Matters nor the Trade Amendment declares any provisions of the GATS applicable under the ECT.
- 48 Article 29 (3), (4) and (5) ECT; however, *export* tariffs, which are highly relevant for the energy sector and utilized for ‘dual energy pricing’, also remain largely unregulated in the WTO, with the exceptions of some recent bindings on them in selected Accession Protocols (e.g. Russia and China).
- 49 See generally on this issue Azaria, ‘Energy Transit’.

- 50 Frasl, 'The Trade Rules', 484.
- 51 See the most recent informal text of the 'Transit Protocol', dated 22 October 2010, under document TT87 22/01/2010. Note: Article 7 ECT proves to be a complex article in itself, looking for instance at the non-discrimination requirement contained in Article 7(3), see Nychay and Shemelin, 'Interpretation of Article 7(3)'.
- 52 See GATS Article 1.2(c).
- 53 Annex W(A)(b) ECT.
- 54 See definitions of 'Economic Activity in the Energy Sector' and 'Investment' respectively in Articles 1(5) and (6) ECT.
- 55 Mavroidis, Bermann and Wu, *The Law of the World Trade Organization*, 802-819.
- 56 See GATS Article I.2.
- 57 See for instance Marceau, 'The WTO in the Emerging Energy Governance Debate', 26.
- 58 However, see WTO, 'Energy Services: Background Note by the Secretariat', 9 September 1998, stating on page 1 that 'the vast majority of the global energy services industry is not covered by GATS specific commitments'.
- 59 WTO, Report by the Chairman to the Trade Negotiations Committee; see WTO, 'Services Sectoral Classifications List', Doc MTN.GNS/W/120.
- 60 GATS Article II, 'General Obligations and Disciplines', and Article XVII, 'National Treatment'.
- 61 See on this issue, in particular, Mavroidis, 'Regulation of Investment in the Trade Regime'; Molinuevo, *Protecting Investment in Services*.
- 62 WTO, 'Energy Services: Background Note by the Secretariat' (updated), 12 January 2010, 16 (Central Product Classification (CPC) 883).
- 63 WTO, 'Energy Services: Background Note by the Secretariat' (updated), 12 January 2010, 16 (CPC 5115).
- 64 WTO, 'Energy Services: Background Note by the Secretariat' (updated), 12 January 2010, 17 (CPC 887).
- 65 WTO, 'Energy Services: Background Note by the Secretariat' (updated), 12 January 2010, 17.
- 66 Such as environmental goods and services, Monkelbaan, *Trade in Sustainable Energy Services*, 7-8.
- 67 Monkelbaan, *Trade in Sustainable Energy Services*, 12.
- 68 See European Commission, 'The Environmental Goods Agreement (EGA): Liberalising Trade in Environmental Goods and Services', at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1116> (accessed March 2016).
- 69 See Article II (Most Favoured Nation) and Article XVI GATS (Market Access). Note, however, that pre-establishment obligations under GATS apply only to sectors or industries that Members specifically include in their schedule of commitments.



- 70 See on this e.g. Dolzer and Schreuer, *Principles of International Investment Law*, 80. Note that Russia wanted to incorporate pre-investment stage protection and thereby mutual consistency with the GATS. This was expressed during the phase of the first ECT negotiations, see the Chairman's statement at the adoption session (17 December 1994): 'In addition, the Russian Federation has expressed the view that the consideration of appropriate amendments to the Treaty pursuant to Article 30 affecting sectors of services within the scope of this Treaty to which measures of the GATS apply, and the negotiations towards the supplementary investment treaty provided for in Article 10(4), should be conducted in such a manner as to assure mutual consistency of the Treaty provisions arrived at. Here again, I am sure that all delegations would fully endorse the need to achieve such consistency in the future incorporation in the Treaty of the results of the Uruguay Round, and in negotiation of the second Treaty for the pre-investment stage.'
- 71 Article III.3 of the Marrakesh Agreement and see the DSU.
- 72 See connection with Article 4 ECT.
- 73 In *US – Section 301 Trade Act*, the Panel held that Article 23.1 of the DSU prescribes 'a general duty of a dual nature': 'Article 23.1 is not concerned only with specific instances of violation. It prescribes a general duty of a dual nature. First, it imposes on all Members to "have recourse to" the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call "exclusive dispute resolution clause", is an important new element of Members' rights and obligations under the DSU.'
- 74 Article 27 ECT, 'Settlement of Disputes between Contracting Parties'; this article explicitly does not apply to energy trade disputes, see Article 28 ECT.
- 75 Article 26 ECT, 'Settlement of Disputes between an Investor and a Contracting Party'.
- 76 Article 7.7 ECT, 'Transit'.
- 77 Article 29 ECT, 'Interim Provisions on Trade-Related Matters', and Annex D ECT, 'Interim Provisions for Trade Dispute Settlement'.
- 78 Article 6 ECT, 'Competition', and Article 19 ECT, 'Environmental Aspects'.
- 79 Article 4 ECT, and Energy Charter Secretariat, *Applicable Trade Provisions*, viii.
- 80 In conjuncture with Article 29(7) ECT.
- 81 Annex D(2)(c) and 4(c) of the ECT. For instance, there is no right to appeal in the procedure to Annex D, contrary to the DSU. Nor does the procedure in ECT Annex D provide for automatic adoption of panel reports, which have to be adopted by the Energy Charter Conference instead and with no less than a three-fourths majority; See additionally Frasl, 'The Trade Rules', 479.
- 82 See also generally Azaria, 'Energy Transit'.
- 83 Article 7(7) ECT; Frasl, 'The Trade Rules', 495; Energy Charter Secretariat, *Trade in Energy*, 37; Azaria, 'Energy Transit'.
- 84 Article 7(7)(b) ECT; Article 7(7)(c) ECT stipulates that 'Only if within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and

conditions to be observed for Transit from a date which he shall specify until the dispute is resolved.’

- 85 It seems that this was the intention of the ECT travaux préparatoires, see *Legal Sub-Group’s Report on Inter-relationship of the Charter Treaty with the GATT*, European Energy Charter, Conference Secretariat, Room Document 1, Plenary Session, 14-18 December 1993, Brussels, 14 December 1993, 1. However, note that Article 7(7) ECT states that ‘The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute.’
- 86 Azaria, ‘Energy Transit’, 591, referring to the travaux préparatoires of the ECT: European Energy Charter Conference Secretariat 22.4.94/2647.
- 87 Articles 26 and 27 ECT.
- 88 See e.g. Molinuevo, *Protecting Investment in Services*.
- 89 Pauwelyn, *Conflict of Norms in Public International Law*, 443, and Article 1.1 DSU.
- 90 Pauwelyn, *Conflict of Norms in Public International Law*, 443, and Article 1.1 DSU. In contrast, see the extensive list of dispute settlement cases litigated under the ECT, ‘List of All Investment Dispute Settlement Cases’, at <http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/> (accessed March 2016).
- 91 In fact, in the event that parties to a dispute fail to settle it amicably pursuant to Article 26(1) ECT, Article 26(2) ECT gives the Investor three options for submitting the dispute for resolution: ‘(a) to the courts or administrative tribunals of the Contracting Party party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this Article [settlement procedure provided for in ECT].’
- 92 Article 16 ECT, ‘Relation to Other Agreements’.
- 93 See Article 4 ECT, ‘Non-derogation from GATT and Related Instruments’, and Article 29 ECT ‘Transitional Arrangements’.
- 94 Azaria, ‘Energy Transit’, 594.
- 95 Thomas W. Wälde, ‘Editor’s Preface’, in Wälde, *The Energy Charter Treaty*, xxi [emphasis added].
- 96 See Marhold, ‘The World Trade Organization and Energy’.
- 97 Lamy, ‘Trade and Energy’, 121.
- 98 Crosby, ‘Energy Discrimination and International Rules’, 342.
- 99 WTO, ‘Lamy Calls for Dialogue on Trade in Energy in WTO’, WTO News, at [http://wto.org/english/news\\_e/sppl\\_e/sppl279\\_e.htm](http://wto.org/english/news_e/sppl_e/sppl279_e.htm) (accessed March 2016), and Energy Charter Secretariat, ‘Workshop on the Role of Intergovernmental Agreements in Energy Policy’, 29 April 2013, at [https://www.wto.org/english/tratop\\_e/envir\\_e/wksp\\_envir\\_apr13\\_e/wksp\\_envir\\_apr13\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/wksp_envir_apr13_e/wksp_envir_apr13_e.htm) (accessed March 2016).
- 100 Leal-Arcas and Filis, ‘The Fragmented Governance of the Global Energy Economy’, 19.

- 101 See Chapter 7 of the EU-Singapore Free Trade Agreement concluded on 17 October 2014.
- 102 See Canada-EU Comprehensive Economic and Trade Agreement (CETA), Chapter XX, at [http://ec.europa.eu/trade/policy/in-focus/ceta/index\\_de.htm](http://ec.europa.eu/trade/policy/in-focus/ceta/index_de.htm) (accessed March 2016).
- 103 CETA, Chapter 25, Articles X.3 and X.5; Article X.12 and X.9.
- 104 CETA, Chapter 25, Article X.9, para 2.
- 105 See EU-US Transatlantic Trade and Investment Partnership (TTIP), 'Trade and Sustainable Development: Initial EU Position Paper', para. 3, at [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151626.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151626.pdf) (accessed March 2016).
- 106 EU-US TTIP, 'Trade and Sustainable Development: Initial EU Position Paper', para. 4.
- 107 EU-US TTIP, 'Trade and Sustainable Development: Initial EU Position Paper', para. 5.
- 108 EU-US TTIP, 'Trade and Sustainable Development: Initial EU Position Paper', para. 8.
- 109 EU-US TTIP, 'Trade and Sustainable Development: Initial EU Position Paper', para. 12. All these matters are further elaborated upon in a more detailed EU Position Paper which sets out and describes the European Union's general approach on Trade and Sustainable Development in the TTIP negotiations. It was tabled for discussion with the US in the negotiating round of 19-23 May 2014 and made public on 7 January 2015, see [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153024.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153024.pdf) (accessed March 2016).
- 110 Trans-Pacific Partnership, Chapter 20, 'Environment', at <https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf> (accessed March 2016).
- 111 See ICTSD, *Fostering Low Carbon Growth*.
- 112 See Annex 4 to the Marrakesh Agreement: current plurilaterals deal with civil aircraft, government procurement, dairy products and bovine meat; additionally, see WTO, 'Plurilaterals: Of Minority Interest', at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm10\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm) (accessed March 2016).
- 113 See generally on this issue, Lamp, 'The Receding Horizon'.
- 114 Lamp, 'The Receding Horizon'.
- 115 ICTSD, *Transforming the APEC Outcome on Environmental Goods into a Broader Sustainable Energy Trade Initiative: What Are the Options?*, 13-14.
- 116 See Conference on the International Energy Charter, 'Agreed Text'.
- 117 The 1991 Energy Charter, also known as the European Energy Charter, was the founding document for the Energy Charter Treaty and provides the political foundation for the Charter process.
- 118 See International Energy Charter, 2015, Preamble, at <http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> (accessed March 2016).
- 119 International Energy Charter, 2015, Preamble.
- 120 International Energy Charter, 2015, Title I: Objectives, point 1.
- 121 International Energy Charter, 2015, Title I: Objectives, point 1.

122 Article III.2 Marrakesh Agreement.

123 See WTO, 'Understanding the WTO: What We Do', at [http://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_we\\_do\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm) (accessed March 2016).

124 Pauwelyn, 'Fragmentation of International Law', para. 25, citing Wolfrum and Matz, *Conflicts in International Environmental Law*, 159-163.

125 Wolfrum and Matz, *Conflicts in International Environmental Law*, 161.

126 Wolfrum and Matz, *Conflicts in International Environmental Law*, 161.

127 Wolfrum and Matz, *Conflicts in International Environmental Law*, 162.

128 Wolfrum and Matz, *Conflicts in International Environmental Law*, 159.

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