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## ENERGY IN INTERNATIONAL TRADE LAW

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### ABSTRACT

This paper looks into the energy resources and the role of international trade law in governing the sale, supply, distribution and storage of the energy. Energy has always been a very important element in the transnational community; however this importance of energy has grown to be a political priority in recent times. Earlier the sector was governed and dominated by the state run monopolies and cartelized by few multinational companies. Further this paper analyzes how this situation is similar in the current scenario and further explains why GATT and now WTO do not deal energy as a separate or distinct sector. Hence basic WTO rules which are applicable to all the other forms of trade are only applicable to trade in energy goods and services. This is mainly because of the natural monopolies and state owned enterprises which own and dominate the energy markets. In the Uruguay round conference WTO made efforts to address the dual prices and export restrictions in the sector; which ended up in vain and ended up in limited access to the Foreign Service operators. Hence WTO doesn't deal properly in trade in energy. However in recent times the joining of many energy exporting countries in WTO, competition and the climate issues brought attention towards trade in multilateral trade regulations and the Doha negotiations which considered energy as a service sector asserts for a reasonable WTO future framework agreement on energy. Even though energy is a minor factor in WTO law there are a wide range of sources and instruments addressing the same, such as international private law, commercial arbitration and several other fragmented energy specific agreements are to be taken into consideration. This paper also focuses on these specific agreements and institutions including OECD/IEA, Energy Charter Treaty, Organization of Petroleum Exporting Countries, Multilateral Environment Agreements, EU and NAFTA.

**Keywords:** *Energy, International trade, Energy trade, WTO*

## **Introduction**

Energy is undeniably the fuel that drives the global economy and this is undisputed. The changes in the supply demand and distribution of the same affects the economy and the political domains. Hence whoever controls the same has a distinct stand and command over the world polity. Here comes the importance of a body to keep, regulate and control the energy market. WTO being a body which controls and settles dispute in matters of every international trade and transactions, it undisputedly has a control over the energy trade too. However the question of how much control or power the WTO can exercise over the energy trade is a question which arises every time when we start dealing with it. Energy being state monopolized and cartelized by certain MNC's the reasonable control of WTO over this sector is very weak when compared to other international trades. Hence WTO acts and deals with energy like other trades which it has power with, through many treaties and agreement that are made between the energy exporting countries and their buyers. One of the most important problems that lead to the weak applicability of WTO rule related to trade in energy happened with the early non participation of many energy exporting countries such as the GCC and Africa most notably the non participation of Saudi Arabia. However things are changing in the changing world and the participation of early non cooperating countries to WTO has made a reasonable change in the authority of WTO.

## **Literature Review**

1. Francis N. Botchway, *International Trade Regime and Energy Trade*, 28 *Syracuse J. INT'L L. & COM.* 1 (2001).

The author in this article lays out some of the theoretical explanations for the seeming ambivalence of the current international trade regime toward the trade in energy. It does this by examining how broad international trade theory, legislation, and international energy transactions relate to one another. It also suggests that changes in worldwide energy policy are more likely to originate from regional economic blocs, atleast initially. However, the current regulatory framework for international trade does not seem to support this expectation.

2. Rafael Leal-Arcas, Costantino Grasso and Juan Alemany Ríos, *Multilateral, Regional and Bilateral Energy Trade Governance*, *Renewable Energy Law and Policy Review* , 2015, Vol. 6, No. 1 (2015)

The international, regional, and bilateral levels of energy trade governance are all examined by the author of this paper. The WTO and concerns with energy transportation are the main topics of the article's analysis of the multilateral energy trade governance structure. The article also looks into the causes of the growth of regional trade agreements, and its co-existence with WTO legislation, and five main regional agreements and their energy-related characteristics. It also lists out different examples of regional energy trade governance from around the world. It also considers how to reduce gaps and get rid of the overlapping while upholding the high level standardizing framework, pin pointing the actions that would improve EU energy security.

3. Joanna I Lewis, *The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development*, Global Environmental Politics (2014).

The article discusses about a variety of laws and incentives, governments all over the world that have made the development of renewable energy technologies a priority and how the production and application of these technologies has expanded quickly. There has been an upsurge in the international commerce of renewable energy technologies as a result of the advent of several fast industrialising economies in these sectors. It also looks into programs that aim to simultaneously promote the establishment of a domestic manufacturing industry run the greatest danger of being in violation of international trade regulations, while any type of direct government assistance that qualifies as a subsidy may do so as well.

4. Thomas Cottier, Garba Malumfashi, Sofya Matteotti-Berkutova, Olga Nartova, Joëlle De Sépibus And Sadeq Z. Bigdeli, Energy in WTO law and policy, WTO, [https://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_7may10\\_e.pdf](https://www.wto.org/english/res_e/publications_e/wtr10_7may10_e.pdf). (last visited Nov 13, 2022).

The essay explores how international law's approach to regulating energy is incredibly disjointed and completely incoherent. It also analyses the necessity of such a framework as well as the essential concerns that should be covered by a future Framework Agreement on Energy under WTO law. This essay examines renewable energy sources and how international trade law affects how renewable energy is supplied, sold, distributed, and stored. The OECD/IEA, Energy Charter Treaty, Organization of Petroleum Exporting Countries, Multilateral Environmental Agreements, EU, and NAFTA are among the specific agreements and organisations that this article also focuses on.

## Legal Regime

The governance structure currently in place for the global energy trade is complex and deep. Global energy security would be enhanced by streamlining it for more legal coherence and international political and economic cooperation.<sup>1</sup> The WTO only covers a limited amount of international law that pertains to energy. The current situation addresses energy issues in a fragmented manner, and some institutions and agreements that are explicitly dedicated to energy include the OECD/IEA, Energy Charter Treaty, Organization of Petroleum Exporting Countries, Multilateral Environment Agreements, EU, and NAFTA.

## The WTO and Energy Trade

In the area of global energy trade, the World Trade Organization is essential. The absence of substantive discussions of energy issues in the early rounds of the General Agreement on Tariffs and Trade, which did not include the participation of major exporters of energy resources like Nigeria, Indonesia, Kuwait, Qatar, the United Arab Emirates, and Saudi Arabia, led to the major issues in existence relating to the application of WTO rules regarding energy.<sup>2</sup>

The GATT and ITO discussions did not directly address energy issues, although they did bring up and discuss topics related to natural resources. Given the WTO regulations broad scope, it seems like they apply to the majority of economic activity relating to energy. Since the energy sector encompasses elements of both trade in products and services, the industry does not distinguish between the two, giving rise to the distinctively hybrid nature of energy commerce. Therefore, in the WTO perspective, the energy trade can be aligned under both GATT and GATS rules. The lack of proper negotiation in GATS and GATT, the issue of overlapping between the two instruments was not paid enough attention. The fact that GATT/WTO rules are generally norms of universal application is another factor explaining why energy trade and GATT/WTO regulations appeared to function mainly independently from one another. Despite the GATS's coverage of a variety of services that are equally important to the energy industry, neither mentions "energy" nor deals directly with issues related to it. Even though the energy sector has structural characteristics that set it apart from problems concerning conventional commerce in commodities and services, there have been significant developments that

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<sup>1</sup> Rafael Leal-Arcas, Costantino Grasso and Juan Alemany Ríos, Multilateral, Regional and Bilateral Energy Trade Governance, Renewable Energy Law and Policy Review , 2015, Vol. 6, No. 1 (2015)

<sup>2</sup> Supra N 1

demonstrate convergence between the global energy market and the regulations included in the WTO regime.<sup>3</sup>

However, current GATT/WTO agreements focus primarily on market access and do not sufficiently address the concerns that are generally thought to be the most important in the oil and gas industry, such as investment protection. Furthermore, the existing multilateral trade regulations do not sufficiently address issues relating to the restrictive practices of the energy exporting countries and energy firms that hold monopoly positions and frequently receive exclusive rights and privileges.<sup>4</sup>

### **Renewable Energy Trade Disputes and Governance**

The development and use of renewable energy is encouraged by several WTO members through a variety of subsidy programmes, some of which have sparked trade conflicts. Numerous legal proceedings by the United States have targeted China's massive subsidies for its renewable energy sector, among other things. For instance, China's import of solar cells and modules is the subject of a countervailing tariff investigation by the United States. Furthermore, China's subsidies for wind energy equipment were removed as a result of a WTO protest from the United States. One such issue involving renewable energy subsidies is that between Japan and Canada.<sup>5</sup> One could argue that the escalating trade disputes over subsidies for renewable energy indicate that the trade regulations undermine "good" renewable energy governance in that they obstruct the production and use of renewable energy. However, such a justification is unpersuasive. The uncertainty of "excellent" renewable energy governance must be recognised. The truth is more complex than that, but in the simplest terms, any policy that promotes the production and use of renewable energy may be seen as good renewable energy governance. We must consider economic effectiveness, international competition, and contrast with alternative energy sources. A strategy that supports renewable energy sources could work against other policy goals.<sup>6</sup>

Renewable energy subsidies are nevertheless subject to WTO regulations and can be found in breach of those regulations by panels and the Appellate Body. However, debates against

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<sup>3</sup> Francis N. Botchway, *International Trade Regime and Energy Trade*, 28 *Syracuse J. INT'L L. & COM.* 1 (2001).

<sup>4</sup> *Ibid*

<sup>5</sup> Joanna I Lewis, *The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development*, *Global Environmental Politics* (2014).

<sup>6</sup> *Supra* N 3

subsidies for renewable energy frequently centre on the side effects and trade distortions of the subsidies rather than necessarily condemning the subsidies themselves. It should not be assumed that actual or anticipated disagreements over renewable energy subsidies indicate that the WTO rules and dispute resolution process are detrimental to a "good" trade in renewable energy.<sup>7</sup>

### **WTO and other international energy law instruments**

Only a small portion of international law that deals with energy is covered by the WTO. It is necessary to consider a variety of sources and tools. Additionally, it should be remembered that contracts governed by international private law and commercial arbitration make up the majority of international trade in energy.<sup>8</sup> Present scenario deals with energy concerns in a fragmented way, and some of the institutions and agreements that are specifically related to energy are outlined here.

#### **1. Organization for Economic Co-operation and Development (OECD) and International Energy Agency (IEA)**

Established in 1961, the OECD is a global organization with 30 member nations and a 342.9 million euro annual budget (as of 2008). The IEA is an organisation that is affiliated with the OECD, serves as a forum for 28 industrialized nations to coordinate their national energy strategies. The following are the goals of the IEA, which focuses on all forms of energy: "improvement of the world energy supply and demand structure, more efficient use of energy, development of alternative energy sources to reduce dependence on any one source, assistance in integrating environmental and energy policies, and the promotion of cooperative relations between oil-producing and oil-consuming countries."<sup>9</sup>

#### **2. Energy Charter Treaty**

The Energy Charter Treaty came into effect in 1998, however certain Members have not yet ratified it. Under the terms of this agreement, a number of WTO Members cooperate in the

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<sup>7</sup> Supra N 3

<sup>8</sup> Supra N 5

<sup>9</sup> Thomas Cottier, Garba Malumfashi, Sofya Matteotti-Berkutova, Olga Nartova, Joëlle De Sépibus And Sadeq Z.Bigdeli, Energy in WTO law and policy, WTO, [https://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_7may10\\_e.pdf](https://www.wto.org/english/res_e/publications_e/wtr10_7may10_e.pdf). (last visited Nov 13, 2022).

energy sector. The ECT addresses a range of investment- and investor-related topics. Trade in energy, energy products, and energy-related equipment, based on the WTO rules; freedom of energy transit; international dispute settlement, including investor-state arbitration and interstate arbitration; and investment protection (e.g., by granting investors nondiscriminatory treatment, national treatment, and most-favorable nation treatment - compensation in case of expropriation and other losses, free transfer of capital).<sup>10</sup>

### 3. Organization of the Petroleum Exporting Countries

Twelve oil-producing and oil-exporting nations from three continents namely, America, Asia, and Africa make up the permanent intergovernmental organisation known as OPEC. The main objective of OPEC is the coordination and unification of the petroleum policies of its Participating Countries, working out means of ensuring the stabilisation of prices in international oil markets while taking into consideration the interests of the producing nations and the necessity of securing a steady income for the producing countries; an efficient, economic, and regular supply of petroleum to consuming nations; and a just return on investment to those investing in the oil industry.<sup>11</sup> None of the five original members of OPEC were parties to GATT when it was established on September 14, 1960.<sup>12</sup>

### 4. Multilateral Environmental Agreements

A number of multilateral environmental agreements (MEAs) have also tackled the issue of energy, particularly those that deal with climate change, such the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol. The energy industry is impacted by anthropogenic climate change, which also jeopardises the foundations of energy security systems. At the same time, energy sustainability and energy efficiency regulations are sparked by climate change mitigation initiatives. Since the climate regime was aware of this, it avoided the strategy used by a number of prior MEAs, which called on parties to those accords to employ trade restrictions against non-parties. The Vienna Convention on the Law of Treaties, that has been addressed in a number of WTO dispute settlement decisions, describes the connection of WTO law to these instruments as belonging to a complicated constellation. From the perspective of international law, all documents are equal, with more recent or specialised agreements having priority over general laws in terms of their implementation. Other

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<sup>10</sup> Ibid

<sup>11</sup> Supra N 3

<sup>12</sup> Ibid

instruments may only be considered from the perspective of WTO law insofar as they affect how WTO rules are applied and interpreted. Even the question of whether an agreement to which not all WTO Members are party can be used in WTO dispute resolution is controversial.<sup>13</sup>

#### 5. Regional Level: European Union (EU) & North American Free Trade Agreement (NAFTA)

Since the European Coal and Steel Community (ECSC) Treaty of 1952, which outlined a coal-based energy policy, the European Community (EC) has undergone changes. The ECSC did not discuss foreign affairs. In fact, the six founding members were free to decide how to interact with other nations. The Euratom and the European Economic Community were two further major treaties that were signed in 1957. The 1967 Merger Treaty made it possible for these Communities' institutions to be combined, including all of the major economic activities, including the wise use of natural resources. The EC participates in international organizations on a global scale. As a full member of the WTO, the Energy Charter Treaty, and the Kyoto Protocol alongside its Member States, the EC has made an effort to take the lead in advancing global standards for the trade of energy. NAFTA's implementation commenced on January 1st, 1994. The agreement's goal was to eliminate trade restrictions between the US, Canada, and Mexico. Energy trade is one of many topics covered by NAFTA, including investment, cross-border services, trade-related measures for energy services, restrictions and obstacles, and measures for investments in the respective countries of the parties.<sup>14</sup>

### **Co-existence of WTO and Regional Trade Agreements**

It is important to note that all trade agreements, whether bilateral, regional, or multilateral in character, are international treaties in order to examine the compliance between the WTO regulations and RTAs.<sup>15</sup> The WTO standards do not necessarily have any legal precedence over EIAs because all international accords are given equal weight under international law. As a result, potential conflicts with the WTO accords do not threaten the legitimacy or survival of EIAs.

Regional preferences are permitted by WTO regulations for both products and services. Therefore, it is acknowledged that RTAs may result in some discriminatory trade restrictions,

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<sup>13</sup> Supra N 9

<sup>14</sup> Supra N 3

<sup>15</sup> Supra N 1



provided that these limits are inherent in and essential to the creation of the RTA. This is in line with the WTO rules' primary goal, which is to provide a set of guidelines under which nations can bargain more lenient trade policies. In reality, these regulations promote RTAs as a way of advancing global trade.<sup>16</sup>

### **Conclusion and Suggestions**

The aim of this paper was to explore and focus on the role of WTO in international energy trade and other organizations and treaties role in governing the trade of energy between nations.

In examination of the same it is profoundly understood that the WTO's role in energy trade has increased more than the earlier times and unlike other international trade, WTO doesn't have a proper authority over the international renewable energy market. This is mainly because of the natural monopoly of energy exporting nations grip over the energy trade. Being a monopolized sector decision on the market is always controlled by these countries and cartels those control them. However the treaties between nations and bilateral agreements have maintained a fair trade on the sector. The coexistence of WTO and regional trade agreements had helped in maintaining a set of written rules in the energy trade and helped to settle the matters amicably in case of dispute. The recent disputes over the renewable resources and their subsidies had also raised a conflict on the energy trade between nations but the weak authority of WTO and its rules on this sector showed a detrimental effect on the same.

It is much important that a proper codified rules and regulations have to be imposed by WTO over this sector to control the artificial scarcity and hoarding created by the monopolized countries. For the same the international communities have to look upon to create a unified law and certain bilateral agreements under the same law.

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