CONTENTS

List of Tables page xvii

Foreword xix

Acknowledgements xxiii

Tables of Cases xxvi

List of Acronyms and Abbreviations xxxv

Introduction and Objectives 1

PART I Energy in International Trade Law: Concepts, History and Legal Framework


1.1 Introduction 7

1.2 Framing Energy: Defining an Evolving Concept 7

1.2.1 Natural Resources and Raw Materials 10

1.2.2 Primary and Secondary Energy Commodities 14

1.2.3 Non-Renewable, Renewable and Clean Energy 15

1.3 The Relevance of International Trade Rules for Energy 17

1.3.1 The World Trade Organization, Energy Charter Treaty and Preferential Trade Agreements 17

1.3.2 The Legal Classification of Energy Resources in International Trade Law 21

1.3.3 When Do International Trade Rules Kick In? 23

xii CONTENTS

1.4.1 Decentralization: Opening-Up a Vertically Integrated Sector 28

1.4.2 Decarbonization: Understanding the Shift from Fossil Fuels to Clean Energy 31

1.4.3 Changing Markets and the Eternal Quest for Energy Security 32

1.5 Conclusion 34

2 Energy’s Place in International Trade Law History 35

2.1 Introduction 35

2.2 From GATT 1947 to the Tokyo Round: Energy In or Out? 35

2.2.1 GATT’s Early Years: Energy on the Back Burner 35

2.2.2 Tariffs on Petrol Taken Up in Members’ Schedules since GATT 1947 39

2.3 From Tokyo to Uruguay: Fuelling Concerns about Energy 43

2.3.1 Tokyo Round (1973–79): OPEC and the Oil Crises 43

2.3.2 Uruguay Round (1986–94): Natural Resource-Based Products and Important Energy Accessions 46

2.4 From Uruguay to Doha: Energy Accessions and Disputes Entering a New Era 50

2.4.1 Energy Issues after the Establishment of the WTO: Doha and Beyond 50


2.4.3 Energy Disputes on the Rise 62

2.5 Conclusion 64

3 The Current WTO Legal Framework Relevant to Energy 66

3.1 Introduction 66

3.2 Multilateral Agreements on Trade in Goods 67

3.2.1 General Agreement on Tariffs and Trade 67

3.2.2 Agreement on Agriculture 80
# Table of Contents

3.2.3 Agreement on Technical Barriers to Trade 81  
3.2.4 Agreement on Trade-Related Investment Measures 82  
3.2.5 Anti-Dumping Agreement 83  
3.2.6 Agreement on Subsidies and Countervailing Measures 85  

3.3 General Agreement on Trade in Services 88  
3.3.1 The Goods/Services Divide in Energy 88  
3.3.2 GATS Coverage and Exceptions 92  
3.3.3 Energy Services as a Separate Sector? 97  

3.4 Trade-Related Aspects of Intellectual Property Rights 99  

3.5 Plurilateral Trade Agreements: Government Procurement 100  

3.6 Summary Table of WTO Energy-Related Disputes 101  

3.7 Conclusion 109  

4 Beyond the WTO: The Energy Charter Treaty and Preferential Trade Agreements 110  
4.1 Introduction 110  
4.2 The Nexus between the WTO and the Energy Charter Treaty 110  
4.2.1 Overview 110  
4.2.2 WTO and ECT: Overlaps and Changes in Membership 114  
4.2.3 WTO and ECT Membership: Changes and Overlaps 1998–2020 115  
4.2.4 Subject-Matter Overlaps between the WTO and the ECT 121  
4.2.5 Procedural Overlaps: Dispute Settlement in the WTO vs the ECT 127  
4.2.6 The WTO-ECT Relationship Twenty-Five Years On: Unresolved Issues and ECT Modernization 131  

4.3 Energy in Selected Preferential Trade Agreements 141  
4.3.1 NAFTA and USMCA 142
4.3.2 EU Free Trade Agreements: Singapore, Ukraine and Mexico 146
4.3.3 Trends in Preferential Trade Agreement Energy Chapters 153
4.4 Conclusion 154


5 Decentralizing Energy Markets in the Light of International Trade Law: OPEC and the EU Internal Energy Market 159
5.1 Introduction 159

5.2.1 GATT Rationale, Restrictive Practices and Quotas 160
5.2.2 Understanding the OPEC Cartel and Its Anti-Competitive Effects 166
5.2.3 OPEC in the WTO Context 171
5.2.4 Avenues for Tackling OPEC Production Quotas under WTO Law 174
5.2.5 Production Quotas as Quantitative Restrictions: Article XX(g) GATT Defences? 180

5.3 Decentralizing the European Internal Energy Market in the Light of WTO Law 188
5.3.1 Rationale of EU Unbundling and the Third Energy Package 188
5.3.2 EU – Energy Package: Russia Challenging EU Decentralization Policies 195
5.3.3 WTO Rules Facilitating EU Energy Market Decentralization Policies 198
5.3.4 WTO Rules Constraining EU Energy Market Decentralization Policies 203

5.4 Conclusion 209
6 Decarbonizing Energy Markets: Constraining Dual Pricing and Options for Fossil Fuel Subsidy Reform in the WTO

6.1 Introduction 211

6.2 Dual Pricing as an Environmentally Harmful Fossil Fuel Subsidy 213

6.3 Understanding Dual Pricing in the GATT/WTO Context 216

6.4 Options for Constraining Dual Pricing in the WTO under Existing Rules 220

6.4.1 General Agreement on Tariffs and Trade (GATT): Articles XI and XVII 221

6.4.2 Agreement on Subsidies and Countervailing Measures: Dual Pricing as a Prohibited or Actionable Subsidy 225

6.4.3 Anti-Dumping Agreement: Countering Dual Pricing by Adjusting the Dumping Margin 229

6.5 Beyond Existing Rules: How Can the WTO Curb Dual Pricing and Promote Fossil Fuel Subsidy Reform? 230

6.5.1 Amending the SCM Agreement: Inspiration from TTIP Negotiations and the EU-Ukraine DCFTA 231

6.5.2 Including Fossil Fuel Subsidy Reform on the WTO Agenda 235

6.6 Conclusion 238

7 The Emerging Concept of Energy Security in International Trade Law 240

7.1 Introduction 240

7.2 The Concept of Energy Security and Its Role in International Law 241

7.2.1 Energy Security as a Concept in International Relations 241

7.2.2 The Role of Energy Security in Public International Law 244

7.2.3 Energy Security in Energy-Specific Treaties 246

7.2.4 Energy Security in International Trade Law: WTO and PTAs 250

7.3.1 India – Solar Cells: Long-Term Energy Security as a Justification for Domestic Content Requirements? 253

7.3.2 EU – Energy Package: Energy Security as an Exception under GATS or GATT? 257

7.4 Conclusion 263

8 General Conclusion and Recommendations 265

8.1 International Trade Law, Energy and the Challenges of Changing Markets 265

8.2 Enhanced Global Energy Governance: Is the WTO the Right Forum? 266

8.2.1 Arguments in Favour of More Proactive Energy Regulation in the WTO 267

8.2.2 Obstacles to More Proactive Energy Regulation in the WTO 273

8.2.3 A Plurilateral Framework on Energy in the WTO? 275

8.3 WTO-ECT Synergy: Scenarios of Competition, Integration and Complementarity 277

8.3.1 Unproductive Scenario: Competition 277

8.3.2 Productive Scenario 1: (Partial) Integration 278

8.3.3 Productive Scenario 2: Complementarity in Global Energy Governance 280

8.4 Alternative Route: Innovating Energy Regulation through PTAs 282

8.5 Conclusion 282

Bibliography 284

Index 304