

Fragmentation and the Nexus between the WTO and the ECT in Global Energy Governance – A Legal-Institutional Analysis Twenty Years Later

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Abstract

This article discusses the place of both the World Trade Organization (WTO) and the Energy Charter Treaty (ECT) and their role in global energy governance in the light of the fragmentation debate roughly twenty years after their establishment. The Energy Charter Secretariat (ECS), the administrative body overseeing the ECT, has taken tension and overlap between the WTO and the ECT into account by providing extensive guidelines on incorporation of WTO rules into the Treaty. This so-called ‘coordination ex ante’ was aimed at functioning as a conflict prevention tool. However, gaps, conflicts and uncertainties remain. Moreover, developments in the past two decades, such as changes in membership to both the ECT and WTO, combined with an attention shift in a rapidly changing trading landscape, invite a re-evaluation of both treaties in view of fragmentation.

Keywords

WTO – Energy Charter Treaty – fragmentation – international trade law – energy – international investment law

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Introduction

The regulation of energy in international law is extremely fragmented and its study admittedly in its youth.¹ The reasons for this are manifold, and can inter alia be sought in: 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, and, finally 5) the pursuit of national interest.² The World Trade Organization (WTO) and the Energy Charter Treaty (ECT) are two treaty-based regimes each covering an area of the global energy governance patchwork.³ While the former is concerned with providing a framework for the regulation of trade in virtually all goods and services amongst its Members, the latter offers a specialized regime for energy trade and investment regulation.

The General Agreement on Tariffs and Trade (GATT) underwent a metamorphosis by the end of the Uruguay Round (1986 – 1994), which resulted in the establishment of the WTO in 1995. The ECT seems to have sprouted as a separate branch of the GATT/WTO regime in the early nineties and continues to operate as a (semi-)distinct treaty-based system today.⁴ In a certain sense, the ECT is partly an elaboration on the GATT, geared towards energy.⁵ In the context of the well-known phenomenon of fragmentation of international law,

¹ See generally Thomas Cottier and others, 'Energy in WTO Law and Policy' in Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation – From Fragmentation to Coherence* (CUP 2011) 211 and Timothy Meyer, 'The Architecture of International Energy Governance' (2012) 106 *ASIL Proceedings* 389 et seq.

² For a more elaborate analysis see Rafael Leal-Arcas and Andrew Filis, 'The Fragmented Governance of the Global Energy Economy' (2013) 6 *Journal of World Energy Law and Business* 1, 4–6 and Rafael Leal-Arcas, Andrew Filis and Ehab S Abu Gosh, *International Energy Governance – Selected Legal Issues* (Edward Elgar 2014) ch 1; also see Meyer (n 1).

³ The World Trade Organization (WTO) was established on 1 January 1995 <<http://www.wto.org>> accessed 31 January 2015; and the Energy Charter Treaty (adopted 17 December 1994, entered into force 18 April 1998) 2080 UNTS 100 (ECT) <<http://www.encharter.org>> accessed 31 January 2015.

⁴ The inauguration of the ECT was in 1994 – right before establishment of the WTO in 1995. The term semi-distinct is used here because the treaties are partly connected in substance through Article 4 'Non-derogation from GATT and Related Instruments' and 29 ECT 'Transitional Arrangements', see elaboration in Section 2 and further; The ECT incorporates WTO rules by reference and can be seen as a 'stepping-stone' treaty for countries on their way to WTO Accession.

⁵ General Agreement on Tariffs and Trade (adopted 21 November 1947, entered into force 29 July 1948) 55 UNTS 194 (GATT).

both frameworks contain partially overlapping elements, objectives and membership. Conversely, both treaties have diverging functions and mechanisms, which are not necessarily in accordance with one another.

This article will discuss the place of both the WTO and the ECT and their role in global energy governance in the light of the fragmentation debate roughly twenty years after their establishment.⁶ The Energy Charter Secretariat (ECS), the administrative body overseeing the ECT, has taken tension and overlap between the WTO and the ECT into account by providing extensive guidelines on incorporation of WTO rules into the Treaty.⁷ This so-called 'coordination *ex ante*' was aimed at functioning as a conflict prevention tool.⁸ However, gaps, conflicts and uncertainties remain. Moreover, developments in the past two decades, such as changes in membership to both the ECT and WTO, combined with an attention shift in a rapidly changing trading landscape, invite a re-evaluation of both treaties in view of fragmentation.⁹

The article will not, as such, focus on the legitimate place of the fragmentation debate in academic discourse, but rather on the actual implications of fragmentation in this particular instance.¹⁰ Its aim is to identify the nature of the nexus between the WTO and the ECT today and to answer the question where tension and conflict could potentially arise. What has changed? Is increased cooperation with or integration between both instruments – perhaps under the WTO umbrella – desirable and realistic? And where does the recently agreed upon political declaration of the 2015 International Energy Charter fit into this scenario?¹¹

⁶ See generally Section 1 below.

⁷ The GATT and several WTO Agreements are incorporated into the ECT 'by reference' through Art 4 ECT, but important exceptions exist; Energy Charter Secretariat, *Applicable Trade Provisions of the Energy Charter Treaty* (ECS 2003) and Energy Charter Secretariat, prepared by Joost Pauwelyn, *Trade in Energy: WTO Rules Applying under the Energy Charter Treaty* (ECS 2001).

⁸ Joost Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law* (CUP 2003) 327 et seq.

⁹ Russia stepped back from 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' (17 November 2011) WT/ACC/RUS/70, WT/MIN(11)/2 (Russian WTO Accession Protocol).

¹⁰ For a timely discussion of the phenomenon of fragmentation and its place in the academic legal debate see Tomer Broude, 'Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law' (2013) 27 *Temple J Intl L* 279.

¹¹ See International Energy Charter, 'Agreed Text for Adoption in The Hague at the Ministerial Conference on the IEC on 20 May 2015' <<http://www.encharter.org/>

It will start out by briefly discussing the concept of fragmentation in international law and the place of the WTO and the ECT therein, in Section 1. Section 2 will focus on both treaties and the various types of fragmentation and show where objectives, issue-area, membership and procedural aspects concur and overlap, exposing the parallels and conflicts that have not been solved. Section 3 will subsequently assess how to best manage the risks of fragmentation between the WTO and the ECT. It will also discern what the nature of the ever-changing nexus between the treaties is. Finally, it attempts to answer the question whether the WTO and the ECT would benefit from closer cooperation and coordination to overcome conflict. The conclusion will recap the findings in this article.

1 Fragmentation in International Law and Its Relevance for the WTO and ECT

1.1 *The Phenomenon of Fragmentation*

Fragmentation refers to the proliferation of specialized rules and rule-systems in international law that have no clear relationship to one another.¹² The potential consequence of this proliferation is that it can lead to conflicts not only between treaty regimes, but also between treaty provisions. Answers to legal questions are therefore dependent on the prism you view them through and on whom you ask.¹³

fileadmin/user_upload/document/IEC/IEC_text_brochure_ENG.pdf> accessed 31 January 2015. The International Energy Charter is a political declaration that will be 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. As it stands now, no revision of the Energy Charter is planned in the coming years.

¹² International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682 (ILC Fragmentation Report) para 8.

¹³ *ibid.* For an overview of fragmentation see Joost Pauwelyn, 'Fragmentation of International Law' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2008) (online edition) <<http://opil.ouplaw.com/home/EPIL>> accessed 31 January 2015; additionally ILC Fragmentation Report (n 12) 10. On conflict of norms and WTO law see generally Pauwelyn (n 8).

The fragmentation debate is anything but new in international law: It was at its peak when Koskenniemi and Leino published an article in 2002 entitled, 'Fragmentation of International Law? Postmodern Anxieties', where the issue of fragmentation was discussed, yet its 'risks' immediately mellowed down as an '... unavoidable minor problem in a rapidly transforming international system'¹⁴ Its publication coincided with the establishment of the Study Group on Fragmentation by the International Law Commission which subsequently issued a report on the phenomenon finalised under the guidance of Koskenniemi in 2006, entitled *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*.¹⁵ An elaborate academic debate on fragmentation followed.¹⁶

By now, we can only confirm that fragmentation has become an accepted phenomenon of the international legal system, accompanied by both advantages and disadvantages alike.¹⁷ It is a mere reality of international law, rather than a problem or a risk *per se*. Fragmentation seems inherent to its nature, in absence of centralized law making and enforcement on the global level. It can even be seen in a positive light as a means to proliferate international law in a polycentric manner.¹⁸ Nevertheless, on a practical level, fragmentation can be a cause of tension between laws and treaty-based systems, whether between general and specialised systems, or between specialised systems.¹⁹

Fragmentation of international law comes in different forms: First, there is *fragmentation in substance*. Fragmentation in substance can be divided into fragmentation of a) issue-areas, and b) along geographical lines. Issue-areas can constitute specialized fields of international law such as human rights, international economic law, international criminal law, etcetera, often

¹⁴ Martti Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden J Intl L* 553, 575.

¹⁵ ILC Fragmentation Report (n 12).

¹⁶ See eg Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *EJIL* 483; in the field of international economic law eg Anne van Aken, 'Fragmentation in International Law: The Case of International Investment Law' (2006) 17 *Finnish YB Intl L* 91; August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration' in James Crawford and others (eds), *International Law Between Universalism and Fragmentation - Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff 2008) 107.

¹⁷ Broude (n 10) 280.

¹⁸ Pauwelyn (n 13) para 7.

¹⁹ *ibid* para 19.

corresponding with treaty regimes governing them, such as the United Nations Covenant on Civil and Political Rights (ICCPR), the WTO and the International Criminal Court (ICC).²⁰ Fragmentation in substance along geographical delimitations implies that treaty regimes can cover the same issue area but can differ in their geographical scope of application. One can think of the European Convention of Human Rights (ECHR) versus the American Convention on Human Rights (ACHR). Fragmentation in substance can become problematic when there are conflicting or parallel rules and obligations governing a) the same issue-area, b) the same geographical area, or c) both the issue-area and geographical area combined.²¹

As mentioned above, fragmentation in substance is often accompanied by a corresponding treaty regime and dispute resolution mechanism, such as a tribunal, a court, or a dispute settlement body. This ties into the second form of fragmentation, namely *fragmentation in procedure*. Fragmentation in procedure manifests itself primarily in the multitude of courts and tribunals tasked with the enforcement of its corresponding treaty rules. Procedural fragmentation, too, can lead to parallels, overlap in or conflict with between treaty-systems and their enforcement mechanisms.²²

Apart from the 1969 Vienna Convention on the Law of Treaties tools, there is no genuine, multilaterally agreed solution to fragmentation, i.e., it is hard to determine hierarchy between conflicting rules and laws at tension with each other.²³ One way to solve the potential conflicts between overlapping issue-area treaties could be to suggest closer cooperation between the treaties through a process of governance in that particular field.²⁴ With respect to procedural overlap and dispute settlement, tribunals could refer to each other's cases so to ensure that there are no conflicting outcomes.²⁵ Another way of dealing with fragmentation and potential conflicts of norms in the case of 'too

²⁰ On the relationship between the WTO and other areas of law, particularly general international law, see Joel P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 Harv Intl LJ 333, 342 et seq; Lorand Bartels, 'Applicable Law in Dispute Settlement Proceedings' (2001) 35 JWT 499, 510 et seq and Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 EJIL 753, 779 et seq.

²¹ Pauwelyn (n 13) para 4.

²² *ibid* para 5.

²³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31.3 (c) ('General Rule of Interpretation').

²⁴ Pauwelyn (n 13) para 25 citing Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer 2003) 159–63.

²⁵ Pauwelyn (n 13) para 25.

much law', arguably the case with the WTO and the ECT, is to answer four questions, developed by Pauwelyn:²⁶

- 1) Is the 'outside law' the treaty may conflict with even part of the law the adjudicating court or tribunal can refer to and apply?
- 2) If this is indeed the case, is one of the norms perhaps invalid or illegal?
- 3) In case there is no inherent normative conflict, there may be a 'conflict in the applicable law', leading to the question which of the two laws has priority and must be applied to the specific case at hand?
- 4) Finally, if there is a genuine conflict, the question is which norm prevails? Which of the two norms must finally be applied?

1.2 *The Relevance of Fragmentation for the WTO and ECT*

Both the WTO and the ECT are two specialised fields of law that overlap in certain areas, potentially creating tension with each other. But how do the WTO and ECT relate to one another institutionally? The WTO can be widely categorised under the 'issue-area labels' of international economic law and international trade law, while the ECT additionally bears the labels of international energy law, international investment law and international environmental law. Both treaties – quite obviously – operate in the wider system of (public) international law.

1.2.1 WTO

The GATT was originally set up to regulate trade in goods, and took on a broader set of responsibilities when it transformed into the WTO in 1995, adding trade in services (GATS), Trade Related Investment Measures (TRIMS) and intellectual property (TRIPS) to its portfolio.²⁷ The WTO has an economic

²⁶ See in particular Pauwelyn (n 8) ch 6 ('Resolving Inherent Normative Conflict') and ch 7 ('Resolving Conflict in the Applicable Law').

²⁷ General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization Annex 1B (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183, (1994) 33 ILM 1167 (GATS); Agreement on Trade-Related Investment Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 186 (TRIMS Agreement); Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299, (1994) 33 ILM 1197 (TRIPS Agreement), all published in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (WTO 1999).

focus since it governs the trade relations amongst its Members.²⁸ The objective of the WTO is to promote free trade by reducing tariffs and other trade barriers and eliminating discriminatory treatment in international trade relations.²⁹ Simply put, it is an organization that administers trade rules and a specialized dispute settlement system. It additionally provides for an institutional forum for trade negotiations, addressing various trade-related issues. The subject matter of the WTO is to regulate the trade in goods (by means of the GATT), services (by means of the GATS) and to implement other trade agreements and results of previous negotiation rounds.³⁰

Energy products have been *de jure* covered by the GATT/WTO system from 1947, and energy services were added after the establishment of the WTO. However, regulation of energy has been anything but problem-free in the multilateral trading system and continues to pose a plethora challenges to the WTO legal framework today.³¹

1.2.2 ECT

The Energy Charter Treaty was signed in Lisbon in 1994, just before the establishment of the World Trade Organization. It entered into force in 1998.³² 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.³³ In essence, the ECT was born as an alternative to

²⁸ Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, art II.1 ('Scope of the WTO'): 'The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.'

²⁹ *ibid* Preamble.

³⁰ See generally Marrakesh Agreement Establishing the WTO (n 28) art II.

³¹ *ibid*. For an overview of challenges with respect to energy regulation in the WTO see Anna Marhold, 'The World Trade Organization and Energy: Fuel for Debate' (2013) 2(8) European Society of International Law (ESIL) Reflections (30 September 2013) <<http://www.esil-sedi.eu/node/417>> accessed 31 January 2015; unresolved issues eg concern the not always clear goods and services distinction of 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 is arguable at tension with the notion of permanent sovereignty over natural resources.

³² ECT (n 3).

³³ Investment and its dispute settlement are regulated in ECT (n 3) pts III and V, and the ECT additionally houses a Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA).

concluding an energy specific agreement within the GATT/WTO framework after the Cold War had ended.³⁴ 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 services (in the form of 'Economic Activity in the Energy Sector') and clearly incorporating gas pipelines as a means of transport in Article 7 ECT on Transit.³⁵ The objective of the Treaty is to provide a stable and predictable framework for trade in energy materials, products and energy-related equipment, based on GATT/WTO rules.³⁶

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 yet ratified the GATT.³⁷ It was intended to promote reform towards GATT compatibility and, consequently, help with GATT/WTO accession.³⁸ 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 Organization. This is visible in the way ECT trade rules are set up: the ECT incorporates WTO rules 'by reference' in Article 4.³⁹ The nexus between the ECT and the WTO seems somewhat asymmetrical: The ECT clearly refers to rules of the WTO and states which should prevail in what instances, going as far as labeling itself as a 'stepping stone' for member states towards their accession to the WTO.⁴⁰ The WTO, however, merely mentions the ECT as an

³⁴ Leal-Arcas and Filis (n 2) 24.

³⁵ Energy Materials and Products are taken up in ECT (n 3) Annex EM; 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'.

³⁶ See ECS, *Applicable Trade Provisions of the ECT* (n 7) vii. On its website, the ECS explains the objective of the ECT as: 'The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thereby mitigating risks associated with energy-related investment and trade' <<http://www.encharter.org/index.php?id=7>> accessed 31 January 2015.

³⁷ Ingrid Frasl, 'Chapter 21 – The Trade Rules of the GATT and Related Instruments and the Energy Charter Treaty' in Thomas W Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996) 459, 460–61.

³⁸ *ibid.*

³⁹ ECT (n 3) art 4 ('Non-derogation from GATT and Related Instruments') and art 29 ('Interim Provisions on Trade-related Matters').

⁴⁰ See ECT website answer FAQ on its relationship with the WTO: 'The Energy Charter shares core principles with the World Trade Organization, in particular the principles of

'intergovernmental organization working with the WTO Secretariat', implying the latter's dominance.⁴¹ Russia's failure to ratify the ECT and the withdrawal from its provisional application in 2009 was a considerable setback for the Treaty, and the effectiveness of the ECT has been questioned many times since then.⁴² Nevertheless, the ECT seems to have survived the test of time, not in the least because of its investment protection and dispute settlement capacities. Additionally, it serves as one of the few fora where stakeholders actively discuss international energy transit issues.⁴³

1.2.3 The Relevance of Fragmentation

The phenomenon of fragmentation with regard to the WTO and the ECT manifests itself both in the substantive and the procedural sense. In the substantive sense the WTO and ECT deal with partially overlapping issue-areas: The WTO regulates the trade of goods and services, of which energy goods and services are a subcategory.⁴⁴ The ECT, on the other hand, aims to regulate trade and

transparency and non-discrimination. The rules of the Treaty are fully compatible with those of the international trading system, and in practice the Energy Charter Treaty has been a valuable stepping-stone for some member states on their way towards accession to the WTO.' <<http://www.encharter.org/index.php?id=18&L=0>> accessed 31 January 2015; Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents* (ECS 2004) 15.

⁴¹ See WTO, 'Intergovernmental Organizations Working with the WTO Secretariat' <http://www.wto.org/english/thewto_e/coher_e/igo_divisions_e.htm> accessed 31 January 2015.

⁴² See ECT, 'Members and Observers' <<http://www.encharter.org/index.php?id=61>> accessed 31 January 2015; 'On 20 August 2009 the Russian Federation has officially informed the Depository that it did not intend to become a Contracting Party to the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects. In accordance with Article 45(3(a)) of the Energy Charter Treaty, such notification results in Russia's termination of its provisional application of the ECT and the PEEREA upon expiration of 60 calendar days from the date on which the notification is received by the Depository.'

⁴³ The ECT houses a 'Trade and Transit Group', which facilitates transit talks between the ECT Parties. This might in fact be the only effective international platform where transit of energy is discussed.

⁴⁴ Energy products are taken up in WTO Members' Schedules of Concessions, based on the Harmonized System (HS) Convention (Harmonized Commodity Description and Coding System) (adopted 14 June 1983, entered into force 1 January 1988) 1503 UNTS 167, see World Customs Organization, <<http://www.wcoomd.org>> accessed 31 January 2015. Negotiations on Energy Services as a separate sector have been added at the outset of the Doha Round of Multilateral Trade Negotiations in 2001, <http://www.wto.org/english/tratop_e/serv_e/energy_e/energy_e.htm> accessed 31 January 2015.

investment in energy materials and products and related services.⁴⁵ With respect to geographical delimitations, neither of the treaties is bound to a specific topographical area, but the WTO and ECT have largely overlapping membership, that has moreover changed significantly since the establishment of both treaty-regimes.⁴⁶

Procedurally, overlap also occurs with respect to dispute settlement in the WTO and the ECT. The WTO aspires to be a self-contained regime and has its own built-in dispute settlement mechanism, the Dispute Settlement Body (DSB), to solve trade disputes between WTO Members in this exclusive forum.⁴⁷ As the wording of Article 23.2 DSU is unambiguous, can one deduce that energy-trading disputes between WTO Members have to be settled solely by the DSB and not under the ECT?⁴⁸ The ECT provides a rather 'informal' mechanism to resolve trade disputes through diplomatic means, and additionally has an Investor-State and State-State dispute settlement mechanism.⁴⁹

It follows that overlap between the WTO and ECT regimes occurs both in the issue-area (i.e., energy goods, related services and with regard to membership to both Organizations) and in the procedural sense (with respect to the settlement of disputes both in the area of trade and investment). The following section will discuss both the WTO and the ECT in the light of fragmentation.

⁴⁵ ECT (n 3) Annex EM ('Energy Materials and Products').

⁴⁶ For an overview see Figures 1 and 2 in Annex I in Section 2.1 below.

⁴⁷ There are two diverging views on this matter: Pauwelyn argues that the WTO law cannot operate as a 'closed legal circuit' (Pauwelyn (n 8) 35), while others, notably Mavroidis and Trachtman, are of the opinion that even though general international law may be used to *interpret* WTO law, this does not mean that non-WTO law is *directly applicable as law* in the WTO. They point to the risks of expecting trade delegates '*to move outside the (illusory) comfort of the covered agreements in order to adjudicate disputes*'; Petros C Mavroidis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts' (2008) 102 AJIL 421, 474 and Joel Trachtman, 'Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law (Book Review)' (2004) 98 AJIL 855, 857.

⁴⁸ Article 23.2 (a) of the WTO Dispute Settlement Understanding prescribes that WTO members shall use the DSU as the sole forum to settle their disputes under the covered agreements, 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2' (adopted 14 April 1994, entered into force 1 January 1995) 1869 UNTS 401 (DSU) published in WTO, *The Legal Texts* (n 27).

⁴⁹ ECT (n 3) Annex D ('Interim Provisions for Trade Dispute Settlement') and arts 26 ('Settlement of Disputes between an Investor and a Contracting Party') and 27 ('Settlement of Disputes between Contracting Parties').

2 The WTO, ECT and Fragmentation: Overlap, Resolution and Potential Conflict

2.1 *Fragmentation of Substance: Overlap in Membership and Issue-Area*

2.1.1 Membership

Since neither the WTO nor the ECT is tied to a particular region per se, *fragmentation in substance along geographical lines* is not much of an issue for both treaties. However, substantial overlap in membership between the ECT and WTO does occur, because the treaties are connected in substance through Article 4 and 29 ECT, providing for incorporation of GATT trade rules in the ECT.⁵⁰ Moreover, the ECT is a self-proclaimed stepping-stone for WTO Membership.⁵¹ Rather than looking at strict geographical lines, it therefore arguably proves a more fruitful exercise to scrutinize the overlap and change in Membership to both the WTO and ECT. This allows us to assess what developments have taken place in the past two decades and draw conclusions from them. Figures 1 and 2 in Annex I below give an overview of the Membership situation to the ECT and WTO, including overlap therein, in 1998 and in 2015. Although the WTO was established in 1995, a representative scheme comparing membership could only be made with the entry into force of the ECT in 1998.

2.1.1.1 WTO

From its establishment in 1995, no other international organization governing international trade has been as widely acceded to as the WTO. The Organization started out with 113 Members, and 61 Observers.⁵² Fourteen countries were neither Members, nor Observers, and continue to function outside of the multilateral trading system today.⁵³ By 2015, WTO Membership has expanded drastically: With the General Council's approval of the Seychelles accession to the Organization in December 2014, the WTO has 161 Members at present.⁵⁴ Amongst them are major fossil fuel producing, exporting and transporting

⁵⁰ ibid arts 4 ('Non-derogation from GATT and Related Instruments') and 29 ('Transitional Arrangements')?

⁵¹ See n 40.

⁵² Nota bene: Observers to the WTO must start accession negotiations to the Organization within five years of becoming observers, WTO, 'Members and Observers' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm#observer> accessed 31 January 2015.

⁵³ See Annex I, Figure 1 'WTO/ECT Membership Status and Overlap (1998)' below.

⁵⁴ See WTO, 'Members and Observers' (n 52) and Annex I, Figure 2 'WTO/ECT Membership Status and Overlap (2015)' below.

countries such as Angola, Bahrain, Brazil, Canada, China, Ecuador, Indonesia, Kuwait, Nigeria, Oman, Qatar, Russia, Saudi Arabia, Ukraine, United Arab Emirates, the United States, and Venezuela, a large part of which joined the WTO only after its establishment in 1995.⁵⁵ Other major players in the energy field such as Algeria, Azerbaijan, Iran, Iraq, Kazakhstan, Libya, and Sudan are in the process of negotiating accession.⁵⁶ Eight members out of twelve of the Organization of Oil Exporting Countries (OPEC) are already in the WTO.⁵⁷ It is thus evident that major stakeholders in the global energy landscape are full-fledged participants in the multilateral trade system.

2.1.1.2 ECT

The WTO's wide-ranging membership is in stark contrast with the membership of the ECT. It entered into force in 1998 with 40 Parties to the Treaty.⁵⁸ At the same time, eight ECT signatories chose to apply the Treaty provisionally pending ratification, while 29 countries were observers to the ECT.⁵⁹ One hundred twenty-one countries did not join the ECT. By 2015 the numbers have changed, but the amount of countries that has acceded to the ECT is still far less comprehensive than that of the WTO: merely 47 countries have ratified the ECT.⁶⁰ Five ECT Signatories continue to apply the Treaty provisionally, and 26 countries have Observer status with the ECT.⁶¹ In a notorious move touched upon in Section 1, Russia stepped back from the agreement altogether in 2009, after applying it provisionally since its signature in 1994.⁶² The number of countries who are neither Parties nor Observers is 120. Major energy producing

⁵⁵ Major energy producing, exporting and/or transporting States who joined the WTO after 1995 are Angola (1996), China (2001), Ecuador (1996), Oman (2000), Qatar (1996), Russia (2012), Saudi Arabia (2005), Ukraine (2008) and the United Arab Emirates (1996).

⁵⁶ WTO, 'Members and Observers' (n 52).

⁵⁷ See OPEC, 'Member Countries' <http://www.opec.org/opec_web/en/about_us/25.htm> accessed 31 January 2015.

⁵⁸ See Annex I, Figure 1 'WTO/ECT Membership Status and Overlap (1998)' below and ECT, 'Members and Observers' (n 42).

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ See Annex I, Figure 2 'WTO/ECT Membership Status and Overlap (2015)' below; Russia stepped back from provisional application of the ECT in 2009, but investments made during the period of provisional application (1998–2009) are protected until 29 October 2029 (see also n 62).

⁶² Allegedly, in connection with the controversial Yukos arbitration cases *Hulley Enterprises Limited v the Russian Federation*, PCA Case No AA226; *Yukos Universal Limited v the Russian Federation*, PCA Case No AA227 and *Veteran Petroleum Limited v the Russian Federation*, PCA Case No AA228, Final Awards (18 July 2014). Note that in the prior interim

and exporting countries like Canada, Indonesia, the United States, Algeria, Bahrain, China, Kuwait, Nigeria, Oman, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela have Observer status to the ECT only.⁶³

2.1.1.3 *WTO and ECT Membership: Changes and Overlap 1998–2015*

As Figures 1 and 2 in Annex I below point out, substantial changes have taken place in Membership to the WTO and ECT alike, from the early days of the WTO and the entry into force of the ECT, to roughly two decades later. The biggest development admittedly is the vast number of accessions to the WTO of a considerable amount of former WTO Observers. These were reduced from 50 in 1998 to only 23 in 2015. Prominent non-ECT countries in this category are Russia,⁶⁴ China, Saudi Arabia, and Oman.⁶⁵

With regard to *fragmentation in substance*, overlapping Membership between the two Treaty-regimes was 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 who are simultaneously WTO Members and ECT Parties, so-called WTO/ECT Members and 2) ECT Parties 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, namely: a) among ECT/WTO Members, b) between ECT/WTO Members and non-WTO ECT Parties, and c) among non-WTO ECT Parties.⁶⁶ The two tiers of ECT Membership and the three possible modes of interaction among them will be continuously referred to in this article.

In 1998, 25 Members to the WTO were simultaneously Party to the ECT.⁶⁷ By 2015, the number of simultaneous ECT/WTO Members has risen to 41. This

awards on jurisdiction and admissibility in the same cases (*Hulley Enterprises Limited v the Russian Federation*, PCA Case No AA226; *Yukos Universal Limited v the Russian Federation*, PCA Case No AA227, and *Veteran Petroleum Limited v the Russian Federation*, PCA Case No AA228, Interim Awards on Jurisdiction and Admissibility (30 November 2009)) the Tribunal decided that Russia undeniably provisionally applied ECT, and was therefore bound to it in its entirety until 19 October 2009, stating: 'Accordingly, the Tribunal has concluded that the ECT in its entirety applied provisionally in the Russian Federation until 19 October 2009, and that Parts III and V of the Treaty (including Article 26 thereof) remain in force until 19 October 2029 for any investments made prior to 19 October 2009.'

⁶³ ECT, 'Members and Observers' (n 42).

⁶⁴ But, see texts to n 61 and n 62 above.

⁶⁵ See Annex I, Figure 2 'WTO/ECT Membership Status and Overlap (2015)' below.

⁶⁶ See Figures 1 and 2 in Annex I below.

⁶⁷ Annex I, Figure 1 'WTO/ECT Membership Status and Overlap (1998)' below.

increase indicates that a substantial number of countries that were ECT Parties *only* in 1998 did indeed accede to the WTO in the course of the past 20 years. Hence, the ECT's partial objective to function as a stepping-stone to WTO Accession seems to have been successful in this respect, though arguably ECT membership was not the only reason that triggered WTO accession for these countries. 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 Organization in August 2012, after protracted negotiations of almost two decades.⁶⁸ But, perhaps owing to the absence of consensus on many energy-related issues (such as dual pricing) among the Members of the WTO, Russia was able to negotiate the accession with almost no 'WTO-plus' commitments in the energy sector.⁶⁹ As a result, Russia's state-owned energy exporter, Gazprom, is practically free of trade barriers and free to apply export taxes when exporting their energy (raw mineral materials and fuels) abroad.⁷⁰

Because of the WTO/ECT rules of conflict set out below, the change of Membership not only affects the applicability between the ECT and/or the WTO countries who have acceded to either Organization. It also changes the significance of the ECT as a whole.⁷¹ The legal implications with regard to application of both treaties in the light of changing membership will be discussed in Section 3.2 below.

2.1.2 Issue-Area

2.1.2.1 *Trade*

As mentioned in Section 1.2, the WTO and the ECT partially overlap in issue-area as both instruments are relevant for trade in energy products and related services. Consequently, the ECT and the WTO share a partial common objective, namely the promotion of free(er) trade.⁷²

⁶⁸ Russian WTO Accession Protocol (n 9).

⁶⁹ *ibid.* In some other sectors, Russia consented to bind and reduce its export duties (ie on lumber, fish, crabs and leather), however, on raw mineral materials and fuels Russia reserved its right to continue applying export taxes.

⁷⁰ David G Tarr, 'Chapter 5 – The Economic Impact of Export Restraints The Economic Impact of Export Restrictions on Raw Materials on Russian Natural Gas and Raw Timber' in OECD, *OECD Trade Policy Studies – The Economic Impact of Export Restrictions on Raw Materials* (OECD 2012) 131, 132.

⁷¹ See Section 3.2 below.

⁷² See Melaku G Desta, 'The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements' (2003) 37 *JWT* 523, 539.

As regards the WTO, the Organization regulates trade in goods (GATT), services (GATS), intellectual property (TRIPS) and trade-related investment measures (TRIMS) between its Members, accompanied by an 'exclusive forum' dispute settlement mechanism, administered by the Dispute Settlement Body (DSB).⁷³ Energy falls within the WTO's remit because energy products are taken up in Members' GATT Article II Schedules.⁷⁴ Additionally, energy services are being negotiated as a separate services sector in the Doha Round and disputes relevant for energy are being settled in the WTO Dispute Settlement System.⁷⁵ Not to mention that the first WTO dispute to ever make it to the Appellate Body (AB) was a case involving energy, the *Reformulated Gasoline Case*, in 1996.⁷⁶ The WTO estimates that at least eighteen per cent of intra WTO-trade involves energy goods such as fossil fuels.⁷⁷ 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

⁷³ Governed by the rules of the DSU (n 48).

⁷⁴ WTO Members' Schedules are based on the classifications the in the HS Convention (n 44), relevant for energy is eg Chapter 27 'Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes'.

⁷⁵ See WTO, 'Energy Services' <http://www.wto.org/english/tratop_e/serv_e/energy_e/energy_e.htm> accessed 31 January 2015; WTO, 'Energy Services identified by Member in WTO, Council for Trade in Services – Special Session of the Council for the Trade in Services, Report by the Chairman to the Trade Negotiations Committee' (TN/S/23) (28 November 2005). Recent WTO case law relevant for energy includes WTO, *China – Measures Related to the Exportation of Various Raw Materials – Appellate Body Report* (30 January 2012) WT/DS395/AB/R; WTO, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum – Report of the Panel* (26 March 2014) WT/DS431/R, WT/DS432/R and WT/DS433/R (both cases dealing with the GATT Article XX(g) exception); WTO, *Canada – Measures Relating to the Feed-In Tariff Program – Appellate Body Report* (6 May 2013) WT/DS426/AB/R and *Canada – Certain Measures Affecting the Renewable Energy Sector – Appellate Body Report* (6 May 2013) WT/DS412/AB/R (on subsidies); and a whole string of disputes concerning solar panels such as WTO, *United States – Countervailing Duty Measures on Certain Products from China – Report of the Panel* (14 July 2014) WT/DS437/R and WTO, *India – Certain Measures Relating to Solar Cells and Solar Modules* (Panel established on 23 May 2014) WT/DS456/R, and, most recently a case concerning the EU's Third Energy Package in WTO, *EU – Certain Measures Relating to the Energy Sector* (in consultations on 30 April 2014) WT/DS476/R.

⁷⁶ *United States – Standards for Reformulated and Conventional Gasoline (Treatment of Imported Gasoline and Like Products of National Origin – Report of the Panel* (29 January 1996) (1996) 25 ILM 274 and *Report of the Appellate Body* (20 May 1996) (1996) 35 ILM 603.

⁷⁷ WTO, *World Trade Report 2010: Trade in Natural Resources* (WTO 2010) 54.

transportation of an energy product).⁷⁸ Sometimes, it possesses the elements of both.⁷⁹

The WTO deals with trade in goods and services of which energy goods and services are a sub-category. The ECT in Articles 4 – 6 and 29 deals with trade in energy goods and related economic activity (read: services) *only*, with the exception that the ECT deals with investment in addition to trade.⁸⁰ The definition of ‘energy’ under the ECT 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.⁸¹ 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 29⁸² ECT;
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’;⁸³

⁷⁸ See text to n 74 and n 75.

⁷⁹ A case in point here is electricity: There is still no conclusive categorization of electricity in the WTO, although ‘electrical energy’ is registered under code 2716 of the HS Convention (n 44). In EU law, however, electricity is explicitly considered a ‘good’ and not a ‘service’, in Case C-393/92 *Almelo v Energiebedrijf IJsselmij* [1994] ECR I-1477, para 28 and Case C-158/94 *Commission v Italy* [1997] ECR I-5789, para 17, the European Court of Justice has ruled that electricity, despite its intangible character, should be treated as a ‘good’.

⁸⁰ Andrey Konoplaynik and Thomas Wälde, ‘Energy Charter Treaty and its Role in International Energy’ (2006) 24 JERL 523, 529. For more information on the background and legal provisions of the ECT see generally Thomas W Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996).

⁸¹ ECT (n 3) Annex EM (‘Energy Materials and Products’).

⁸² ECT (n 3) art 29 (‘Interim Provisions on Trade-related Matters’) sets out temporary trade rules for ECT parties in the process of WTO accession.

⁸³ See ECT (n 3) art 7(10)(ii)(b): “‘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.’ NB: A Transit Protocol, which intends to be an elaboration on Article 7 ECT and the ECT as a whole is still under negotiation.

4. Reducing the negative environmental impact of the energy cycle through improving energy efficiency, set out in Article 19 ECT and the PEEREA;⁸⁴ and
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.

As mentioned above, the Energy Charter Secretariat, the body overseeing the ECT, intentionally based ECT trade rules on the GATT/WTO. The ECT has, for instance, incorporated the trade rules of the GATT in its trade part by means of Article 4 ECT.⁸⁵ Fragmentation in substance with respect to the trade provisions of both treaty-regimes therefore occurs there 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 overlap between the GATT and the ECT, the ECS issued two extensive guides with a referencing mechanism, in 2001 and 2003.⁸⁶ There are several basic rules at the heart of this incorporation of GATT rules 'by reference' in the ECT:⁸⁷

1. The trade provisions of the ECT apply with and between Parties to the ECT that are not Members to the WTO *only*.⁸⁸
2. Conversely, trade in energy materials and products between ECT Parties, who are also WTO Members, are exclusively regulated by the trade provisions of the WTO.⁸⁹
3. Trade between ECT Members, of which at least one is not a WTO Member, is, with some exceptions, governed by WTO rules incorporated to the ECT through Article 29(2)(a) ECT.⁹⁰

⁸⁴ PEEREA (n 33).

⁸⁵ ECT (n 3) art 4 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.'

⁸⁶ ECS, *Applicable Trade Provisions of the ECT* (n 7) and ECS, *Trade in Energy* (n 7).

⁸⁷ ECS, *Applicable Trade Provisions of the ECT* (n 7) viii.

⁸⁸ ECT (n 3) art 29(1) ('Interim Provisions on Trade-related Matters').

⁸⁹ *ibid* art 4 ('Non-Derogation from GATT') for GATT Members.

⁹⁰ *ibid* art 29(2)(a). The exceptions are listed partly in Annex W of the ECT Trade Amendment, partly in Article 29(2)(b) of the ECT and most importantly relate to the Dispute Settlement System of the WTO (DSS), which cannot be used for non-WTO Members, 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

4. The ECT uses a 'negative' reference listing technique and incorporates all WTO provisions, unless they are listed in Annex W(A) to the ECT.⁹¹

There are a couple of important main exceptions with regard to WTO rules integrated in the ECT: Firstly, 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 to increase custom duties or importation and exportation charges of any kind.⁹²

Article 7 ECT on Transit goes further than Article V GATT and explicitly incorporates gas pipelines as a means of transport.⁹³ It thereby creates additional obligations for ECT Parties who 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'.⁹⁴ It is also worth mentioning that negotiations on an ECT Protocol on Transit are on-going since 1999 and foster the same 'WTO-plus' ambitions: complementing the ECT while being in accordance with Article 7 ECT.⁹⁵

other countries only apply it provisionally, see ECT, 'Signatories and Contracting Parties, Energy Charter Treaty and Related Documents' (n 40) 223–25; 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. Also see Section 2.2 on WTO/ECT procedural overlap below.

⁹¹ ECT (n 3) Annex W(A) ('Exceptions and Rules Governing the Application of the Provisions of the WTO Agreement – in Accordance with Article 29(2)(a)').

⁹² *ibid* art 29(3), (4) and (5). 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 (eg Russia and China).

⁹³ In WTO law, it is still debated whether Article V GATT covers fixed infrastructures such as gas pipelines. See generally on this issue Danae Azaria, 'Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade' (2009) 27 *JERL* 559.

⁹⁴ Frasl (n 37) 484.

⁹⁵ See the most recent informal text of the 'Transit Protocol' dated 22 October 2010, under document number: TT87 22/01/2010; NB Article 7 ECT proves to be a complex article in itself, looking for instance at the non-discrimination required contained article 7(3), see Nadiya Nychay and Dmitry Shemelin, 'Interpretation of Article 7(3) of the Energy Charter Treaty' Trade and Investment Law Clinic Papers (Graduate Institute, Centre for Trade and Economic Integration, 2012) <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/memoranda2012/Law_Clinic%20NND%20ECT.pdf> accessed 31 January 31.

GATS,⁹⁶ TRIPS⁹⁷ and TRIMS⁹⁸ are not taken over into the ECT, but each have an equivalent Article in the Energy Charter Treaty: Services are covered under the overarching term of 'Economic Activity in the Energy Sector',⁹⁹ a commitment to protect intellectual property rights is taken up in the Final Act of the International Conference¹⁰⁰ and Article 5 ECT incorporates trade related investment measures.¹⁰¹ It should be mentioned that here, the conflict between the two treaties caused by simultaneously applicable provisions is not solved. Additionally, the WTO Special and Differential Treatment provisions do not apply in the ECT, except for paras 1 to 4 of the Enabling Clause.¹⁰²

Relevant trade-remedy agreements of the WTO, such as TBT, Antidumping, Subsidies and Safeguards, are incorporated into the ECT, just as the market-access agreements on Import Licensing, Rules of Origin, Custom Valuation and Preshipment Inspection.¹⁰³

Plurilaterals that are not binding on all WTO Members have not been taken over in the ECT. In the same vein, WTO Multilateral agreements, which are substantially irrelevant for the subject matter of the ECT, such as SPS, Textiles and the Agreement on Agriculture, do not apply either.¹⁰⁴ Last but not least,

⁹⁶ ECT (n 3) Annex W (A)(b).

⁹⁷ *ibid* Annex W (A)(c).

⁹⁸ *ibid* Annex W (A)(iv). Also generally see Steivan Defilla, 'Energy Trade under the ECT and Accession to the WTO' (2003) 21 JERL 428.

⁹⁹ ECT (n 3) art 1(5) ('Definitions'): 'Economic Activity in the Energy Sector' means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.'

¹⁰⁰ ECT Parties made a commitment to provide protection of intellectual property rights, laid down in the Final Act of the International Conference and Decision by the Energy Charter Conference in Respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Joint Declaration on Trade-Related Intellectual Property Rights.

¹⁰¹ ECT (n 3) art 5 ('Trade-Related Investment Measures'), linked to Annex D and Article 26 ECT.

¹⁰² Through *ibid* Annex W (A) para 2(a).

¹⁰³ See ECS, *Trade in Energy* (n 7) 66–82.

¹⁰⁴ Note however, that the Agreement of Agriculture is of some relevance with regard to the energy sector, as it incorporates tariffs on biofuels; Alan Yanovich, 'Chapter 1: WTO Rules and the Energy Sector' in Yulia Selivanova (ed), *Regulation of Energy in International Trade Law – WTO, NAFTA and Energy Charter* (Wolters Kluwer, Alphen aan den Rijn 2011) 27 and Harmonized System Convention (n 44), Chapter 22 'Beverages, Spirits and Vinegar'.

Protocols of Accession of new Members to the WTO are not incorporated into the ECT.¹⁰⁵

One can conclude that with regard to *trade in goods* provisions, the ECS has taken into account the risks stemming from fragmentation in substance between the ECT and the WTO and has pre-emptively set out conflict rules to reconcile both treaties. Conflicts not (directly) solved in the ECT concern TRIMS, TRIPS and GATS.

2.1.2.2 *Investment*

Another important issue-area where conflict of rules between the WTO and the ECT remain unsolved is where investment protection in the WTO (through GATS Mode 3)¹⁰⁶ 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 in the ECT as such.¹⁰⁷ 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 (NT) and Most Favoured Nation treatment (MFN) in Article 10(3) in Part III of the ECT.¹⁰⁸ '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', i.e., concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products covered in de ECT.¹⁰⁹

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. As with GATT Schedules, WTO Members make sector-specific commitments in their GATS Schedules of Specific Commitments, where they agree on particular market access commitments with regard to trade in services.¹¹⁰ There are horizontal commitments, which apply to all commitments in the schedules, and

¹⁰⁵ See Marrakesh Agreement Establishing the WTO (n 28) art XII.1 and ECT (n 3) Annex W(A) (1).

¹⁰⁶ See GATS (n 27) art 1.2 (c).

¹⁰⁷ ECT (n 3) Annex W(A)(b).

¹⁰⁸ *ibid* art 10(3) ('Promotion, Protection and Treatment of Investments').

¹⁰⁹ See definitions of respectively 'Economic Activity in the Energy Sector' and 'Investment' in *ibid* arts 1(5) and (6).

¹¹⁰ Petros C Mavroidis, George A Bermann and Mark Wu, *The Law of the World Trade Organization* (West 2010) 802–19.

sector specific commitments affecting only to the sector in question, which may additionally only apply to one or more of the four modes of supply of the GATS. These are a) Mode 1, when neither the service supplier nor the service consumer has to move, b) Mode 2, when the consumer moves to the country where the service is supplied, c) Mode 3, when the service supplier establishes commercial presence in the country where he/she supplies and d) Mode 4, when the service supplier is established in a different country.¹¹¹

WTO Members have to grant Most Favoured Nation (MFN) to all foreign services, and National Treatment (NT) to GATS commitments made in their Schedules.¹¹² It figures that investments in services, and particularly investments in energy services, can in fact be covered in the GATS through Article I.2 under c, Mode 3, when the service supplier establishes commercial presence in the country where he/she supplies (i.e., a foreign company setting up subsidiaries or branches to provide services in another country).¹¹³

In principle, GATS rules apply to all energy related services.¹¹⁴ There are some sectors, which are particularly relevant to energy and to which Members committed in the services schedules.¹¹⁵ These are for instance: construction and related engineering services, distribution services, environmental services, financial services, transport services and other services not included elsewhere.¹¹⁶

Moreover, since the start of the Doha Round (2001-present), energy services are under negotiation as a separate sector under the GATS and sector-specific commitments in energy services were made so far by 45 Members concerning

¹¹¹ See GATS (n 27) art I.2.

¹¹² *ibid* arts II ('General Obligations and Disciplines') and XVII ('National Treatment').

¹¹³ See on this issue in particular Petros C Mavroidis, 'Chapter 1: Regulation of Investment in the Trade Regime' in Zdenek Drabek and Petros C Mavroidis (eds), *Regulation of Foreign Investment – Challenges to International Harmonization* (World Scientific 2013) and Martin Molinuevo, *Protecting Investment in Services – Investor State Arbitration versus WTO Dispute Settlement* (Wolters Kluwer 2011).

¹¹⁴ See for instance Gabrielle Marceau, 'The WTO in the Emerging Energy Governance Debate' in Joost Pauwelyn (ed), *Global Challenges at the Intersection of Trade, Energy and the Environment* (The Graduate Institute 2011) 26.

¹¹⁵ However, see WTO, Council for Trade in Services, 'Energy Services – Background Note by the Secretariat' (Doc S/C/W/52) (9 September 1998) 1 stating that 'the vast majority of the global energy services industry is not covered by GATS specific commitments.'

¹¹⁶ Energy Services identified by Members in WTO, 'Council for Trade in Services – Special Session of the Council for the Trade in Services, Report by the Chairman to the Trade Negotiations Committee' (TN/S/23) (28 November 2005); See WTO, 'Services Sectoral Classifications List' (10 July 1991) MTN.GNS/W/120.

'services incidental to mining',¹¹⁷ 27 in 'on-site preparation work for mining',¹¹⁸ 18 have undertaken commitments 'incidental to energy distribution',¹¹⁹ and 12 Members have undertaken specific commitments 'on pipeline transportation of fuels'.¹²⁰

It therefore follows that investment in energy services may fall within the scope of GATS protection on the basis of Article I.2 (c) Mode 3. This would be the case for those WTO Members that have made sector-specific commitments in services relevant to the energy sector, or in energy services directly, and to which Mode 3 of supply of services (commercial presence) applies.

The rules of conflict of the ECT have not taken this into account adequately, presumably since the complete exclusion of the GATS from the ECT left this scenario unforeseen. One thing should be noted in this respect, though: The ECT does not provide for pre-establishment or market access obligations, in contrast to GATS Articles II and XVI.¹²¹ The conflict between the ECT and the GATS is therefore likely to arise in the post-establishment phase only.¹²² The result, however, is one of fragmentation: both treaties can apply with respect to protection of investments in the energy sector. Fragmentation of substance in issue-area overlap in this instance can continue to have an impact on fragmentation in procedure: with respect to dispute resolution in energy investments, both the procedures from the ECT and the WTO could apply. This will be discussed in more detail in Section 2.2 below.

¹¹⁷ WTO, Council for Trade in Services, 'Energy Services – Background Note by the Secretariat' (12 January 2010) S/C/W/311, CPC, para 883.

¹¹⁸ *ibid* CPC, para 5115.

¹¹⁹ *ibid* CPC, para 887.

¹²⁰ *ibid* 14.

¹²¹ See GATS (n 27) arts II (MFN) and XVI ('Market Access').

¹²² On this see eg Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 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 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.'

2.2 *Fragmentation of Procedure: Dispute Settlement in the WTO versus the ECT*

Fragmentation in procedure and accompanying parallel competence concerning the WTO and the ECT occurs in the area of settling trade as well as investment disputes. The first has been accounted for by ECT rules of conflict, the latter has not.¹²³ This section will briefly discuss both.

2.2.1 Trade

An advantage of the institutional function of the WTO is the Dispute Settlement System, governed by the rules of the Dispute Settlement Understanding (DSU).¹²⁴ 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.¹²⁵ Members to the WTO must settle any trade dispute among themselves, including the disputes on energy trade, in this *exclusive* forum.¹²⁶ What this means in practice is that Members are in effect precluded from settling their trade disputes elsewhere. 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.¹²⁷ Even though the functioning of the WTO dispute settlement system is not free of criticism, with around four hundred seventy-five cases settled in the nearly twenty years of the WTO's existence, it is clearly one of the WTO's success stories.¹²⁸ The WTO has witnessed several energy-related disputes recently, notably *Canada – Renewable Energy*,

¹²³ See Annex II, Figure 3 'Resolution of Conflict, Issue-Area and Procedural Overlap – A Comparison between the WTO and the ECT' below.

¹²⁴ DSU (n 48) art III.3.

¹²⁵ *ibid* art 3.2.

¹²⁶ See connection with ECT (n 3) art 4.

¹²⁷ WTO, *In US — Section 301 Trade Act*, the Panel held that Article 23.1 of the DSU (n 48) 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.'

¹²⁸ Generally see Donald McRae, 'What is the Future of the WTO Dispute Settlement?' (2004) 7 *J Intl Econ L* 3 and WTO, 'Chronological List of Disputes Cases' <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> accessed 31 January 2015.

China – Raw Materials and *China – Rare Earths*.¹²⁹ In *Canada – Renewable Energy*, the Panel and the AB had to resort to what some call ‘legal acrobatics’ in order to avoid finding that a scheme aimed at promoting a public good – the underlying feed-in tariff for renewable energy – was in fact a subsidy.¹³⁰

The ECT, on the other hand, provides mechanisms for the settlement of both energy trade and investment disputes, more precisely, it offers State-State,¹³¹ Investor-State,¹³² Transit,¹³³ Energy Trade¹³⁴ and Environment and Competition¹³⁵ dispute settlement. Concerning energy trade dispute settlement and overlap in competence between the WTO and the ECT, the latter has taken into account several conflict resolution measures to avoid parallelism and forum shopping.¹³⁶ Following Article 4 ECT, the WTO Dispute Settlement Understanding (DSU) applies to the resolution of energy trade disputes between ECT Parties who are simultaneously WTO Members.¹³⁷ 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 amongst non-WTO ECT Parties.¹³⁸ The special mechanism provided for in Annex D of the ECT follows the WTO dispute settlement model closely, but it is more informal in nature, meaning less detailed and legalistic. For instance, there is no right to appeal in the procedure to Annex D, contrary to the DSU.¹³⁹ 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 fourth majority.¹⁴⁰

¹²⁹ See text to n 75.

¹³⁰ Aaron Cosbey and Petros C Mavroidis, ‘A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO’ EUI Working Paper RSCAS 2014/17 (Robert Schuman Centre for Advanced Studies, 2014) 9.

¹³¹ ECT (n 3) art 27 (‘Settlement of Disputes between Contracting Parties’); this article explicitly does not apply to energy trade disputes, see *ibid* art 28.

¹³² *ibid* art 26 (‘Settlement of Disputes between an Investor and a Contracting Party’).

¹³³ *ibid* art 7.7 (‘Transit’).

¹³⁴ *ibid* art 29 (‘Interim Provisions on Trade-related Matters’) and Annex D (‘Interim Provisions for Trade Dispute Settlement’).

¹³⁵ *ibid* arts 6 (‘Competition’) and 19 (‘Environmental Aspects’).

¹³⁶ Frasl (n 37) 478.

¹³⁷ ECT (n 3) art 4 and ECS, *Applicable Trade Provisions of the ECT* (n 7) viii.

¹³⁸ In conjunction with ECT (n 3) art 29(7). See Section 2.2 on overlap in procedure below.

¹³⁹ As set out in DSU (n 48) arts 17 and 20. See additionally Frasl (n 37) 479.

¹⁴⁰ ECT (n 3) Annex D(2)(c) and 4 (c).

Transit disputes are treated differently from the rules of conflict for 'regular' trade disputes between the ECT and WTO.¹⁴¹ Resolution of transit disputes under the ECT is accounted for in Article 7(7) ECT.¹⁴² 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.¹⁴³ 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.'¹⁴⁴

There is no apparent conflict 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':¹⁴⁵ It offers settlement of transit disputes in a way that is not provided for by GATT Article V.¹⁴⁶ As a result, the rights and obligations provided for in Article 7(7) ECT go beyond WTO commitments for simultaneous WTO/ECT Members.¹⁴⁷ Article 7(8) ECT further emphasises that nothing in Article 7 ECT shall derogate from a Party's rights and obligations under international law including customary international law, existing bilateral or multilateral agreements, ergo including Article V of the GATT.¹⁴⁸ Article 7 ECT, including its dispute resolution mechanism, therefore proves to be an elaboration on the obligations set out in Article V GATT,

¹⁴¹ See also generally Azaria (n 93).

¹⁴² ECT (n 3) art 7(7).

¹⁴³ *ibid*; Frasl (n 37) 495; ECS, *Trade in Energy* (n 7) 37, and Azaria (n 93).

¹⁴⁴ ECT (n 3) arts 7(7)(b) and 7(7)(c) 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.'

¹⁴⁵ It seems that this was the intention of the ECT *travaux préparatoires*, see European Energy Charter, 'Legal Sub-Group's Report on Inter-relationship of the Charter Treaty with the GATT' (Conference Secretariat, Room Document 1, Plenary Session, Brussels, 14–18 December 1993) (14 December 1993) 1; However, note that ECT (n 3) art 7(7) 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.'

¹⁴⁶ GATT (n 5) art V ('Freedom of Transit').

¹⁴⁷ See text to n 93.

¹⁴⁸ ECT (n 3) art 7(8) and Azaria (n 93) 589.

with Article V GATT setting the minimum standard.¹⁴⁹ 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 seem to go further than those in Article V GATT for energy transit disputes.

2.2.2 Investment

With regard to *fragmentation of procedure* and 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).¹⁵⁰

The unresolved rules of conflict between energy investment dispute resolution flows from overlap between ECT energy investment protection and possible protection of such investments through GATS Mode 3, but only where this concerns State to State dispute resolution as set out in Article 27 ECT.¹⁵¹ In other words, there may be overlaps and conflicts between the dispute settlement mechanisms if they are available to the *same* parties, i.e., States that are simultaneous 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.

One provision worth mentioning with regard to ECT investment protection in relation to other agreements, though, is Article 16 ECT.¹⁵² The article comes closest to being a conflict prevention/coordination tool and is aimed at the instances when one or more Contracting Parties enter or have entered into other international agreements, concerning the subject matter of Part III (Investment) or Part V (Dispute Settlement) of the ECT. 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, should prevail.¹⁵³

¹⁴⁹ Azaria (n 93) 591, referring to the *travaux préparatoires* of the ECT: European Energy Charter Conference Secretariat 22.4.94/2647.

¹⁵⁰ ECT (n 3) arts 26 and 27.

¹⁵¹ See Section 2.1.

¹⁵² ECT (n 3) art 16 ('Relation to other agreements').

¹⁵³ *ibid.*

The potential overlap and/or conflict in the narrow sense of private law in this area between the WTO and the ECT does not hold true where it concerns GATS Mode 3 dispute resolution in the WTO (State to State) versus Investor-State dispute settlement according to Article 26 ECT. Here, we see the two dispute settlement mechanisms working in parallel rather than in conflict with one another, since they do not involve the same parties or the same applicable law, even though the disputes may stem from the same events.¹⁵⁴ In this case there is a fruitful complementarity between the ECT and the WTO dispute resolution mechanisms, where both the WTO (for States) and the ECT (for Investors) provide a potential forum for redress in the field of energy investment protection.

2.3 *The WTO, ECT and Fragmentation - A Schematic Overview*

By way of overview of this section, Figure 3 in Annex II attempts to schematise *fragmentation of substance and procedure* by comparing both treaties and identifying issue-area and procedural overlap between them. It also identifies resolution of conflict between the WTO and the ECT, where available. Section 3 will subsequently analyse what conclusions can be drawn from this when adding the vast changes in Membership to both treaty-regimes to the picture.

3 **The Nexus between the WTO and ECT Twenty Years Later – Managing the Risks of Fragmentation in a Changing Trading Landscape**

3.1 *Managing the Risks of Fragmentation*

3.1.1 The Risks of ECT/WTO Fragmentation

Before exploring the ever-changing nexus between the WTO and the ECT in Section 3.2, the outstanding risks of fragmentation between the two treaties have to be confronted. While the WTO was set-up from the standpoint of creating an optimal long-term governance model for international trade regulation, the ECT seems to have been brought into life to deal with problems as they arose after the fall of the Iron Curtain. It was these unpredicted circumstances

¹⁵⁴ See, as an interesting analogy to WTO/ECT conflict in dispute settlement, the discussion on conflicting judicial decisions and *res judicata* in investment law and diplomatic protection in Martins Paporinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 264, 297–98.

that led to the establishment of the ECT and which simultaneously caused the fragmentation between the two treaties in the first place.¹⁵⁵ It has to be reiterated, though, that the WTO and the ECT are not unique in their fragmentation. Unforeseen developments are often the triggers of the creation of new treaty regimes that can contribute to fragmentation in a certain field. As mentioned in the introduction, the WTO and ECT are just two instruments, which happen to cover a patch of global energy and trade governance and partially overlap in doing so.

The main risk of fragmentation between the WTO and the ECT is evidently one of parallel applicability and overlap in issue-area and procedure with no clear hierarchy. While introducing ECT rules of conflict from the start has averted tension between the main trade provisions between WTO and the ECT, certain conflicts remain unresolved even two decades later.

A case in point here is the applicability of TRIMS, TRIPS and GATS Agreements of the WTO with respect to trade in energy, mentioned in Section 2.1, in parallel with their corresponding provisions in the ECT: Article 5 ECT on Trade Related Investment Measures, the commitment to provide protection of intellectual property rights in the ECT in the Joint Declaration on Trade Related Intellectual Property Rights, and Article 1(5) ECT covering 'Economic Activity in the Energy Sector'.¹⁵⁶ The tension here has not been solved: TRIMS, TRIPS and GATS cover energy goods and services insofar as they fall within the scope of the WTO, while the ECT, in its own wording, additionally provides protection in these areas for energy sector.

There is no 'real' normative conflict between these norms in that they are not contradictory in nature and both the WTO and the ECT aim to transmit a similar message: to provide rules on trade-related investment measures, intellectual property and trade in services. But the rules on TRIMS, TRIPS and GATS of the WTO and the rules of the same notion in the ECT are not in the least identical and might result in significantly diverging results if applied in practice.¹⁵⁷ Instead of an inherent normative conflict, the problem here is that both the WTO and ECT are applicable in parallel. Which of the norms prevails? It appears there is no straightforward answer in this case. The rules of the ECT have not provided for any explicit conflict clauses regarding TRIMS, TRIPS and the GATS and both norms are deemed to be 'equal', i.e., this appears to be a

¹⁵⁵ Meyer (n 1) 390.

¹⁵⁶ See overview in Annex II, Figure 3 'Resolution of Conflict, Issue-Area and Procedural Overlap – A Comparison between the WTO and the ECT'.

¹⁵⁷ It goes without saying that rules on TRIMS, TRIPS and GATS (n 27) within the WTO are much more elaborate than the rules provided on these topics in the ECT.

case of 'too much law'. As Pauwelyn suggests in such circumstances, a *non liquet* may be declared.¹⁵⁸ However, if a conflict arises with regard to TRIMS, TRIPS and GATS in the energy sector, it is clear that while the rules of the ECT convey the essence of these notions, WTO rules on these matters are drafted with more clarity and precision and may be litigated more successfully under the DSU. Yet, the fact remains that there is no legal hierarchy regarding the application of either treaty.

Another 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.¹⁵⁹ This overlap is not an exclusive problem of the WTO and the ECT, but part of a greater discourse on the gaps and overlaps between trade and investment law in general.¹⁶⁰

While the issue-area overlap with respect to GATS Mode 3 investment protection and Part III ECT is subject to the same questions as those with regard to TRIMS, TRIPS and the GATS above (i.e., 'too much law' and what to do with it), the fragmentation stemming from procedural overlap in this particular instance faces a practical problem for countries who are simultaneous WTO/ECT Members. Arguably, investments of one WTO Member in the energy sector are protected by GATS rules under GATS Mode 3 in the area of another WTO Member. But, investments of an ECT Party and/or Investor of an ECT Party in the energy sector are additionally protected through the rules set out in Part III of the ECT.¹⁶¹ Dispute settlement for States (not Investors) who are WTO/ECT Members would therefore appear to be possible under the DSU as well as under Article 27 of Part V of the ECT.¹⁶² 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, one making the case for prevalence of dispute settlement in the WTO over the ECT, and the other vice versa. Nonetheless, neither of these scenarios provides conclusive legal answers to the question which treaty-regime should have priority.

With respect to the WTO, one could claim that a dispute in the energy sector, stemming from a violation in of the GATS in connection with Mode 3

¹⁵⁸ Pauwelyn (n 8) 418.

¹⁵⁹ See Section 2.

¹⁶⁰ Eg Molinuevo (n 113).

¹⁶¹ ECT (n 3) pt III ('Investment Promotion and Protection').

¹⁶² Note, however, that in the case of article 26 of the ECT, the Investor would be the litigating party, while under the DSU it would be a state, namely a WTO Member.

(commercial presence) should be litigated first and foremost between WTO Members before a WTO Panel. A strong argument in favour is that the WTO offers an exclusive forum for dispute resolution for its Members and they are precluded from going elsewhere.¹⁶³ 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.¹⁶⁴ That being said, GATS Mode 3 has only been one the table in one WTO dispute so far, namely in *China – Certain Measures Affecting Electronic Payment Services*, a dispute which moreover did not concern energy investment protection.¹⁶⁵

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. The view that a specialised regime should prevail in this case could coincide with the rules of conflict resolution.¹⁶⁶ What is more, the ECT has been used very frequently for such disputes, as opposed to the WTO.¹⁶⁷ It must however be said that contrary to the WTO, there is nothing in the wording of the ECT that prescribes exclusive settlement of energy investment disputes under the ECT.¹⁶⁸

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.¹⁶⁹ Nevertheless, again, there is no legal hierarchy with respect to either of these fora, making this a clear example where the risks of fragmentation of procedure between the WTO and the ECT are obvious, possibly triggering forum shopping. If nothing else, it certainly does put the perceived 'exclusivity' of the WTO dispute settlement system into

¹⁶³ See text to n 124.

¹⁶⁴ Pauwelyn (n 8) 443; DSU (n 48) art 1.1.

¹⁶⁵ WTO, *China – Certain Measures Affecting Electronic Payment Services – Report of the Panel* (16 July 2012) WTO/DS413/R.

¹⁶⁶ See Section 1.1 and text to n 26.

¹⁶⁷ *ibid.* In contrast, see the extensive list of dispute settlement cases litigated under the ECT, 'Investor-State Dispute Settlement Cases' <<http://www.energycharter.org>> accessed 31 January 2015.

¹⁶⁸ In fact, in case parties to a dispute failed to settle it amicable 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 – author].'

¹⁶⁹ ECT (n 3) art 16 ('Relation to other agreements').

question, as a parallel route of settlement for energy investment disputes is available through the ECT.¹⁷⁰

3.1.2 Cooperation and Coordination to Overcome Tension?

From the above it is obvious that parallel applicability causes some tension between the WTO and ECT. But how can these institutions best manage the unsolved conflicts stemming from fragmentation in substance and procedure? This seems difficult to predict and largely depends on the course both treaty-regimes aim to take in the future.

Nevertheless, in absence of clear rules prescribing how to manage the risks of fragmentation concerning the WTO and ECT, one can look at the fairly straightforward suggestions made in analogy in the somewhat related field of international environmental law.¹⁷¹ Wolfrum and Matz propose an approach where closer *cooperation* and *coordination* between overlapping regimes and institutions can contribute to overcoming tension.¹⁷² What is meant here is a broad concept of both terms, and it implies voluntary and coordinated action between stakeholders of both institutions.¹⁷³ 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. But 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.¹⁷⁴

Increased coordination and closer cooperation between the WTO and the ECT can solve existing overlapping competence and conflict more efficiently.¹⁷⁵ This should not be in the form of a one-time event, but has to be part of a continuing process.¹⁷⁶ In part, this has been attempted in the early 2000s, with the Energy Charter Secretariat providing rules of coordination for WTO and the ECT. But this alone is not enough: As this article 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

¹⁷⁰ See text to n 47.

¹⁷¹ Pauwelyn (n 13) para 25 citing Wolfrum and Matz (n 24) 159–63.

¹⁷² Wolfrum and Matz (n 24) 159–63.

¹⁷³ *ibid* 161.

¹⁷⁴ *ibid*.

¹⁷⁵ Wolfrum and Matz (n 24) 162.

¹⁷⁶ *ibid* 159.

and perhaps unnecessarily so.¹⁷⁷ Figure 3 in Annex II attempted to draw a drastically simplified picture of overlap between the two treaties and their resolution of conflict, yet this has proved not to be light exercise.¹⁷⁸ Perhaps it is not unthinkable that coordination between the two treaty-regimes could happen in a simpler manner in the future.

Recently, the WTO and ECT seemed to have made a renewed careful step in the direction of increased cooperation and coordination by organising a common conference at the WTO Headquarters in Geneva in 2013, focusing on legal problems concerning energy in the WTO, the ECT and the interaction of these legal instruments.¹⁷⁹ 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.

Nonetheless, these modest developments seem to be in line with the recently issued political declaration on global cooperation in the field of energy, the 2015 International Energy Charter, negotiated under the auspices of the Energy Charter Secretariat in The Hague.¹⁸⁰ While this declaration is a soft law instrument and has no legal validity, it is a positive sign that ECT members, signatories as well as non-signatories gathered around the table to discuss 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 1991.¹⁸¹ 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.'¹⁸² Additionally, the document hints to more cooperation and coordination between multilateral agreements in the field of energy. Its signatories have agreed to foster synergies among energy-related multilateral fora and stated that they are willing to take full advantage

¹⁷⁷ See ECS, *Applicable Trade Provisions of the ECT* (n 7) and ECS, *Trade in Energy* (n 7).

¹⁷⁸ See Annex II, Figure 3 'Resolution of Conflict, Issue-Area and Procedural Overlap – A Comparison between the WTO and the ECT'.

¹⁷⁹ WTO, 'Lamy Calls for Dialogue on Trade in Energy in WTO' (29 April 2013) <http://wto.org/english/news_e/sppl_e/sppl279_e.htm> accessed 31 January 2015, and Energy Charter Secretariat, 'Workshop on the Role of Intergovernmental Agreements in Energy Policy - 29 April 2013' <<http://www.encharter.org/index.php?id=595&L=0>> accessed 31 January 2015.

¹⁸⁰ See n 11.

¹⁸¹ 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.

¹⁸² See Preamble to the text of the 2015 Charter.

of the expertise of existing international organisations in the energy field.¹⁸³ More importantly, for cooperation between the ECT and WTO, the Signatories to the 2015 Charter aim to ensure the development of trade in energy is consistent 'with major multilateral agreements such as the WTO Agreement and its related instruments'¹⁸⁴ This goal 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.¹⁸⁵

3.2 *Exploring the Ever-Changing Nexus between the WTO and ECT: 1994–2015*

3.2.1 Competition, Integration and Complementarity

For effective coordination and cooperation between the WTO and the ECT in managing the risks of fragmentation, it is important to discern what the nature of the nexus between the two treaties is. This pertinent question has remained unanswered in the article so far.

While the original objective of the ECT initiative in 1994 was to function as a 'stepping-stone' for WTO accession, and the treaty-regimes are obviously connected in substance through Article 4 and 29 ECT, it is difficult to put a conclusive label on their relationship.¹⁸⁶ Undoubtedly, the WTO offers a 'general' trade regime, and the ECT a 'specialized' energy treaty.¹⁸⁷ Yet, to label the ECT as merely a *lex specialis* of 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. Substantially, 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.¹⁸⁸

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

¹⁸³ *ibid.*

¹⁸⁴ See the text of the 2015 International Energy Charter, under Title I – Objectives, para 1.

¹⁸⁵ *ibid.*

¹⁸⁶ See ECT (n 3) arts 4 ('Non-derogation from GATT and Related Instruments') and 29 ('Transitional Arrangements').

¹⁸⁷ Azaria (n 93) 594.

¹⁸⁸ See discussion of this in Section 2 above.

has taken place since their inception. In the author's view, it is worth to discuss three potential types of nexuses between the WTO and the ECT in this respect: *competition*, *integration* and *complementarity*.

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

There is serious competition [i.e., 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.¹⁸⁹

Wälde saw the relationship between the WTO and the ECT thus as one of *competition* and threat rather than anything else. This is remarkable, since from the inception of the ECT regime one of the objectives of the Treaty was to acquaint non-WTO countries with the rules of the multilateral trading system. It is therefore unclear why Wälde perceived the WTO as a threat 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) and, vice versa, introducing WTO-type laws to the energy sector in a comprehensive manner. This is relevant when we take into account that the WTO was only marginally interested in actively engaging in energy issues at the time.¹⁹⁰

Instead of *competition*, it therefore seems more correct to identify the nexus between the WTO and the ECT at the time of inception of both treaty-regimes as one of (partial) *integration* on the side of the ECT. The nexus of *integration* was the objective to introduce former socialist countries to the global trading system of the WTO through the Treaty. Surely, the practical difficulties of fragmentation expressed themselves in competing competence and parallel applicability. But, incorporation of WTO rules in the ECT was the actual objective of the ECT to a large extent after all, and moreover taken into account by the rules of conflict issued by the Energy Charter Secretariat.

¹⁸⁹ Thomas W Wälde, 'Editor's Preface' in Wälde (n 37) xxi.

¹⁹⁰ See Marhold (n 31).

The nexus between the WTO and the ECT seems to have transformed from one of *integration* in 1994 to one of *complementarity* by 2015. Indicative of this have been the vast changes in Membership to both treaties over the past two decades. Particularly the amount of accessions to the WTO has had extensive legal consequences for the role of the ECT.

What stands out in particular in this respect is the fading relevance of the ECT provisions on energy trade. In Section 2.1 we discussed how the trade provisions of the ECT are only applicable between non-WTO Members who are Party to the ECT.¹⁹¹ Because of the large number of accessions to the WTO, this means that these trade rules are only applicable between a handful of ECT Parties by 2015 (as opposed to 1998): Afghanistan, Azerbaijan, Bosnia and Herzegovina, Kazakhstan, Uzbekistan and Turkmenistan.¹⁹² With the exception of Turkmenistan, all these countries are WTO Observers and currently in the process of acceding to the WTO. Between all other ECT Parties who already are WTO Members, and even between these ECT/WTO Members and non-WTO ECT Parties, GATT rules apply, with the abovementioned exceptions.¹⁹³ What is to happen to the trade provisions of the ECT once all WTO Observers who are ECT Parties have acceded to the Organization? Will they become obsolete, with the exception of the 'WTO-plus' style provisions such as Article 7 ECT on Transit? If that is the case, will the trade provisions of the ECT still have a legitimate purpose? This remains to be seen.

At present, it is clear that the *complementary* nature of the nexus between ECT and the WTO not so much lays the 'regular' energy trade provisions provided for by the ECT (except for transit). The reason for this is that WTO accessions have simply made the trade provisions of the ECT significantly less relevant. The *complementary* nature of the ECT to the WTO is rather to be found in its investment protection and resolution capacities, as well as in its active role in energy transit negotiations.¹⁹⁴ These mechanisms add both frequently used and valuable elements to dual ECT/WTO members that the WTO framework simply does not provide.

¹⁹¹ Section 2.1.

¹⁹² See Annex I, Figure 2 'WTO/ECT Membership Status and Overlap (2015)' as opposed to Figure 1 'WTO/ECT Membership Status and Overlap (1998)'. Left out are the ECT countries who apply the ECT provisionally, or have applied it provisionally in the past: Russia, Belarus, Australia, Iceland, and Norway.

¹⁹³ See Section 2 above.

¹⁹⁴ See text to n 43.

3.2.2 Future Opportunities for the WTO and ECT

It is not unthinkable that with the vast changes the WTO system and the global trading landscape is facing, the relationship between the WTO and the ECT will change once again. In view of current developments, the nexus between the treaties could once more become one of *integration* in the future. This would be a 'second phase' type of integration, depended mainly on how the WTO wants to tackle energy issues in the Organization and to what extent the WTO and the ECT want to cooperate, coordinate and perhaps even integrate in this endeavour. Both treaties would arguably benefit from closer cooperation, as the WTO now bears major energy producing and exporting countries among its Members who are not Parties to the ECT. The Organization is moreover confronted with complex problems concerning energy trade regulation.

One of the foremost functions of the WTO is to offer an inclusive platform for trade negotiations between its Members.¹⁹⁵ The WTO itself is the result of negotiations and everything the WTO does is based on negotiations: commitments to lower tariffs and other trade barriers, opening up service markets.¹⁹⁶ The Organization 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. Such agreements usually have a narrower group of signatories and are sector specific.¹⁹⁷ Hard commitments in the energy field might be difficult to reach (at least at the initial stages), but weaker commitments at the outset might better than no commitments at all – they leastwise have the potential to crystalize into something stronger on the long term.

The ECT on the other hand, brings a specialized set of rules governing energy trade in a WTO-plus style manner into the picture and also offers investment protection. To see the WTO as merely *competition* to the ECT would be a missed opportunity. The author is of the opinion that both treaty-regimes could learn from each other through closer cooperation and coordination while simultaneously overcoming the tensions created by their fragmentation along the way.

¹⁹⁵ Marrakesh Agreement Establishing the WTO (n 28) art III.2

¹⁹⁶ See WTO, 'Understanding the WTO – What We Do' <http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm> accessed 31 January 2015.

¹⁹⁷ See Annex 4 to the Marrakech Agreement: Current plurilaterals deal with civil aircraft, government procurement, dairy products and bovine meat; additionally see WTO, 'Plurilaterals – of Minority Interest' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrmio_e.htm> accessed 31 January 2015.

The minimum threshold and starting point for this would be to at least accommodate energy as an official topic of discussion in the WTO. As former WTO Secretary-General 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.¹⁹⁸

What is lacking at present in order to begin materializing the potential of the WTO in the energy field is the embracement of energy at the official level in the policy discussions; also, the technical expertise needed to navigate this complex field and support form stakeholders, including the energy industry, seems absent. Multilateral trade rules with respect to energy will work only if they address the issues faced by energy companies and the industry.¹⁹⁹ However, the contribution that the ECT could make in this respect should not be underestimated.

Conclusion

This article examined the effect of fragmentation in substance and procedure of two major treaty-based systems relevant for governance in the energy sector, the World Trade Organization and the Energy Charter Treaty. While the WTO, established in 1995 governs global trade in general, the ECT with came into force in 1998, offers a specialized regime for the regulation of the energy sector. Both treaties intersect and overlap in several places. The goal of this article was to scrutinize the origins of the resulting fragmentation between them and to examine where tension and parallel applicability occurs. It has schematized areas of overlap to show where solutions have been found and, vice versa, where the conflict has not been solved.

¹⁹⁸ Pascal Lamy, *The Geneva Consensus – Making Trade Work for All* (CUP 2013) 121.

¹⁹⁹ Daniel Crosby, 'Energy Discrimination and International Rules in Hard Times: What's New This Time Around, and What Can Be Done' (2012) 5 *Journal of World Energy Law and Business* 325, 342.

Parts that are prone to the risks of fragmentation are the parallel applicability of the WTO and the ECT in the field of TRIMS, TRIPS and GATS. The tension between energy investment protection and State-to-State dispute resolution in the ECT vis-à-vis the protection offered to such investments in Mode 3 of the GATS presents us with an additional challenge. One straightforward way to prevent and overcome the effects of fragmentation in these areas of the WTO and the ECT is to foster increased cooperation and coordination between institutions, as proposed by Wolfrum and Matz.²⁰⁰

Additionally, the article attempted to identify the nature ever-changing nexus between the two treaties from integration to one of complementarity. Over the course of roughly two decades, significant changes in Membership have taken place (in particular concerning WTO Accessions), with far-reaching consequences for both regimes. The future of the ECT trade provisions, once all WTO Observers who are simultaneously Party to the ECT accede to the WTO, is especially unclear.

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

²⁰⁰ Wolfrum and Matz (n 24).

ANNEX I - WTO/ECT Membership Status and Overlap 1998 and 2015

FIGURE 1 – WTO/ECT Membership Status and Overlap (1998) (Entry into force of ECT)

Total: 198 (including EC and Palestine)	WTO Members (Including EC, former EU) (134)	WTO Observers (50)	Non-WTO Members (14)
ECT Members (Including EC, former EU) (40)	(25, including EC): Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, EC, Finland, France, Greece, Hungary, Ireland, Italy, Kyrgyzstan, Liechtenstein, Luxemburg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom	(14): Albania, Armenia, Azerbaijan, Croatia, Estonia, Georgia, Kazakhstan, Latvia, Lithuania, Moldova, FYROM (Macedonia), Ukraine, Uzbekistan, Tajikistan,	(1): Turkmenistan
ECT Signatories* (Provisional Application) (8)	(6): Australia, Iceland, Malta, Norway, Poland, Turkey	(2): Belarus, Russian Federation	X
ECT Observers (29)	(17): Bahrain, Canada, Egypt, Indonesia, Japan, Korea, Kuwait, Mauritania, Mongolia, Morocco, Nigeria, Pakistan, Qatar, Tunisia, United Arab Emirates, USA, Venezuela,	(11): Afghanistan, Algeria, Bosnia and Herzegovina, Iran, Jordan, Montenegro, Oman, Saudi Arabia, Serbia, Syria, Yemen	(1): Palestine National Authority
Non-ECT Members (121)	(86): Angola, Antigua and Barbuda, Argentina, Bangladesh, Barbados, Belize, Benin, Bolivia, Botswana, Brazil, Brunei, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Cuba, CR Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Fiji, Gabon, The Gambia, Ghana, Grenada, Guatemala, Guinea,	(23): Andorra, Bahamas, Bhutan, Cabo Verde, Cambodia, China, Comoros, Equatorial Guinea, Ethiopia, Holy See, Iraq, Laos, Lebanon, Liberia, Libya, Nepal, Samoa, Sao Tomé and Príncipe, Seychelles, Sudan, Tonga, Vanuatu, Viet Nam,	(12): Eritrea, Kiribati, North Korea, Marshall Islands, Micronesia, Monaco, Nauru, Palau, San Marino, Somalia, Timor-Leste, Tuvalu

Total: 198 (including EC and Palestine)	WTO Members (Including EC, former EU) (134)	WTO Observers (50)	Non-WTO Members (14)
	Guinea-Bissau, Guyana, Haiti, Honduras, Hong Kong, India, Israel, Jamaica, Kenya, Lesotho, Macao, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritius, Mexico, Mozambique, Myanmar, Namibia, New Zealand, Nicaragua, Niger, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent & the Grenadines, Senegal, Sierra Leone, Singapore, Solomon Island, South Africa, Sri Lanka, Suriname, Swaziland, Chinese Taipei, Tanzania, Thailand, Togo, Trinidad and Tobago, Uganda, Uruguay, Zambia, Zimbabwe		

FIGURE 2 – WTO/ECT Membership Status and Overlap (2015)

Total: 198 countries (including EU and Palestine)	WTO Members (161, including EU)	WTO Observers (23)	Non-WTO Members (14)
ECT Members (47, including EU)	(41, including EU): Albania, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, EU, Finland, France, Georgia, Greece, Hungary, Ireland, Italy, Japan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Moldova, Mongolia, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, FYROM (Macedonia), Turkey, Ukraine, United Kingdom	(5): Afghanistan, Azerbaijan, Bosnia and Herzegovina, Kazakhstan, Uzbekistan	(1): Turkmenistan
ECT Signatories (Provisional Application)* (5)	(4): Australia, Iceland, Norway, Russian Federation**	(1): Belarus	X
ECT Observers (26)	(21): Bahrain, Canada, China, Egypt, Indonesia, Jordan, Korea, Kuwait, Mauritania, Montenegro, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Tunisia, United Arab Emirates, USA, Venezuela, Yemen	(4): Algeria, Iran, Serbia, Syria	(1): Palestine National Authority
Non-ECT Members (120)	(95): Angola, Antigua and Barbuda, Argentina, Bangladesh, Barbados, Belize, Benin, Bolivia, Botswana, Brazil, Brunei, Burkina Faso, Burundi, Cabo Verde, Cambodia, Cameroon, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Cuba, CR Congo, Djibouti,	(13): Andorra, Bahamas, Bhutan, Comoros, Equatorial Guinea, Ethiopia, Holy See, Iraq, Lebanon, Liberia, Libya, Sao Tomé and Príncipe, Sudan	(12): Eritrea, Kiribati, North Korea, Marshall Islands, Micronesia, Monaco,

Total: 198 countries (including EU and Palestine)	WTO Members (161, including EU)	WTO Observers (23)	Non-WTO Members (14)
	Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Fiji, Gabon, The Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hong Kong, India, Israel, Jamaica, Kenya, Laos, Lesotho, Macao, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritius, Mexico, Mozambique, Myanmar, Namibia, Nepal, New Zealand, Nicaragua, Niger, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent & the Grenadines, Samoa, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Island, South Africa, Sri Lanka, Suriname, Swaziland, Chinese Taipei, Tanzania, Thailand, Togo, Tonga, Trinidad and Tobago, Uganda, Uruguay, Vanuatu, Viet Nam, Zambia, Zimbabwe		Nauru, Palau, San Marino, Somalia, Timor-Leste, Tuvalu

Sources: ECT, 'Members and Observers' <<http://www.encharter.org/index.php?id=61>> accessed 31 January 2015 and WTO, 'Members and Observers' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 31 January 2015.

* All ECT Signatories apply Part VII of the Treaty provisionally. Only Belarus applies the whole ECT provisionally.

** The Russian Federation signed the Energy Charter Treaty and was applying it provisionally until 18 October 2009 inclusive.

Annex II – Resolution of Conflict, Issue-Area and Procedural Overlap – A Comparison between the WTO and the ECT

FIGURE 3 – *Resolution of Conflict, Issue-Area and Procedural Overlap – A Comparison between the WTO and the ECT*

WTO	ECT	WTO Rules in ECT: Resolution of Conflict
Trade in Energy Goods	- Trade Provisions ECT (Art 4, 5, 6 and 29 ECT*) - Art 5 ECT 'Trade Related Investment Measures' - Art 7 ECT 'Transit' (ECT Transit Protocol to be elaboration on ECT and this Article)	GATT 1994 incorporation into ECT by reference (Art 4 ECT): - GATT 1994 Applies: a) Among ECT/WTO Members (Art 4 ECT) b) Between ECT/WTO Members and non-WTO ECT Parties (Art 29(2)(a) ECT)*
- GATT - TBT - TRIMS - TRIPS - Trade Remedy Agreements: Anti-Dumping, Subsidies and Safeguards - Market Access Agreements: Import Licensing, Rules of Origin, Customs Valuation and Preshipment Inspection	- Trade Provisions ECT (Art 4, 5, 6 and 29 ECT*) - Art 5 ECT 'Trade Related Investment Measures' - Art 7 ECT 'Transit' (ECT Transit Protocol to be elaboration on ECT and this Article) - Transit Protocol (under negotiation – Most recent informal text available: TT87 22/01/2010)	- Trade Provisions ECT (Art 4, 5, 6 and 29 ECT) apply among non-WTO ECT Parties only (Art 29(1) ECT)* - Article 7 ECT creates additional obligations for ECT/WTO Members (i.e., Article 7 prevails over Article V GATT – the so-called 'WTO-plus effect of the ECT' – The same would account for an ECT Transit Protocol (Draft Art 3 Transit Protocol)
Not directly relevant for trade in energy goods: - SPS - Other WTO Agreements: Agreement on Agriculture, Textiles - Plurilaterals, not binding on all WTO Members (GSP, Government Procurement, Civil Aircraft)	NB The aim of the Transit Protocol is to complement the ECT while being in accordance with Art 7 ECT (Draft Art 3 Transit Protocol)	Main exception to GATT incorporation by reference (Art 4 ECT): - Schedules of Concessions Article II GATT are not incorporated into the ECT, but ECT has 'Best-endeavours' clause (Art 29 (3), (4) and (5) ECT*)

WTO Agreements excluded from incorporation into ECT:

- a) Plurilaterals, not binding on all Members (Annex W ECT), e.g. Government Procurement, Civil Aircraft
- b) WTO Agreements, not directly relevant for ECT (Annex W ECT), e.g. Agreement on Agriculture, SPS, Textiles
- c) The WTO Special and Differential Treatment provisions do not apply in the ECT, except for paras 1 to 4 of the Enabling Clause (through Annex W, section A, para 2(a) ECT)

Conflict not solved:

- TRIMS not incorporated in ECT (Annex W(A) (iv) ECT), but similar article in Art 5 ECT 'Trade Related Investment Measures'
- TRIPS not incorporated in ECT (Annex W(A) (c) ECT), but commitment to provide protection of intellectual property rights (*Final Act of the International Conference and Decision by the Energy Charter Conference in Respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Joint Declaration on Trade-Related Intellectual Property Rights*)

FIGURE 3 - Resolution of Conflict, Issue-Area and Procedural Overlap – A Comparison between the WTO and the ECT (cont.)

	WTO	ECT	WTO Rules in ECT: Resolution of Conflict
Trade in Energy Services	- GATS	- 'Economic Activity in the Energy Sector' (Art 1(5) ECT) - Transit Protocol (under negotiation – Most recent informal text available: TT87 22/01/2010)	- Art 11 ECT 'Key Personnel' takes up issues treated as specific commitments under the GATS (the so-called 'WTO-plus effect of the ECT') Conflict not solved: GATS not incorporated in ECT (Annex W(A)(b), but energy services nevertheless covered in ECT as 'Economic Activity in the Energy Sector'
Resolution Energy Trade Disputes	- DSU	- Annex D 'Interim Provisions for Trade Dispute Settlement' - Art 7(7) ECT for Transit disputes	- DSU Applies: a) Among ECT/WTO Members (Art 4 ECT) - Annex D Applies: a) Between ECT/WTO Members and non-WTO ECT Parties (Art 29(7) ECT*) b) Among non-WTO ECT Parties (Art 29(7) ECT)* - Article 7(7) ECT creates additional obligations for ECT/WTO Members (the so-called 'WTO-plus effect of the ECT')

Energy Investment Protection	- GATS Mode 3 'Commercial Presence' - Part III ECT 'Investment Promotion and Protection'	Conflict not solved:
Resolution	- Part V ECT 'Dispute Settlement':	Overlap/tension where GATS Mode 3 investment protection coincides with ECT Part III (because GATS not incorporated in ECT)
Energy Investment Disputes	- DSU for GATS Mode 3 disputes a) Investor – State (Art 26 ECT) b) State – State (Art 27 ECT, non-trade matters only)	Conflict not solved: (Stems from issue-area conflict) Overlap/tension where GATS Mode 3 investment protection disputes coincide with ECT Part III, State – State disputes (Art 27 ECT) (post-establishment). However, see Article 16 ECT 'Relation to Other Agreements' regarding Part III and V of the ECT. WTO/ECT complementarity regarding Investor – State disputes (Art 26 ECT)
Environmental Protection	- Art 19 ECT 'Environmental Aspects' - Environmental Protocol (PEEREA) NB Also see WTO Decision on Trade and Environment	- Article 19 ECT and the Environmental Protocol (PEEREA) create additional obligations for ECT/ WTO Members (the so-called 'WTO-plus effect' of the ECT)

* NB Article 29 ECT sets out transitional arrangements and ceases to exist for an ECT Party when it joins the WTO. The application of Article 29 ECT will end only upon universal WTO Membership of all ECT Parties.

Sources: The Energy Charter Treaty & Related Documents; ECT Draft Transit Protocol (Preliminary Draft TTG87, 22/01/2010); WTO Agreements; Energy Charter Secretariat, *Trade in Energy – WTO Rules Applying under the Energy Charter Treaty* (ECS 2001); Energy Charter Secretariat, *Applicable Trade Provisions of the Energy Charter Treaty* (ECS 2003); Ingrid Frasl, 'The Trade Rules of GATT and Related Instruments and the Energy Charter Treaty' in Thomas W Wälde (ed), *The Energy Charter Treaty – An East-West Gateway to Investment & Trade* (Kluwer 1996) 459; and Martha M Roggenkamp, 'Transit of Network-Bound Energy: The European Experience' in Thomas W Wälde (ed), *The Energy Charter Treaty – An East-West Gateway to Investment & Trade* (Kluwer 1996) 499.