

To Include or Not to Include an Energy Chapter in TTIP?

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Whereas all the attention in the TTIP-debate has been focusing on the investor-state dispute settlement (ISDS) provisions and, more recently, on the proposal of the European Commission for the creation of an investment court system (ICS), the proposed energy chapter – with potentially much more importance – has so far remained unnoticed.

The significance of the TTIP energy chapter proposed by the European Commission is highlighted by the radically different energy situation in the US and the EU.

On one hand, the US has rather suddenly become the largest exporter of liquefied natural gas (LNG) in the world, whereas on the other hand, the EU is heavily dependent on Russian gas and oil and therefore is in need of energy diversification.

Meanwhile, US President Obama has recently agreed to lift the ban on US crude oil exports, which was dating back from the 1970s. Consequently, the US could also become a significant crude oil exporter.

Moreover, whereas the US Natural Gas Act requires the authorization of LNG exports to third countries, it at the same time allows for automatic authorization of LNG exports to all countries with which the US has a FTA.

Thus, the conclusion of TTIP – even without an energy chapter – would significantly simplify the export of US LNG to the EU and thus could enable the EU to replace its Russian gas and oil imports by importing US LNG and crude oil, thereby reducing its dependence on Russia.

However, the necessary LNG installations would still need to be approved and build on the East Coast of the US in order to facilitate LNG export to the EU. It must also be noted that US LNG – at the current prices – would be more expensive than Russian gas. Consequently, many EU Member States would have to be ready to pay higher gas prices in exchange for more independence from Russia.

But before discussing the content of the proposed energy chapter, the question must be asked what would be the additional benefits of including such a chapter in TTIP? Another related question is which existing energy problems, if any, between the EU and the US would such an energy chapter solve? And what would be its real impact?

So far, it has been very rare to include an energy chapter in FTAs. The US has included it once in [NAFTA Chapter 6](#) (and before in the predecessor US-CAN FTA). The EU has included some energy related provisions in the [EU-Ukraine DCFTA Chapter 11](#).

The fact that a specific energy chapter is usually not included in an FTA can be explained by the circumstance that other international agreements such as the various WTO Agreements (GATT and GATS) and the Energy Charter Treaty (ECT) also cover energy related issues.

The WTO Agreements contain the general disciplines, which are also applicable to energy such as the most favoured nation treatment (MFN), national treatment (NT), free transit, Art. XX GATT exceptions as well as rules on subsidies and public procurement. Also, the similar GATS provisions apply to energy related services.

Indeed, all these principles, which are contained in most FTA are simply applied also to energy issues, thereby rendering it unnecessary to include a specific energy chapter.

Moreover, the ECT - which has been signed by more than 50 states - is the most extensive international agreement specifically regulating practically all energy issues and also contains specific ISDS provisions. However, the US is only Observer in the ECT.

Nonetheless, by and large energy issues are already covered by the usual international trade and investment principles. So, the real question is: What would be the added value of having an energy chapter in TTIP?

Prima facie, there are no significant energy related problems between the EU and the US that would need to be addressed by a specific energy chapter in TTIP.

Since the US has just lifted its crude oil export ban and the conclusion of TTIP in itself will simplify US LNG exports to the EU, any additional benefits seem to be limited. Perhaps the rules on acceptable subsidies for renewables - an issue which is not yet solved in the WTO system - could be clarified and the regulatory cooperation regarding climate change, for example concerning common rules on emissions trading and biofuels, could be developed.

But generally it seems that the inclusion of an energy chapter in TTIP would rather be for systemic reasons by providing a blueprint for other EU FTAs, which the EU intends to conclude in the future with other countries.

But let's have a closer look at the elements which are included the proposed energy chapter for TTIP.

Interestingly and despite the European Commission's effort to increase transparency around the TTIP negotiations by publishing draft texts of various chapters, this is not the case for the proposed energy chapter. Instead, only a [leaked draft text of 20 September 2013](#) can be found on internet, which contains the following elements.

The first provision sets out the general scope and aim of the energy chapter by stating that:

Article A Principles

1. Without prejudice to provisions in other chapters of this Agreement, this [Chapter, Section, etc.] contains specific disciplines reinforcing free trade in raw materials and energy, by notably abolishing trade and investment restrictions on goods and services and by creating a more transparent market framework fostering investments in the raw materials and energy sector.
2. The Parties recognize the importance of having viable and internationally competitive raw

materials and energy sectors.

3. The Parties recognize that it is desirable to strengthen the important role that trade in raw materials and energy plays in their relationship and to enhance this role through sustained and gradual liberalisation.
4. The Parties also aim, by agreeing on rules in the raw materials and energy sector, including the renewable energy sector, to create disciplines improving international governance in these sectors.

The subsequent provisions of the energy chapter provide for the following:

- Export restrictions would be removed;
- Trading and export monopolies would be removed;
- Domestic price regulation may be allowed in the context of a public service obligation;
- Dual pricing regarding domestic and export prices shall be prohibited;
- General access conditions must be granted;
- Access to and licensing of the exercise of the activities of prospecting, exploring for and producing hydrocarbons shall be granted on a non-discriminatory basis;
- General principles of risk management in offshore oil and gas operations would be agreed upon in particular in the event of major accidents happening in US and EU waters and also in international waters;
- The Parties affirm the existing rights and obligations in Article V GATT, which is hereby incorporated into and made part of this Agreement. Article V GATT is understood to include the transportation by pipeline or grids of energy goods;
- Interruptions shall be minimized by adopting the necessary measures;
- Third party access to energy transport facilities shall be put in place and shall be applied in a non-discriminatory manner;
- Regulatory authorities shall be established which are independent;
- Localisation in the renewable energy sector the Parties agree not to maintain local content requirements.

It seems that all these issues could be regulated by applying the general disciplines, which are applicable to other sectors as well, and do not warrant a specific energy chapter.

So while including a specific energy chapter does not appear to be of much added value, the systemic disadvantages could be significant, in particular regarding the dispute settlement system.

Indeed, the importance of the ISDS provisions in the energy sector is evidenced by the following statistics. According to the [2015-2 ICSID Statistics](#), 26% of all disputes concerned oil, gas and mining and another 15% electric power & other energy resources, i.e., 41% of all disputes relate to the energy sector. According to [UNCTAD Issue Note 2015 \(2\)](#), the ECT surpassed NAFTA as the most frequently invoked investment treaty. The recently launched [UNCTAD Investment Dispute Settlement Hub](#) now counts 81 ECT cases and 54 NAFTA cases. This means that the ISDS provisions of the BITs, FTAs and in particular the ECT are heavily used. This can be explained by the high costs involved, the sensitivity and importance of the energy sector, and the significant involvement of governmental bodies (i.e. regulators) and State Owned Enterprises (SOEs) in the energy sector.

In short, the energy sector obviously needs effective ISDS provisions.

Including an energy chapter in TTIP would in principle also extend the ISDS provisions of TTIP to the energy chapter – unless this sector is carved out. Consequently, the majority of the Member States, which so far have no BITs with the US would be exposed to potential investment arbitration disputes by US investors covering the energy sector. Conversely, all European investors in the energy sector

would be able to bring claims against the US. The question is whether the US, the EU and its Member States are actually looking forward to be exposed to that risk?

Moreover, in light of the new proposal for an international court system (ICS), a completely different dispute settlement regime would apply to energy disputes under TTIP compared to the ISDS provisions contained in the existing BITs between the US and several EU Member States, and the ECT. This could lead to divergences and legal conflicts with the ECT jurisprudence and EU law (including the CJEU) as far as similar legal issues are concerned. More generally, if similar energy chapters are included in FTAs between the EU and other ECT members, this could create a new parallel “*lex specialis* energy treaty system” with all the risks of divergences and legal conflicts with existing instruments. Indeed, the risk of further fragmentation of the ISDS provisions in the various treaties would not be limited to the ISDS provisions, but could also affect the varying substantive obligations.

For all these reasons, this piecemeal approach should be avoided. Instead, the EU should regulate in TTIP as far as it is necessary the energy related issues by applying the usual trade and investment and ISDS disciplines to the energy sector. More specifically, it would increase the consistency of the energy regulation, if TTIP would mirror as much as possible the relevant WTO and ECT provisions.

Finally, if indeed the US considers necessary to specifically regulate or harmonize any energy issues further, it could also consider becoming full member of the ECT. This would allow the application of the same rules for the US and the EU and strengthen the importance of the ECT as the major international treaty for the energy sector.