



European Union

G | M | F The German Marshall Fund
of the United States
STRENGTHENING TRANSATLANTIC COOPERATION

CONSIDERATIONS FOR THE TREATMENT OF ENERGY IN THE US–EU TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

By Keith J. Benes

SEPTEMBER 2015



ABOUT THE CENTER ON GLOBAL ENERGY POLICY

The Center on Global Energy Policy provides independent, balanced, data-driven analysis to help policymakers navigate the complex world of energy. We approach energy as an economic, security, and environmental concern. And we draw on the resources of a world-class institution, faculty with real-world experience, and a location in the world's finance and media capital. Visit us at energypolicy.columbia.edu



facebook.com/ColumbiaUEnergy



twitter.com/ColumbiaUEnergy

ABOUT THE SCHOOL OF INTERNATIONAL AND PUBLIC AFFAIRS

SIPA's mission is to empower people to serve the global public interest. Our goal is to foster economic growth, sustainable development, social progress, and democratic governance by educating public policy professionals, producing policy-related research, and conveying the results to the world. Based in New York City, with a student body that is 50 percent international and educational partners in cities around the world, SIPA is the most global of public policy schools. For more information, please visit www.sipa.columbia.edu

ABOUT THE LUGAR CENTER

The Lugar Center is dedicated to proposing solutions to global problems that will define the 21st Century. The Center seeks to educate the public, global policymakers, and future leaders on critical issues such as food and energy security, controlling weapons of mass destruction, and effective governance. It provides a forum for timely commentary by respected experts. The Center is committed to thoughtful analysis and civil dialogue that facilitate bipartisan governance.

ABOUT THE GERMAN MARSHALL FUND OF THE UNITED STATES

The German Marshall Fund of the United States (GMF) strengthens transatlantic cooperation on regional, national, and global challenges and opportunities in the spirit of the Marshall Plan. GMF contributes research and analysis and convenes leaders on transatlantic issues relevant to policymakers. GMF offers rising leaders opportunities to develop their skills and networks through transatlantic exchange, and supports civil society in the Balkans and Black Sea regions by fostering democratic initiatives, rule of law, and regional cooperation.

Founded in 1972 as a non-partisan, non-profit organization through a gift from Germany as a permanent memorial to Marshall Plan assistance, GMF maintains a strong presence on both sides of the Atlantic. In addition to its headquarters in Washington, DC, GMF has offices in Berlin, Paris, Brussels, Belgrade, Ankara, Bucharest, and Warsaw. GMF also has smaller representations in Bratislava, Turin, and Stockholm.





European Union

G | M | F The German Marshall Fund
of the United States
STRENGTHENING TRANSATLANTIC COOPERATION



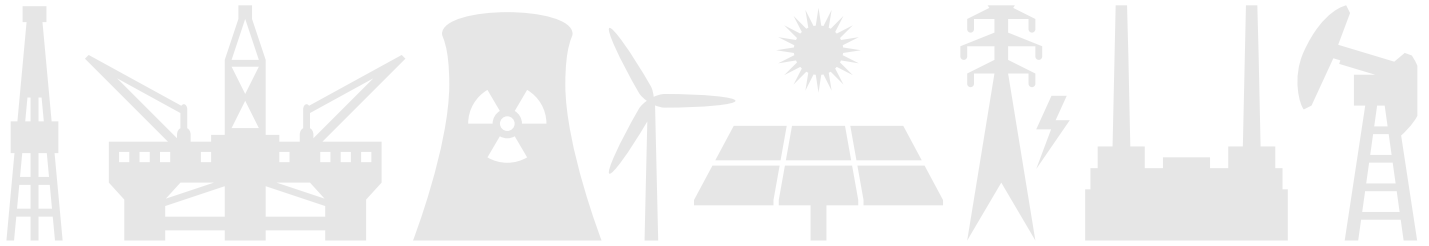
CONSIDERATIONS FOR THE TREATMENT OF ENERGY IN THE US-EU TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

By Keith J. Benes*

SEPTEMBER 2015

***Keith Benes** is a non-resident Fellow at the Center on Global Energy Policy at Columbia University. Previously he served with US State Department where he was an Attorney-Adviser. In addition to advising the State Department on all aspects of public international law, Mr. Benes provided strategic, analytical and policy expertise on the negotiations under the UN Framework Convention on Climate Change, environmental review of cross-border infrastructure projects, and the North American crude oil market.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK



ACKNOWLEDGMENTS

The author wishes to thank Jonathan Stoel, Douglas Hengel, Kristine Berzina and Neil Brown for their very helpful comments on earlier drafts of this issue brief.

This paper has been produced with the assistance of the European Union. The contents of this paper are the sole responsibility of the author and can in no way be taken to reflect the views of the European Union. It does not necessarily represent the views of the Center on Global Energy Policy, the German Marshall Fund of the United States, or The Lugar Center.

TABLE OF CONTENTS

ACKNOWLEDGMENTS	2	FIGURE	
FOREWORD	4	US crude oil imports from FTA countries.....	11
EXECUTIVE SUMMARY	5	TABLES	
INTRODUCTION.....	6	Table 1: US energy trade with the EU in 2014.....	7
CURRENT TRANSATLANTIC ENERGY LANDSCAPE..	7	Table 2: Issues EU has proposed for a TTIP energy chapter.....	16
GENERAL TRADE PROVISIONS RELEVANT TO TRADE IN ENERGY.....	9	BOX	
Rules on Trade in Services		Lessons from Mexico and the NAFTA Energy Chapter.....	18
TREATIES ADDRESSING TRADE IN ENERGY.....	11		
The US-Canada FTA and NAFTA			
EU Deep and Comprehensive Free Trade Area(s)			
Trade Provisions in the Energy Charter Treaty			
ENERGY IN THE TTIP NEGOTIATIONS.....	15		
CONCLUSION.....	20		
NOTES.....	21		

FOREWORD

Not long ago, energy security received barely a mention in meetings of United States and European Union leaders. Today, a diverse set of energy challenges – from enabling competitive markets to reducing environmental impact – are rightly recognized to be essential to both the economic and security goals of the trans-Atlantic alliance. Alongside the energy imperative, economic recovery and growth in our deeply integrated economies is mutually beneficial for the prosperity of peoples on both sides of the Atlantic. Negotiations on the Trans-Atlantic Trade and Investment Partnership (TTIP) are an important manifestation of that agenda.

Yet, the fact that energy security and trade can lead to a deepening of the alliance does not mean that the two are easy bedfellows in substance or in politics. Although some EU leaders have said that it is difficult to imagine TTIP without an energy chapter, as this paper points out, a specific energy chapter is the exception rather than the rule in trade agreements. Meanwhile, changing energy markets and technologies allow for new opportunities to rethink the role – and opportunities – for energy in trade.

Progress in the emerging debate on energy and TTIP will require that experts on energy policy and experts on trade policy – two very separate communities – understand one another and communicate effectively. We hope the reader finds this paper to be a helpful step in that direction.

SIGNED:

Neil Brown
Member of the Board,
The Lugar Center

Kristine Berzina
Transatlantic Fellow,
German Marshall Fund of the United States

Jason Bordoff
Director, Center on Global Energy Policy at
Columbia University's School of International and Public Affairs

EXECUTIVE SUMMARY

While the negotiations between the United States and the European Union for the Transatlantic Trade and Investment Partnership (TTIP) have not received as much US press attention as the proposed US-Pacific basin TransPacific Partnership (TPP) has, the two deals are of a similar magnitude and importance in terms of total global GDP and trade potentially at issue.

One key issue that has emerged from the TTIP negotiations is a disagreement over whether to include a separate chapter on energy. The European Union favors such a chapter, in hopes it would help it secure access to increasing production of US oil and natural gas and potentially serve as a set of model trade-in-energy provisions that would help in negotiations with other countries, particularly those to its East. Highly dependent on Russian oil and natural gas, the EU has been looking for ways to diversify its supply base. The United States has not outright opposed such a chapter, but has indicated skepticism that it is necessary.

The dynamics of the negotiation put both sides in potential unusual positions. The United States, long a champion of removing export barriers in energy goods and of the European Union diversifying its energy supplies, has to wrestle with restrictions on crude oil exports and the potential strong domestic political opposition to relaxing them. The European Union, which supports alternative energy sources and reducing fossil fuel consumption, faces becoming entangled in the environmental controversies around the rapidly expanding oil and gas production in North America – including hydraulic fracturing and the exploitation of the Canadian oil sands.

This paper provides background on how the existing global and regional trade regime applies to energy for policy-makers and TTIP negotiators. In short, it finds:

- There are no energy-specific provisions in the WTO agreements but this does not mean energy is not covered by the WTO. The general WTO provisions apply to trade in energy goods and services. There are a limited number of Free Trade Agreements (FTAs) with energy-specific chapters, and both the United States and the European Union are party to such agreements.
- The EU's insistence on an energy chapter with an

ally that is a potential exporter of oil and natural gas is similar to past United States positions where Washington insisted on separate energy chapters in its FTAs with neighbor countries that are large oil exporters to the United States.

- The EU has identified a list of energy-specific provisions for consideration in TTIP covering issues on which it often shares a common position with the United States. However, that does not mean that all identified issues are appropriate to include in TTIP.
- To determine what energy-specific provisions should be in TTIP, the United States and the European Union should consider whether a provision is necessary to improve the transatlantic trade relationship; how likely it is that a provision will be influential as a model provision; and the potential unintended consequences of including a provision in TTIP.
- Whether to consolidate any energy-specific provisions in a separate chapter on energy can have political or symbolic importance, but does not alter the substance or legal impact of the individual provisions. In the NAFTA negotiations, the United States arguably achieved its biggest negotiating success regarding energy (opening up Mexico's contracting process for PEMEX and the state electricity provider to foreign companies) in the government procurement chapter.
- The most significant risk is entangling TTIP approval in additional, politically contentious issues, such as crude oil exports, and sensitive environmental issues, such as the exploitation of Canadian oil sands.
- Including provisions in a treaty can help establish model rules or norms for future negotiations, but there are reasons to be cautious about how much influence the proposed EU provisions might have in the future for two reasons. First, some potential future negotiating partners are highly resistant to influence from international norms. Second, provisions included in TTIP that do not have any real impact on the trade relationship are likely to be less influential in the future.

INTRODUCTION

The European Union and the United States are in the midst of negotiating a comprehensive free trade and investment agreement—the Transatlantic Trade and Investment Partnership (TTIP), a product of cooperative examination between the United States and the European Union on how to stimulate their respective economies in the wake of the global economic downturn that hit in 2008. Together the United States and the European Union account for nearly half of world GDP and 30 percent of world trade, but GDP and job growth in both economies have been stagnant compared to historic rates since the Great Recession. The potential economic benefit of reducing transatlantic trade and investment barriers is estimated to be in the hundreds of billions of dollars annually. While the completion of TTIP is an economic priority for both the United States and the European Union, negotiations have gone slower than anticipated, having just completed their ninth round in April 2015.

Among the questions that have arisen in TTIP negotiations is how to address trade and investment in energy, and whether or not there should be a separate chapter on energy. Global energy markets have undergone profound changes since 2008. The United States, once expected to be a major importer of liquefied natural gas, is now expected to become a major exporter of the fuel. There is a growing debate about whether the country should allow unrestricted exports of oil as well. At the same time, concerns about the European Union’s dependence on Russia for oil and natural gas have grown since Moscow’s actions in Ukraine.

The EU position is that there should be a separate energy chapter in TTIP, while the United States has been reluctant to say one is necessary.¹ Indeed, the World Trade Organization (WTO) agreements have no separate treatment for energy. It is also relatively rare for regional trade agreements to have a separate energy chapter (or even energy-specific provisions), although both the United States and the European Union have agreed to energy chapters in other trade agreements.²

This paper outlines some key issues for policymakers considering the treatment of energy in the TTIP discussions. First, it summarizes recent changes in the energy landscape, as they are relevant for potential transatlantic trade in energy, particularly the dramatic increase in US

production of oil and natural gas. Second, it reviews the provisions of existing trade agreements that are most relevant to trade in energy. Third, it reviews some of the perceived inadequacies of the generally applicable Free Trade Agreement provisions (i.e., those that apply across all sectors) as they apply to energy, the energy-specific provisions of the regional FTAs that have had separate energy chapters, and the energy-specific issues that have been identified in the TTIP negotiations. Fourth, it identifies key considerations for policymakers on specific potential provisions.

CURRENT TRANSATLANTIC ENERGY LANDSCAPE

Energy in general and oil in particular are recognized as not only significant economic commodities but also as key strategic ones.³ The TTIP negotiations are occurring at a time when the trajectories of internal energy production for the United States and the European Union are radically different, with critical geopolitical and economic implications. The discussion in the United States has centered on increasing security, sparking discussions of the possibility of energy independence within North America. In the European Union, the focus is on diversifying energy suppliers, increasing the region's energy production through measures, such as greater deployment of renewables, and sustainable production of fossil fuels.⁴

Thanks to the advances in horizontal drilling and hydraulic fracturing in recent years, the United States is experiencing unprecedented growth in its natural gas and crude oil production. These increases, paired with improvements in energy efficiency and the greater deployment of renewables, have drastically reduced US energy imports.

Just four to five years ago, forecasts called for the United States to import increasing volumes of liquefied natural gas. The surge in output has turned that outlook on its head, with expectations that it will become a significant exporter of LNG before 2020, with first shipments of LNG expected to sail in late 2015.⁵

In addition, production of shale oil has led to a drop-off in US crude oil imports, from 67 percent of total US crude demand in 2008, to 27 percent in 2014 (the lowest level since 1985).⁶ The United States is also now the largest producer of liquid fuels in the world and the largest gross exporter of refined products. While the United States allows unlimited exports of refined products, exports of crude oil are restricted, allowed only under certain circumstances, due to laws crafted during the oil crisis of the 1970s.

Given the dramatic rise in US oil production as well as the transformation of the global oil market since the 1970s, there has been a growing debate in the United States over whether the restrictions on exports should be lifted.⁷ Such a move would increase the supply of US crude to international markets, which has already grown considerably—from 29,000 b/d on average in 2008 to over 400,000 b/d in the first quarter of 2015—based on what the current restrictions allow.⁸ One of the arguments put forward by some supporters of lifting the restrictions on crude oil exports has been the potential for US barrels to ease European dependence on Russian crude oil.

The European Union's reliance on imported energy has risen due to declining regional production of fossil fuels.⁹ Energy imports have climbed from approximately 40 percent in the 1980s to 53 percent in 2013 for the EU-28

Table 1: US energy trade with the EU in 2014

	Export	Imports
Oil (1,000s b/d)		
Crude oil	6	11
Petroleum products	635	399
Finished motor gasoline	4	28
Unfinished gasoline	-	220
Gasoil	323	12
Jet fuel	14	-
Coal (million metric tons)	39	-

Source: EIA. Note: The crude oil exports were of Canadian crude oil exported from the U.S. Gulf Coast.

despite relatively flat energy consumption and the increasing use of renewables.¹⁰ Crude oil and natural gas are the two most important energy sources in the European Union, and the sources with the highest import dependence (88 percent and 66 percent, respectively).¹¹ This has raised concerns about energy security, particularly since Russia is the largest exporter of oil and gas to the region, supplying approximately 30 percent of crude oil imports and 40 percent of natural gas imports.¹² Several times over the past decade, there have been disruptions (or threatened disruptions) to natural gas supplies to the European Union because of the geopolitical turmoil surrounding Russia and Ukraine.

Currently, the European Union does not import US crude oil or natural gas.¹³ Other than those two products, however, there is extensive trade in energy products between the United States and the EU. In 2013, the EU imports of mineral fuels (primarily refined petroleum products and coal) from the United States constituted 10 percent of total goods imported from the United States, and exports of mineral fuels to the United States were 6 percent of total goods exported to the United States.¹⁴

While free exports of US LNG and crude oil would not be large enough to eliminate the need for the European Union to import energy from Russia, it would reduce that reliance and serve as another alternative source of reliable energy.¹⁵

GENERAL TRADE PROVISIONS RELEVANT TO TRADE IN ENERGY

A critical factor in determining whether TTIP should address energy specifically is to examine how energy trade is covered in existing trade agreements, especially those that fall under the World Trade Organization (WTO). Although the WTO agreements do not have a specific chapter or separate specific provisions on energy trade, the generally applicable provisions of the WTO are understood to apply to energy as they do to any other commodity. Prior to the 1990s, there was a common misperception that the WTO agreements did not apply to petroleum or other energy products, but this was primarily due to the fact that until the 1980s most petroleum exporters were not yet parties to the WTO agreements.¹⁶

Some of the provisions of the WTO agreements that are most relevant to trade in energy products include:¹⁷

- The most-favored-nation (MFN) principle, which specifies that any treatment (in terms of imports or exports) that is granted to the products¹⁸ originating in one country must be granted to like products originating in all contracting parties to the WTO agreements.¹⁹
- The national treatment principle, which provides that imported products shall receive treatment under domestic laws and regulations that are no less favorable than the treatment afforded to like domestic products. This principle applies once the foreign products have been imported.²⁰
- The principle that if a state provides protection for domestic producers, it can only do this through tariffs on imports or exports, and may not be done through measures restricting the quantity of imported or exported goods.²¹
- The General Agreement on Tariffs and Trade (GATT) requires that goods transiting through the territory of any WTO member from any other WTO member should be given favorable treatment (basically MFN treatment) and prohibits subjecting transport to unnecessary delays or restrictions.²²
- Subject to certain exceptions, the GATT prohibits quantitative restrictions on imports and exports (such as quotas or measures that function as quotas).²³ Among the exceptions is a provision that would allow an exporting country to temporarily impose export restrictions in order to relieve critical shortages of essential products in the exporting country.²⁴ This exception could be invoked by energy-exporting countries to limit exports, but recent WTO appellate body decisions have indicated that the exception is rather narrow.²⁵
- The GATT includes a number of general exceptions allowing national measures such as those to protect public morals, human or animal health, or to protect exhaustible natural resources so long as such measures are not applied in an arbitrary or discriminatory fashion and are not disguised restrictions on trade.²⁶ Most relevant to the energy sector is the exception regarding protecting exhaustible natural resources. However, recent appellate body decisions have clarified that to be acceptable under the GATT, measures placing restrictions on exports to protect exhaustible natural resources would need to be accompanied by restrictions on domestic production or consumption.²⁷
- The GATT allows a member to take any action it considers necessary for the protection of its essential security interests.

These are certainly not the only WTO provisions that are directly relevant to the trade in energy goods. Others would include rules on subsidies, especially as those rules may ultimately be applied to subsidies for renewable energy sources; the WTO Agreement on Technical Barriers to Trade; and the WTO rules on regional trade agreements.²⁸

RULES ON TRADE IN SERVICES

The previous section covered the issue of trade in goods, but there are also rules under the WTO system on trade in services in the General Agreement on Trade in Services (GATS) relevant to the energy sector.²⁹ The GATS includes a most-favored-nation principle, rules on monopolies and exclusive service providers, general rules on domestic reg-

ulation, and additional obligations that are only applicable to sectors in which specific commitments have been accepted by a member.³⁰ There are two potential difficulties in applying the GATS rules to energy services.³¹ First, under the most-used classification system for services, there is no specific category for “energy services” (such as exploration, drilling, or refining). Instead, the different types of energy services span across different services categories, and a single energy service and could arguably fit in multiple categories. Because different protections apply to different categories of services, it could be difficult to identify exactly which protections apply to energy services. Secondly, there is not a clear division between what is a trade in energy goods or a trade in energy services. For example, pipeline transport of crude oil might fall into both categories.³²

TREATIES ADDRESSING TRADE IN ENERGY

There are a limited number of treaties that have entered into force that have explicitly addressed trade in energy goods and services and supplemented the generally applicable WTO rules previously outlined: the US–Canada FTA (implemented in 1989 and which predated the NAFTA), the NAFTA (1994), the EU–Ukraine Deep and Comprehensive FTA (expected to be implemented in 2016), and the Energy Charter Treaty (1998).³³ Where trade in energy products has been specifically addressed in an agreement, the additional provisions have typically represented relatively modest extensions of protections or provisions specific to energy.

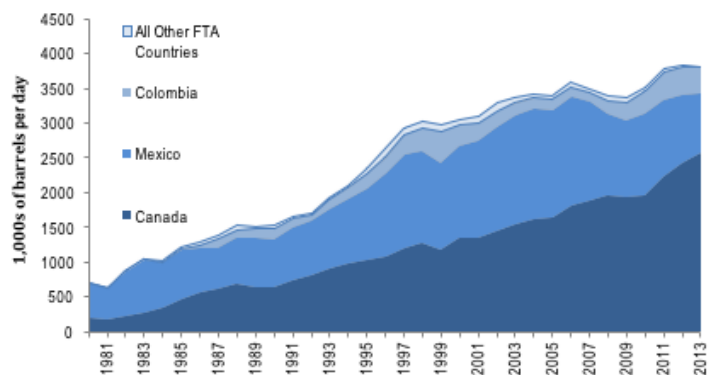
The primary energy-specific provisions of these agreements can be summarized as follows:

- Clarify that generally applicable rules on trade in goods apply to trade in energy goods (the NAFTA, EU–Ukraine DCFTA, Energy Charter Treaty).
- Narrow some of the exceptions that could otherwise be utilized under the WTO agreements to restrict imports or exports of energy products (the NAFTA).
- Create a more explicit definition of freedom of transit as applied to energy products (EU–Ukraine DCFTA, Energy Charter Treaty) and a streamline dispute resolution procedure to address issues of interrupting transit of energy goods (EU–Ukraine DCFTA).

THE US–CANADA FTA AND NAFTA

The United States has entered into two FTAs that contain energy chapters: the US–Canada FTA and the North American Free Trade Agreement (NAFTA). In the negotiations for each of these FTAs, the United States was strongly in favor of including a separate energy chapter. This US position was based largely on energy security concerns and the policy goal of obtaining greater access to the crude oil resources in its geographic neighbors Mexico and Canada. Of the United States’ other FTA partner countries, only Colombia exports a significant amount of crude oil to the United States, but it does not have the extensive crude oil resources or the production levels of either Canada or Mexico. Figure 1 shows total US crude oil imports from its FTA partner countries since 1980.

Figure 1: US crude oil imports from FTA countries (In thousands of b/d)



Source: EIA.

During negotiations in 1986–87, both the United States and Canada favored having a separate energy chapter in the US–Canada FTA. The United States—with fresh memories of the oil supply disruptions of the 1970s—was interested in preventing Canada from reinstating the oil export restrictions it had implemented during that decade that had included a plan to eliminate all oil exports to the United States by the early 1980s.³⁴ For its part, Canada had suffered through uncertain and shifting US import allocations under the US Mandatory Oil Import Program in the 1960s.³⁵ Canada was therefore interested in securing a stable market going forward for anticipated growth in production from its oil sands resources.³⁶ Although the memories of these protectionist bilateral trade restrictions were still relatively fresh for both countries when the FTA was negotiated, by the time the FTA was completed, the actual energy trade between the two nations was already “basically unimpeded.”³⁷

The provisions in the energy chapter in the US–Canada FTA primarily reaffirmed the general trade commitments the countries had under the General Agreement on Trade and Tariffs that came into effect in 1948 (GATT). The chapter clarified that prohibitions on import and export restrictions included energy products, including minimum export prices.³⁸ There were two primary alterations to the general GATT provisions. First, the chapter narrowed the circumstances when a party could limit exports in the time of a supply shortage, requiring that the proportion of exports not be reduced relative to the overall supply of

the good. This provision was viewed by the United States as additional protection against a repeat of Canadian oil export restrictions in the event of future supply shocks.³⁹ Second, the chapter narrowed the circumstances of when a party could restrict exports based on national security concerns. Although both of these provisions did make changes to existing free trade rules, a 1988 Congressional Research Service report noted that the initial effects of the energy chapter upon energy trade would likely be “largely symbolic” because there were already few barriers to trade in energy between the countries.⁴⁰

The provisions of the US–Canada FTA energy chapter became the basis of the NAFTA energy chapter. Since the US and Canada energy trade was already covered by the provisions in their bilateral FTA, Mexico was the main target for trade liberalization in the NAFTA negotiations. Mexico had very long-standing protectionist measures regarding energy production and distribution, particularly for crude oil, which stemmed from the nationalization of the oil sector in 1938. These included restrictions on foreign ownership of crude oil reserves and a monopoly for state oil company *Petróleos Mexicanos* (Pemex). The state ownership of oil was enshrined in the Mexican constitution and was fundamental to views of Mexican sovereignty.⁴¹

From the beginning of negotiations on NAFTA, the United States insisted on an energy chapter.⁴² Two of its primary goals were to open the Mexican energy sector (primarily oil production) to foreign participation and to secure promises from Mexico to limit the circumstances under which exports of crude oil could be reduced, similar to the limitations in the US–Canada FTA.⁴³ Although some Mexican officials recognized that they needed to open their energy sector to secure expertise and investments to maintain and expand crude oil production, the Mexican position going in to the NAFTA negotiations was that there would not be an energy chapter.⁴⁴ Mexico outlined the fundamentals of its position (both privately and publicly) in a list of five nonnegotiable positions, which came to be known as the “Five Noes.”⁴⁵

Midway through the negotiations, Mexico agreed to form a working group to negotiate a separate energy chapter but only on the condition that the chapter also included petrochemicals, which was an area in which Mexico had more flexibility to negotiate.⁴⁶ In the end, Mexico held firm on several points. While Mexico opened up some aspects

of the energy sector, it did not make any concessions regarding national ownership over natural resources or on the Pemex monopoly in oil exploration and production, and took extensive reservations to the NAFTA energy chapter.⁴⁷

Therefore, while the NAFTA provisions clarify that the relevant provisions of the GATT apply to energy products, like the US–Canada FTA, it also specified that many of these key provisions did not apply to Mexico. The primary alterations NAFTA made to generally applicable GATT provisions for energy products included:

- limiting some of the exceptions the parties could utilize under the GATT to restrict imports or exports on energy products;⁴⁸
- explicitly stating that domestic energy regulatory measures are subject to national treatment and should be undertaken to promote a stable commercial environment; and
- narrowing the grounds upon which the national security justification for restricting imports or exports could be invoked for energy products.⁴⁹

Among other NAFTA provisions relevant to energy, those regarding investment protections in chapter eleven warrant brief mention.⁵⁰ Some of the first expropriation cases adjudicated by international arbitration tribunals involved oil investment,⁵¹ and over the past three decades approximately 40 percent of investor–state arbitration cases involved energy and raw materials.⁵² Chapter eleven provides protection to investors from one NAFTA party with investments in the other NAFTA parties, including nondiscrimination (MFN and national treatment), guarantees of minimum standard of treatment, and protections against expropriation.⁵³ The chapter was innovative compared to many previous investor-protection treaties (including investment provisions in the US–Canada FTA) in that it extended protection beyond just foreign direct investment. It included binding investor–state arbitration provisions allowing an aggrieved foreign investor to seek money damages from a host country in international arbitration.⁵⁴

The NAFTA led to some liberalization in Mexico’s energy sector despite Mexico’s reservations. Mexico agreed to increase US and Canadian access to the electricity, petrochemical (other than basic petrochemicals), and

natural gas transport markets. Perhaps the biggest concession on energy obtained by the United States was not in the energy chapter but in the government procurement chapter, wherein Mexico agreed to open procurement contracts of Pemex and CFE (the state electricity commission) to foreign participation.⁵⁵

EU DEEP AND COMPREHENSIVE FREE TRADE AREA(S)

The energy chapter of the EU–Ukraine Deep and Comprehensive Free Trade Area (DCFTA) was forged in a significantly different context. Ukraine was already a member of the Energy Community Treaty (ECT) in Europe, which created an integrated market for electricity and natural gas between the European Union and the other contracting countries.⁵⁶ As party to the ECT, Ukraine was already obligated to implement the most recent EU legislation and regulatory regime on electricity and natural gas when it negotiated the DCFTA.⁵⁷ The EU–Ukraine DCFTA energy chapter added four pillars to those existing obligations by:⁵⁸

- prohibiting dual pricing in gas and electricity markets (i.e., a party cannot impose prices on exported energy products that are higher than domestic prices);
- reiterating obligations on freedom of transit from the GATT (and noting it applies to energy products), and establishing a fast-track dispute settlement procedure and other measures to ensure early consultation between parties in the event of a supply problem;
- establishing a distinct and independent regulator for gas and electricity markets; and
- requiring nondiscriminatory access to licensing and production of hydrocarbons.

The EU–Ukraine DCFTA was signed in June 2014, and it was expected to provisionally enter into force in November 2014.⁵⁹ The EU and Ukraine both ratified the treaty in September 2014. But, as a result of trilateral talks among the EU, Ukraine and Russia regarding the unrest in Ukraine, the EU and Ukraine agreed to postpone provisional application of the DCFTA until December 31, 2015.⁶⁰

The EU also signed DCFTAs with Moldova and Georgia at the same time that it signed one with Ukraine.⁶¹ Each of those DCFTAs include the first three of the four pillars in the Ukraine agreement, but do not include any provisions on nondiscriminatory access to licensing and production of hydrocarbons.⁶² Each of those agreements has been ratified by the respective sides, and they are all being provisionally applied.⁶³

TRADE PROVISIONS IN THE ENERGY CHARTER TREATY

The Energy Charter Treaty (1998) was negotiated between EU countries, former Soviet countries (including Russia), and other Eastern European and Asian countries in the wake of the fall of the Soviet Union, to strengthen the rule of law on energy issues and take advantage of the opportunity to overcome the Cold War economic divisions. Russia and many other former Soviet states had abundant energy resources, but were in desperate need of Western investment to develop them.⁶⁴ Western Europe was interested in diversifying its energy supplies to reduce its reliance on the Middle East.⁶⁵ The treaty covered five broad areas: energy investment, energy trade, freedom of energy transit, environmental protections, and dispute settlement.⁶⁶ The treaty currently has 54 parties, primarily from Europe and Central Asia.⁶⁷ Russia signed the Energy Charter Treaty in 1994, but never ratified it. It announced in 2009 that it no longer intended to ratify the treaty and ceased applying its provisions.⁶⁸

The Energy Charter Treaty contains an investment protection regime modeled on chapter eleven of the NAFTA (as well as bilateral investment treaties) and includes a binding investor–state dispute resolution mechanism that allows a foreign investor to take a host government to binding international arbitration in certain circumstances.⁶⁹

The treaty does not contain a new set of trade rules, but rather extends WTO trade rules to energy products and energy-related equipment between the WTO members and non-WTO members of the treaty (as well as between the non-WTO members of the treaty).⁷⁰ Because the treaty included a substantial number of non-WTO members (and still includes five countries that are not WTO members), including the WTO trade rules to energy created new

legal obligations between some countries.⁷¹ An amendment negotiated in 1998 entered into force in 2010 that extended the scope of the treaty to trade in energy-related equipment and a mechanism for addressing customs duties on energy-related imports and exports.⁷²

The Energy Charter Treaty also includes specific provisions on the transport of energy, (an important issue as demonstrated by the subsequent experience Europe has had with interrupted natural gas delivery from Russia as a result of disputes between Russia and Ukraine in the 2000s). These provisions were meant to supplement the general nondiscrimination in transit rules for trade in goods in the WTO, including explicitly covering energy carried over a grid by providing more specificity in the terms of freedom of transit as well as the enforceability of the transit provision through a special, rapid conciliation procedure to deal with transit disputes.⁷³ The Energy Charter Treaty, however, does not require countries to grant third-party access to transit facilities, which can be a key issue in countries where there is monopoly control of the energy infrastructure.

ENERGY IN THE TTIP NEGOTIATIONS

While the European Union is in favor of a separate energy chapter in TTIP, the United States has been reluctant to endorse such a chapter, although it also has not opposed one. An EU non-paper reported in the press in May 2014 indicated that up to that time the United States had only indicated a limited willingness to consider energy-specific provisions on transport and transit and offshore safety.⁷⁴ This section will examine the EU's proposals and provide an analytical framework for transatlantic policymakers to consider whether or how energy provisions in TTIP can be addressed.

The EU's proposals for an energy chapter in the TTIP negotiations are much more extensive than the energy-specific trade provisions in previous agreements. In its position papers, the EU identified the deficiencies in existing WTO rules related to trade in energy products and services and proposed the separate energy chapter be established with specific provisions to address those deficiencies.⁷⁵ The primary reasons offered by the EU for including an energy chapter (at least in its public position papers) have been to “serve as a model for subsequent negotiations involving third countries” and “send a powerful signal to other countries that trade in raw materials and energy can be and will be subject to global governance.”⁷⁶

It is certainly true that including particular provisions or covering particular issues in a treaty can help solidify the status of those provisions models for other international negotiations. Portions of NAFTA became templates for negotiations in the WTO,⁷⁷ and regional trade agreements have helped expand acceptance of trade law into new areas.⁷⁸

Different types of treaty provisions have different persuasiveness as potential model rules. A treaty (or specific provision in a treaty) is likely to be more influential if it is adopted by a state that will actually be constrained by the rules and norms in that treaty. For example, scholars have noted that in developing the treaty against land mines in 1990s, it was important for France and Great Britain to support the treaty since they were both land mine producers.⁷⁹ Similarly, some states are more resistant than others to being influenced by model rules. Scholars have noted that the EU has not had much success in trying to influence behavior of certain powerful states such as Russia and China⁸⁰ and have noted a declining normative influence

of the EU over smaller states in its neighborhood.⁸¹

Keeping these factors in mind, there are three basic considerations that could help frame the assessment of whether and how to address energy issues in TTIP, including whether a separate energy chapter is needed.

1) Is a provision needed to improve some aspect of energy trade investment between the United States and the European Union? In other words, if there is not an energy-specific provision in TTIP, would it leave a trade issue unaddressed? Relevant questions to this consideration include:

- Does a general TTIP (or WTO) provision already cover the issue?
- Is the issue addressed by a potential provision currently a trade issue between the United States and the European Union?
- If not currently a trade issue, what is the likelihood that it could become one in the future?

2) What is the likelihood that including the provision in TTIP will successfully resolve (or improve) the issue? How likely is it that a model provision in TTIP will influence the other target state(s)? Some of the issues covered by the EU proposals are more politically contentious (in the United States and/or geopolitically) than others. The more politically controversial an issue is—such as eliminating restrictions on US crude oil exports—the less likely it is that including a provision in TTIP will resolve it. On the other hand, many of the issues are more technical and seek to resolve ambiguities and gaps that exist in the current set of rules. The lack of a clear definition of energy services is an example of an issue where even countries that largely agree on trade policies and goals could end up in disputes regarding what disciplines apply because of inherent ambiguity in the current rules.

3) What are the potential unintended consequences of including a particular provision in the agreement? Unintentionally, certain provisions could be stumbling into hot-button political issues that make acceptance of the agreement more difficult or create potential complications in implementing the agreement over time.

The answer to any one of these questions is unlikely to determine how a particular provision or issue should be treated. But the systematic assessment of issues with these questions can help prioritize which among the proposed issues should be included in the TTIP and help determine whether a separate energy chapter is advisable.

For example, a proposed energy provision may not be necessary in the TTIP agreement because it is already addressed by a general WTO provision and covers an issue that is not currently a trade problem between the United States and the European Union. However, it may still be advisable to include the provision. As discussed in chapter “Treaties Addressing Trade in Energy,” when the US–Canada FTA was negotiated, the energy trade between the two countries was already very open, so little immediate impact was anticipated. In such a circumstance, the FTA provisions can serve as additional insurance against one party adopting more trade or investment-restrictive measures in the future.⁸² The provision may also serve as a sort of model provision for which the European Union is advocating in TTIP. Again, the US–Canada FTA certainly

influenced the NAFTA energy chapter, which influenced the Energy Charter Treaty negotiations.

On the other hand, if there are potentially unintended, adverse consequences that would come from including a provision like that described in the previous paragraph, then the costs of including it likely outweigh the benefits. The benefits also decline if a provision is included to influence other negotiations and has little possibility of serving as a compelling model provision for other states and negotiations in the future.

Table 2 lists the issues that have been proposed by the European Union for inclusion in an energy chapter and identifies whether those issues are addressed by general WTO provisions and/or by the energy-specific provisions of existing agreements.⁸³

This is an appropriate set of issues to consider for energy in trade negotiations, especially if the goal is to develop a model chapter for use in other agreements. The list is drawn from specific situations and experiences in the WTO and in other negotiations, and is consistent with the issues

Table 2: Issues EU has proposed for a TTIP energy chapter

EU-Proposed TTIP Energy Chapter Issues	Applicable General WTO Provision	Energy-Specific Provisions in the NAFTA, EU–Ukraine DCFTA, or Energy Charter Treaty
Elimination of quantitative export restrictions on goods	Art. XI:1	NAFTA, DCFTA ^a , Energy Charter Treaty
Freedom of transit for energy goods	Art. V	DCFTA ^a , Energy Charter Treaty
Elimination of local content requirements	Art. III(5)	None
Elimination of dual pricing	None	NAFTA; DCFTA ^a
Nondiscriminatory access for exploitation of energy resources	None	DCFTA
Third-party access guaranteed to pipelines or electricity grids	None	None
State-owned enterprises required to act in commercially competitive ways	None	None
Greater transparency in domestic processes of licensing for trade and investment activities in energy	None	None
Address non-tariff barriers and trade irritants on APEC-agreed environmental goods	None	None
Renewable energy and energy efficiency—parties may maintain or establish regulations on energy performance of products, appliances, and processes while working toward convergence of US and EU standards	None	None
Develop common regulatory commitments for offshore oil and gas safety standards	None	None

^a The same provisions are also in the EU–Moldova and the EU–Georgia DCFTAs.

identified in academic and policy literature as areas ripe for reform. For example, Russia and other countries have asserted, despite a lack of textual support, the freedom of transit principle in GATT Article V does not apply to fixed transit infrastructure such as pipelines.⁸⁴ There is also debate about whether those provisions apply at all to the transit of electricity through grids.⁸⁵ Indeed, the United States has long been a proponent of many of the issues identified for inclusion in TTIP by the European Union, including opposition to dual pricing, opposition to export restrictions, favoring nondiscriminatory access to exploit resources that have been opened for development.⁸⁶

However, while this list may flag issues appropriate for consideration, it does not necessarily mean that all of the issues identified should have an energy-specific provision devoted to them in TTIP. Examining a few specific EU proposals with the above framework will illustrate how that framework can help inform the negotiations, as well as how the framework does not necessarily produce definitive answers.

Perhaps the area where TTIP could have the largest impact on US–EU energy trade is in addressing export restrictions, particularly if a provision could impact US rules on the export of crude oil and LNG. The possibility of the United States becoming an alternate supplier of oil and natural gas is tantalizing for the European Union as this would lessen its energy dependence on Russia.⁸⁷ It is understandable that the European Union would want the assurance of an explicit provision in TTIP guaranteeing that US export restrictions would not constrict their supplies.⁸⁸ Indeed, the United States has been a strong advocate for the idea that the European Union needs to diversify its energy supplies. Concerns about supply security and diversification are similar to the issues that motivated the United States to demand separate energy chapters in the Canada–US FTA and NAFTA, including an explicit bar on energy export restrictions. Given this, the US position in the negotiations resisting a separate energy chapter is arguably inconsistent with its past positions.

In addition, in the case of LNG, it is worth noting that exports are authorized under current US law to any country or area with which the United States has an FTA.⁸⁹ Thus, a stronger provision on export restrictions may not affect actual trade flows.⁹⁰

Additionally, restrictions on crude oil and LNG exports are arguably already covered by general WTO provisions, making an energy-explicit provision in TTIP redundant. The

European Union is correct in arguing that existing WTO rules tend to focus more on import restrictions than export restrictions. But the recent victories by the United States and the European Union against China in WTO dispute proceedings concerning exports of China's raw materials and rare earth elements have increased the salience of the existing WTO provisions on export restrictions.

Against the uncertain practical benefits of explicitly addressing export restrictions of energy goods in TTIP weighs the potential unintended consequence of snarling the agreement in what has typically been a contentious political issue in the United States—the debate over oil exports. To date, despite politicians such as Senator Murkowski advocating in favor of allowing unrestricted crude oil exports, even the Republican caucus is divided on the issue.⁹¹ Policymakers should weigh the risk that making TTIP an explicit part of the debate on the US oil export limits could add to political opposition to TTIP from US elected officials who would otherwise be supportive of TTIP.

Another reason the European Union is eager to build an energy chapter into TTIP is to reinforce that GATT Article V freedom of transit obligations apply to pipeline transport and energy grids. Unlike the issue of export restrictions, where there is uncertain benefit in the TTIP context, this issue appears to have almost no direct relevance to trade flows under TTIP. There is no indication that the European Union and the United States have any disagreement about the applicability or meaning of GATT freedom of transit in the energy context.⁹² There are limited energy product flows that originate outside of the United States and the European Union that then are transported through the territory of one on its way to the other party. Likewise, provisions regarding transit on an electrical grid seem irrelevant where there is no connection and where there is unlikely to ever be a connection between the grids of the parties.

However, it is understandable that the European Union would want to establish a more precise model rule on freedom of transit as it is a geopolitically important issue in dealing with Russia and energy access to the EU's east. But it seems unlikely that addressing freedom of transit in TTIP will be particularly influential as a model rule as it would not actually alter the relationship between the United States and European Union, and Russia, clearly one of the main targets to be influenced by the model rule, has proven very resistant to influence from EU norm-setting. Also,

LESSONS FROM MEXICO AND THE NAFTA ENERGY CHAPTER

The political dynamics that make lifting US crude oil export restrictions difficult may not be as deeply ingrained as the issue of sovereign ownership of oil in Mexico, but Mexico's experience with NAFTA may be instructive. When NAFTA was negotiated in the early 1990s, commentators noted that Mexico needed more foreign investment and expertise to increase oil production in the long term.⁹³ It was not until after production had peaked in 2004, and then dropped by nearly 25 percent by 2010, that the political situation shifted enough to enable extensive energy sector reforms, including constitutional reforms.⁹⁴ Twenty years after NAFTA was negotiated, the reforms grant greater access for foreign companies to Mexican oil upstream. This was driven not by the NAFTA provision recognizing the desirability of "sustained and gradual liberalization" in the energy sector, but by fundamental shifts in the trajectory of Mexican oil production and the interaction of that trend with its domestic politics.

Although NAFTA did not directly contribute to the recent Mexican reforms, the limited gains that were

made by the NAFTA energy chapter in liberalizing some parts of the Mexican energy sector, as well as the broader institutional reforms in Mexico's economy after the NAFTA entered into force, may have played a role.⁹⁵ While the NAFTA reforms in Mexico did not reach the oil sector, they did allow some expanded participation by private firms in limited areas, such as in procurement contracts and in aspects of the electricity and gas sectors.⁹⁶ This limited liberalization in the energy sector has not been identified as having played a substantial role in the reforms, which were driven by the overwhelming fiscal pressure that came from decades of underinvestment and falling oil production,⁹⁷ but it may have played some role in setting the political stage for reform.

The Mexican experience with NAFTA illustrates the limited ability for an international trade agreement to trump intensely held domestic political positions. But, over time, small gains made in such a trade agreement may play some role in setting the stage for how reforms occur when domestic political change is realized.

the Energy Charter Treaty already covers the key transit countries in Eastern Europe except Russia, which never joined the treaty and announced it would no longer apply it provisionally in 2009.⁹⁸

In short, clarifying freedom of transit would seem to be a provision with limited relevance to the EU-US trade context and limited prospect of influencing other key countries (at least in the short term). The potential for unintended consequences lies in the fact that such an explicit provision could apply to transit of Canadian oil through the United States. Increasing the potential flow of oil sand crude through the United States has proved to be one of the most contentious US environmental issues over the last half decade.

This should not mean there is no room for energy-specific provisions addressing export restrictions or freedom of transit in TTIP. The examples are meant to inform the framing of analysis, rather than determine those issues. The

framing analysis helps illuminate what questions need to be answered from each negotiating side. On the issue of unrestricted US energy exports, it would seem incumbent on the United States to explain the apparent inconsistency between its negotiating position opposing explicitly addressing them and its encouragement of the European Union to diversify its sources of supply. Is it simply the domestic politics of the issue of crude oil exports driving that position, or is there something else? On the issue of freedom of transport, the European Union needs to explain why it is worth taking on any risk of unintended consequences by including a provision that is unlikely to have any practical impact on trade between the United States and EU, which also makes such a provision less likely to be influential as a model.

In contrast to the above issues, there are some energy issues for which the proper application of WTO provisions is simply unclear. Examples of this would be trade in energy

services, which has been identified by US, EU and policy commentators as in need of further clarification.⁹⁹ In addition, there is the need for clarification of the rules for acceptable subsidies for renewable energy, which is another unresolved issue in the WTO system.¹⁰⁰ As noted in Table 2, most of the remaining issues identified by the European Union fall into the category of issues that are not explicitly addressed by general WTO provisions or previous energy-specific provisions. Using the framing considerations identified here would help prioritize among these other issues by identifying whether their inclusion would have a more direct positive impact on trade between the European Union and the United States, whether and how they could contribute to the development of clearer multilateral rules, and whether there are potential unintended consequences of including them in TTIP.

Whatever energy-specific provisions may be selected for inclusion in TTIP, the question remains whether to compile them in a separate chapter or leave them interspersed throughout the agreement. Ultimately, this question may in part be one of political messaging and drafting convenience, rather than legal substance. A separate chapter may send a political signal of energy's importance, as the European Union asserts, and make it more convenient to examine such measures in one place in the agreement without adding to or detracting from the substantive impact of those provisions. For example, one of the most significant substantive gains the United States made in the NAFTA energy negotiations was in getting Mexico to open Pemex and CFE contracts to foreign participation. This achievement was reflected in the government procurement chapter and not in the energy chapter.¹⁰¹

Whether a separate energy chapter would be influential depends in large part on its substance. Would it include provisions that actually alter the trade dynamics between the United States and the European Union? Would it include provisions on the more politically difficult issues? One potential unintended consequence of including a separate chapter on energy could be the possibility of a weak chapter being seen not as an example of model rules, but as an example of how even two actors that have traditionally aligned positions on trade in energy may be unable to negotiate resolutions on the toughest issues.

CONCLUSION

Trade in energy goods is a sizeable portion of transatlantic trade. Although the WTO agreements have general provisions that govern trade in energy, both the United States and the European Union have signed on to other FTAs that include energy-specific chapters. To determine what energy-specific provisions should be in TTIP, the United States and the European Union should consider many factors, including whether a provision is necessary to improve the transatlantic trade relationship; how likely it is that a provision will be influential as a model provision; and the potential unintended consequences of including a provision in TTIP.

Energy-specific provisions in a separate chapter on energy can have political or symbolic importance, but would not alter the substance or legal impact of the individual provisions. There is a risk of entangling TTIP approval in additional, politically contentious issues in the United States, such as crude oil exports, and sensitive environmental issues, such as the exploitation of Canadian oil sands.

While including provisions in a treaty can help establish model rules or norms for future negotiations, there are reasons to be cautious about how much influence the proposed EU provisions might have in the future for two reasons. First, some potential future negotiating partners are highly resistant to influence from international norms. Second, provisions included in TTIP that do not have any real impact on the trade relationship are likely to be less influential in the future.

The framing outlined in this paper does not ultimately answer the question of what, if any, energy-specific provisions should be included in TTIP, but following it would help structure the dialogue in a way that focuses on the potential utility of the provisions—both to the transatlantic trade relationship and as model provisions—weighed against potential unintended consequences of including a provision.

NOTES

1. S. Donnan, “Europeans urge US to push power button on trade deal,” *Financial Times*, 27 July 2014, <http://www.ft.com/cms/s/0/fb4aa88e-10cd-11e4-b116-00144feabdc0.html>.
2. The only US FTAs with separate energy chapters have been NAFTA and the US–Canada FTA that preceded it. The EU only has a separate energy chapter in its FTA with the Ukraine, although the negotiated, but not yet in force, EU–Singapore FTA has a chapter on non-tariff barriers related to renewable energy.
3. United Nations Conference on Trade and Development, “Trade Agreements, Petroleum and Energy Policies 2000,” New York and Geneva, 2000, p. 14, http://unctad.org/en/Docs/itcdtsb9_en.pdf.
4. European Commission, “Energy security: Commission puts forward comprehensive strategy to strengthen security of supply,” 28 May 2014, http://europa.eu/rapid/press-release_IP-14-606_en.htm.
5. Energy Information Administration, *Annual Energy Outlook*, 2014, [http://www.eia.gov/forecasts/aeo/pdf/0383\(2014\).pdf](http://www.eia.gov/forecasts/aeo/pdf/0383(2014).pdf).
6. Energy Information Administration, Frequently Asked Questions, “How much oil consumed by the United States comes from foreign sources?” <http://www.eia.gov/tools/faqs/faq.cfm?id=32&t=6>; <http://www.eia.gov/petroleum/weekly/archive/2011/110525/twipprint.html>.
7. J. Bordoff and T. Houser, “Navigating the US Oil Export Debate,” Columbia University Center on Global Energy Policy, 2014.
8. US Energy Information Administration, “Exports by destination: Crude oil,” http://www.eia.gov/dnav/pet/pet_move_expc_a_EPC0_EEX_mbbldpd_m.htm.
9. European Commission, Eurostat, “Energy Trends,” http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_trends#Primary_energy_production.
10. Policy Department A: Economic and Scientific Policy, “TTIP Impacts on European Energy Markets and Manufacturing Industries,” European Parliament, Directorate General for Internal Policies, p. 27, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536316/IPOL_STU\(2015\)536316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536316/IPOL_STU(2015)536316_EN.pdf).
11. Policy Department A: Economic and Scientific Policy, “TTIP Impacts on European Energy Markets and Manufacturing Industries,” European Parliament, Directorate General for Internal Policies, p. 28.
12. European Commission, Eurostat, “Volumes and prices for monthly and cumulative crude oil imports by country of origin (2013–2014),” <http://ec.europa.eu/energy/en/statistics/eu-crude-oil-imports>; <https://ec.europa.eu/energy/en/node/11>. Eastern EU member states are almost exclusively dependent on Russian gas. Policy Department A: Economic and Scientific Policy, “TTIP Impacts on European Energy Markets and Manufacturing Industries,” European Parliament, Directorate General for Internal Policies, p. 31.
13. Policy Department A: Economic and Scientific Policy, “TTIP Impacts on European Energy Markets and Manufacturing Industries,” European Parliament, Directorate General for Internal Policies, p. 28. The permitting and infrastructure development to support export of substantially more natural gas from the United States as liquefied natural gas (LNG) are underway. The United States only recently began exporting increasing amounts of crude oil to Canada (the country to which it is easiest to obtain approval for exports) in the past year.
14. Policy Department A: Economic and Scientific Policy, “TTIP Impacts on European Energy Markets and Manufacturing Industries,” European Parliament, Directorate General for Internal Policies, p. 14.

15. J. Bordoff and T. Houser, “American Gas to the Rescue? The Impact of US LNG Exports on European Security and Russian Foreign Policy,” Columbia University Center on Global Energy Policy, 2014; Policy Department A: Economic and Scientific Policy, “TTIP Impacts on European Energy Markets and Manufacturing Industries,” European Parliament, Directorate General for Internal Policies, p. 43.
16. UNCTAD, Trade Agreements, Petroleum and Energy Policies 2000, at iv; Y. Selinova, *The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector*, International Center for Trade and Sustainable Development, Geneva, 2007, at 4.
17. For a more complete description of the relevant WTO provisions, see G. Marceau, *The WTO in the Emerging Energy Governance Debate*, Global Trade and Customs Journal, Kluwer Law International, 2010; Y. Selinova, *The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector*, International Center for Trade and Sustainable Development, Geneva, 2007.
18. The question of what constitutes a “like product” can be a complex and controversial one that has been subject to consideration in several dispute proceedings. Further consideration of what issues could arise in determining like energy products is beyond the scope of this paper.
19. GATT Article I:1.
20. GATT Article III.
21. GATT Articles XI and XIII; UNCTAD, Trade Agreements, Petroleum and Energy Policies 2000, at 25.
22. GATT Article V. World Trade Organization, Panel Report, *Colombia—Ports of Entry*, (WT/DS366/R), FN 783 to para. 7.477.
23. GATT Article XI:1.
24. GATT Article XI:2(a).
25. World Trade Organization, *China—Measures Related to the Exportation of Various Raw Materials* (WT/DS394/R), http://www.wto.org/english/tratop_e/dispu_e/cas-es_e/ds394_e.htm.
26. GATT Article XX.
27. World Trade Organization, *China—Measures Related to the Exportation of Various Raw Materials* (WT/DS394/R), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm; World Trade Organization, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (WT/DS432/R), http://www.wto.org/english/tratop_e/dispu_e/cas-es_e/ds431_e.htm.
28. G. Marceau, *The WTO in the Emerging Energy Governance Debate*, Global Trade and Customs Journal, Kluwer Law International, 2010, pp. 85–86.
29. These rules derive from the General Agreement on Trade in Services (GATS).
30. G. Marceau, *The WTO in the Emerging Energy Governance Debate*, Global Trade and Customs Journal, Kluwer Law International, 2010, p. 85. https://www.wto.org/English/res_e/publications_e/wtr10_forum_e/wtr10_marceau_e.pdf
31. Energy services are the range of activities necessary to take energy products to the market from exploration to distribution. In its examination of energy services issues, UNCTAD identified the following as “core” energy services: exploration, drilling, processing and refining, transport, transmission, distribution, waste management, and disposal. UNCTAD, Trade Agreements, Petroleum and Energy Policies 2000, p. 39.
32. *Ibid.* pp. 85, 89.
33. The EU–Singapore FTA, which has been negotiated but has not yet entered into force, contains a chapter on “Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation.” DRAFT EU–Singapore FTA, Chapter Seven, trade.ec.europa.eu/doclib/html/151742.htm. The chapter is focused on explicitly prohibiting local content requirements and fostering cooperation on CCS, smart grids, energy efficiency, and other clean-energy technologies.
34. M. Gattinger, “From Government to Governance in the Energy Sector: The States of the Canada–US Energy Relationship,” *The American Review of Canadian Studies*, Summer 2005, p. 326.

35. P. Verleger, "Implications of the Energy Provisions," in J. Schott and M. Smith (eds.), *The Canada–United States Free Trade Agreement: The Global Impact*, Washington, Institute for International Economics, 1988, pp. 117–118. Both countries' restrictions on trade in energy goods had extended beyond just oil and had included measures on electricity, uranium, and natural gas. *Ibid.* Government of Canada, "The Canada–US Free Trade Agreement," p. 141, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf>.
36. M. Gattinger, "From Government to Governance in the Energy Sector: The States of the Canada–US Energy Relationship," *The American Review of Canadian Studies*, Summer 2005, p. 327.
37. Congressional Research Service, "Energy and the Free Trade Agreement," February 8, 1988, p. crs-1.
38. Congressional Research Service, "NAFTA at 20: Overview and Trade Effects," April 28, 2014, p. 3.
39. Government of Canada, "The Canada–US Free Trade Agreement," p. 143, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf>.
40. Congressional Research Service, "Energy and the Free Trade Agreement," February 8, 1988, p. crs-1.
41. F. Mayer, *Interpreting NAFTA: The Science and Art of Political Analysis*, Columbia University Press, New York, 1998.
42. A. Mena, "Getting to 'No': Defending Against Demands in NAFTA Energy Negotiations," in *Negotiating Trade: Developing Countries in the WTO and NAFTA*, J. Odell, ed., p. 179.
43. *Ibid.* p. 187.
44. *Ibid.*
45. F. Mayer, *Interpreting NAFTA: The Science and Art of Political Analysis*, Columbia University Press, New York, 1998. The five noes were: "no reduction of control over ownership, exploration, or development of petroleum, including basic petrochemicals; no loss of control over storage and distribution; no foreign ownership of gas stations; no guarantees of supply to foreign countries; and no equity contracts for exploration." *Ibid.*
46. A. Mena, "Getting to 'No': Defending Against Demands in NAFTA Energy Negotiations," in *Negotiating Trade: Developing Countries in the WTO and NAFTA*, J. Odell, ed., p. 196.
47. E. Murphy, "The Prospect for Further Energy Privatization in Mexico," in *Texas International Law Journal*, vol. 36, 2000, pp. 75–76; G. Huffbauer, et al., "NAFTA: An Assessment," Peterson Institute for International Economics, 1993, p. 33.
48. Under the GATT, exports could be restricted to temporarily relieve a critical shortage of an essential good (allowed under GATT Article XI:2(a)) or to protect an exhaustible natural resource (allowed under GATT Article XX(g)). NAFTA Article 605 provided that a NAFTA party could only impose such export restrictions on a good if the restriction did not reduce the proportion of exports to the other party relative to the overall supply of the good (605(a)). It also provided that export restrictions could not be used to impose a higher price on the exported good than is charged for that good domestically (605(b)). Mexico, however, entered a reservation to that provision (as with many of the other provisions in the energy chapter) and is exempt from its requirements.
49. NAFTA Article 607. The US analysis of the NAFTA described the narrowed restrictions: "Specifically, Canada and the United States may invoke the exception in respect of their energy trade only where an import or export restriction is necessary to permit the supply of a military establishment, to fulfill critical defense contracts, to respond to armed conflict, to assure nuclear weapons nonproliferation, or to respond to direct threats of disruption in the supply of nuclear materials for defense purposes." The North American Free Trade Agreement Implementation Act: State of Administrative Action, p. 65.

50. Y. Selivanova, *Regulation of Energy in International Trade Law: WTO, NAFTA, and Energy Charter*, p. 351, <https://books.google.com/books?id=C-Q1xKXGt4RQC&pg=PA351&lpg=PA351&dq=nafta+chapter+11+energy&source=bl&ots=k-cRYx58ZKN&sig=HGp0IPx-c56A2Lhef-NxUM-1jmlw&hl=en&sa=X&ei=64oqVfXdFvj7sATp-w4G4BA&ved=0CB0Q6AEwADgK#v=onepage&q=nafta%20chapter%202011%20energy&f=false>.
51. M. Krajewski, “The Impact of International Investment Agreements on Energy Regulation,” in C. Hermann and J. P. Terhechte (eds.), *European Yearbook of International Economic Law*, vol. 3, 2012, p. 343.
52. International Center for Settlement of Investment Disputes, “The ICSID Caseload—Statistics,” Issue 2015-1, 2015, p. 12, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20%28English%29%20%282%29_Redacted.pdf.
53. Y. Selivanova, *Regulation of Energy in International Trade Law: WTO, NAFTA, and Energy Charter*, p. 351, <https://books.google.com/books?id=CQ1xKXGt4RQC&pg=PA351&lpg=PA351&dq=nafta+chapter+11+energy&source=bl&ots=k-cRYx-58ZKN&sig=HGp0IPx-c56A2Lhef-NxUM-1jmlw&hl=en&sa=X&ei=64oqVfXdFvj7sATp-w4G4BA&ved=0CB0Q6AEwADgK#v=onepage&q=nafta%20chapter%202011%20energy&f=false>.
54. *Ibid.*
55. NAFTA: An Assessment, p. 33.
56. European Commission, *EU–Ukraine Deep and Comprehensive Free Trade Area*, http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150981.pdf, at 7. The zDCFTA was one part of a much broader EU–Ukraine Association Agreement signed to deepen ties between the Ukraine and the European Union. http://eeas.europa.eu/images/top_stories/140912_eu-ukraine-association-agreement-quick_guide.pdf. The relationship between the association agreement, including the DCFTA, and the ongoing conflict and turmoil in Ukraine, and the diplomatic agreements and efforts among the EU, Ukraine and Russia regarding the application of that agreement are beyond the scope of this paper.
57. *Ibid.* The corpus of EU laws, regulations, and policies on electricity and gas is referred to as the energy *acquis communautaire* and is specified in an annex to the Energy Community Treaty. Treaty Establishing the Energy Community, Title II, Article 11, https://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/Treaty#TitleII.
58. European Commission, *EU–Ukraine Deep and Comprehensive Free Trade Area*, http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150981.pdf, at 7.
59. Delegation of the European Union to Ukraine, “EU–Deep and Comprehensive Free Trade Area,” 27 June 2014, http://eeas.europa.eu/delegations/ukraine/eu_ukraine/trade_relation/free_trade_agreement/index_en.htm.
60. Delegation of the European Union to Ukraine, “Association Agreement,” 27 June 2014, http://eeas.europa.eu/delegations/ukraine/eu_ukraine/association_agreement/index_en.htm; European Commission, “Outcome of the Trilateral Talks on the Implementation of the EU–Ukraine Association Agreement/Deep and Comprehensive Free Trade Area,” 18 May 2015, http://europa.eu/rapid/press-release_STATEMENT-15-4992_en.htm.
61. European Commission, “The EU’s Association with Georgia, the Republic of Moldova and Ukraine,” 23 June 2014, http://europa.eu/rapid/press-release_MEMO-14-430_en.htm.
62. European Commission, “EU–Republic of Moldova Deep and Comprehensive Free-Trade Area,” 11 February 2014, http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152194.pdf, p. 8; European Commission, “EU–Georgia Deep and Comprehensive Free-Trade Area,” 11 February 2014, http://eeas.europa.eu/delegations/georgia/documents/eap_aa/dcfta_guide_2014_en.pdf, p. 7.
63. European Commission, “The EU’s Association with Georgia, the Republic of Moldova and Ukraine,” 23 June 2014, http://europa.eu/rapid/press-release_MEMO-14-430_en.htm.
64. A. Konoplyanik, T. Waelde, “Energy Charter Treaty and Its Role in International Energy,” *Journal of Energy and Natural Resources*, vol. 24, no. 4, 2006, p. 524.

65. Ibid.
66. Energy Charter Secretariat, “The Energy Charter Treaty and Related Documents,” p. 15, http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.
67. Energy Charter Secretariat, “The Energy Charter Treaty,” <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>.
68. Energy Charter Secretariat, “Energy Charter Conference Decisions,” <http://www.encharter.org/index.php?id=414&L=1%2F%5C#c1338>.
69. A. Konoplyanik, T. Waelde, “Energy Charter Treaty and Its Role in International Energy,” *Journal of Energy and Natural Resources*, vol. 24, no. 4, 2006, p. 532.
70. A. Konoplyanik, T. Waelde, “Energy Charter Treaty and Its Role in International Energy,” *Journal of Energy and Natural Resources*, vol. 24, no. 4, 2006, p. 528; Energy Charter Secretariat, “The Energy Charter Treaty and Related Documents,” p. 15, http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.
71. Energy Charter Secretariat “Energy Charter, Trade & Transit,” <http://www.encharter.org/index.php?id=5&L=0L%3%83%2%83%3%83%2%86%3%83%2%83%3%83%2%A2>.
72. Energy Charter Secretariat, “The Energy Charter Treaty and Related Documents,” p. 15, http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.
73. Energy Charter Secretariat, “The Energy Charter Treaty: A Reader’s Guide,” pp. 29-30, http://www.encharter.org/fileadmin/user_upload/Publications/ECT_Guide_ENG.pdf; M. Cossy, “Energy Trade and WTO Rules: Reflexions on Sovereignty over Natural Resources, Export Restrictions, and Freedom of Transit,” in C. Hermann and J. P. Terhechte (eds.), *European Yearbook of International Economic Law*, vol. 3, 2012, p. 299.
74. Council of the European Union memo, *Non-Paper on a Chapter on Energy and Raw Materials in TTIP*, 27 May 2014, p. 2, reported by L. DePillis, “A leaked document shows just how much the EU wants a piece of America’s fracking boom,” *The Washington Post*, 8 July 2014. <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/08/could-a-trade-deal-lift-the-u-s-long-standing-ban-on-crude-oil-exports-europe-thinks-so>
75. European Commission, EU–US Transatlantic Trade and Investment Partnership Raw Materials and Energy: Initial EU Position Paper, July 2013. European Commission, EU–US Transatlantic Trade and Investment Partnership Raw Materials and Energy: Initial EU Position Paper, July 2013.
76. European Commission, *EU–US Transatlantic Trade and Investment Partnership Raw Materials and Energy: Initial EU Position Paper*, July 2013, p. 2.
77. Congressional Research Service, “The North American Free Trade Agreement,” April 16, 2015, p. 1, <https://fas.org/sgp/crs/row/R42965.pdf>.
78. J. Barton, et al., *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*, Princeton University Press, Princeton, NJ, 2006, p. 55.
79. M. Finnemore, K. Sikkink, “International Norm Dynamics and Political Change,” *International Organization*, 52, 4, Autumn 1998, p. 901.
80. T. Forsberg, “Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type,” *Journal of Common Market Studies*, 2011 Volume 49. Number 6. pp. 1183–1204.
81. Ibid. p. 1195.
82. This increased stability and predictability was cited as a long-term benefit of the FTA in the 1988 CRS report. Congressional Research Service, “Energy and the Free Trade Agreement,” February 8, 1988, p. crs-1.
83. This list of issues is distilled from the EU’s initial position paper on energy and raw materials, and on a leaked non-paper on the same topic (see footnotes 70 and 71). It is unclear if the EU has formally raised all of these issues in the negotiations.

84. M. Cossy, “Energy Trade and WTO Rules: Reflexions on Sovereignty over Natural Resources, Export Restrictions, and Freedom of Transit,” in C. Hermann and J. P. Terhechte (eds.), *European Yearbook of International Economic Law*, vol. 3, 2012, p. 297.
85. A. Konoplyanik, T. Waelde, “Energy Charter Treaty and Its Role in International Energy,” *Journal of Energy and Natural Resources*, vol. 24, no. 4, 2006, p. 526.
86. M. Cossy, “Energy Trade and WTO Rules: Reflexions on Sovereignty over Natural Resources, Export Restrictions, and Freedom of Transit,” in C. Hermann and J. P. Terhechte (eds.), *European Yearbook of International Economic Law*, vol. 3, 2012, p. 292; World Trade Organization Council for Trade in Services, “Communication from the United States to Energy Services,” December, 2000; https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=62857,93452,34294,45607,12103,50181,739&CurrentCatalogueIdIndex=6&FullTextSearch=.
87. For example, with respect to LNG exports, see J. Bordoff and T. Houser, “American Gas to the Rescue? The Impact of US LNG Exports on European Security and Russian Foreign Policy,” Columbia University Center on Global Energy Policy, 2014.
88. N. Snow, “US, European energy leaders to discuss gas diversification measures,” *Oil & Gas Journal*, 27 March 2014, <http://www.ogj.com/articles/2014/03/us-european-energy-leaders-to-discuss-gas-diversification-measures.html>.
89. This provision in the Natural Gas Act was added in the Energy Policy Act of 1992 to ensure compliance with the NAFTA. M. Foss, et al., “North American Energy Integration: The Prospects for Regulatory Coordination and Seamless Cross-Border Transactions,” Final Technical Report, University of Houston Shell Interdisciplinary Scholars Program, 1998, p. 24.
90. J. Bordoff and T. Houser, “American Gas to the Rescue? The Impact of US LNG Exports on European Security and Russian Foreign Policy,” Columbia University Center on Global Energy Policy, 2014.
91. J. Bordoff and T. Houser, “Navigating the US Oil Export Debate,” Columbia University Center on Global Energy Policy, 2014, p. 60.
92. The disagreements about the applicability of the freedom of transit provisions in the WTO to pipeline transport have likely arisen less from ambiguity in the application of the provision, but in political expediency for certain countries to argue that freedom of transit does not apply to pipelines or grids because the infrastructure is stationary.
93. A. Mena, “Getting to ‘No’: Defending Against Demands in NAFTA Energy Negotiations,” in *Negotiating Trade: Developing Countries in the WTO and NAFTA*, J. Odell, ed., p. 179.
94. A. Lajous, “Mexican Energy Reform,” pp. 7–8, Columbia University Center on Global Energy Policy, http://energypolicy.columbia.edu/sites/default/files/energy/CGEP_Adrian%20Lajous_Mexican%20Energy%20Reform_Final.pdf. The Mexican position in the NAFTA negotiations was strengthened by the fact that state ownership of natural resources was enshrined in the constitution, but more important was that the then-current domestic politics were not yet ripe to allow extensive reform in the energy sector. Indeed, the Mexican constitution had sixty-one amendments during the time of the NAFTA negotiations and ratification. A. Mena, “Getting to ‘No’: Defending Against Demands in NAFTA Energy Negotiations,” in *Negotiating Trade: Developing Countries in the WTO and NAFTA*, J. Odell, ed., p. 205.
95. I. Morales, “The Future of Oil In Mexico: The Energy Factor in Mexico—U.S. Relations,” prepared for the Study “The Future of Oil In Mexico” sponsored by the James A. Baker III Institute for Public Policy and the Mexican Studies Programme at Nuffield College, Oxford University, April 29, 2011, pp. 23-24; M. Foss, et al., “North American Energy Integration: The Prospects for Regulatory Coordination and Seamless Cross-Border Transactions,” Final Technical Report, University of Houston Shell Interdisciplinary Scholars Program, 1998, p. 40.

96. I. Morales, “The Future of Oil In Mexico: The Energy Factor in Mexico—U.S. Relations,” prepared for the Study “The Future of Oil In Mexico” sponsored by the James A. Baker III Institute for Public Policy and the Mexican Studies Programme at Nuffield College, Oxford University, April 29, 2011, p. 25.
97. For a discussion of the drivers of reform in Mexico, see A. Lajous, “Mexican Energy Reform,” pp. 7–8, http://energypolicy.columbia.edu/sites/default/files/energy/CGEP_Adrian%20Lajous_Mexican%20Energy%20Reform_Final.pdf.
98. When Russia made the announcement, it asserted that the Energy Charter Treaty had failed to become an effective governing instrument. S. Nappert, “EU-Russia Relations in the Energy Field: The Continuing Role of International Law,” International Association for Energy Economics, 3rd quarter 2010, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&cad=rja&uact=8&ved=0CB0QFjAAOApqFQoTCP2z4_Sj3sYCFcZzPgodMQsLDA&url=https%3A%2F%2Fwww.iaee.org%2Fen%2Fpublications%2Fnewsletterdl.aspx%3Fid%3D110&ei=euumVf2OCsbn-QGx-lqyg&usq=AFQjCNEcvHbmFRfIYh2a5yXAz-C5PZnoFEg&sig2=Mwuecb4uMgZnDFNOvszBxg&bvvm=bv.97949915,d.cWw. Speculation at the time was that Russia withdrew because of a pending arbitration against it under the Treaty by Yukos shareholders and/or because Russia did not want to lose the ability to control gas flows through its territory. A. Hadfield and A. Amkhan-Bayno, “From Russia with Cold Feet: EU-Russia Energy Relations, and the Energy Charter Treaty,” International Journal of Energy Security and Environmental Research, <http://www.menachambers.com/people/adnan-amkhan-bayno/From%20Russia%20with%20Cold%20Feet%20-%20MENA%20Chambers.pdf>.
99. T. Cottier, et al., “Energy in WTO Law and Policy,” in World Trade Organization, *World Trade Report 2010*, pp. 9–10.
100. *Ibid*, pp. 10–12.
101. NAFTA Chapter 10, Annex 1001.1a-1, Schedule of Mexico.



COLUMBIA | SIPA

Center on Global Energy Policy



