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EUROPEAN ENERGY LAW REPORT VII

Edited by
Martha M. ROGGENKAMP
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European Energy Law Report VII

Edited by Martha M. Roggenkamp and Ulf Hammer

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LIST OF ABBREVIATIONS

AAA	American Arbitration Association
AAUs	Assigned Amount Units
ABB	ASEA Brown Boveri
ACER	Agency for the Cooperation of Energy Regulators
ACES	American Clean Energy and Security Act
ADR	Alternative Dispute Resolution
AEP	American Electric Power
AG	Aktiengesellschaft
AIDN	Association Internationale du Droit Nucléaire
ANI	American Nuclear Insurers
BACT	Best Available Control Technology
BEB	Gewerkschaften Brigitta und Elwerath Betriebsführungs- gesellschaft mbH
BITs	Bilateral Investment Treaties
BNetzA	BundesNetzAgentur
BP	British Petroleum
CAA	Clean Air Act
CAFE	Corporate Average Fuel Economy
CARB	California Air Resources Board
CBO	Congressional Budget Office (U.S.)
CCS	Carbon Capture and Storage
CDM	Clean Development Mechanism
CEEC	Central and Eastern European Countries
CEO	Chief Executive Officer
CER	Certified Emission Reductions
CH ₄	Methane
CHP	Combined heat and power
CIF	Consorzio Industrie Fiammiferi
CIS	Commonwealth of Independent States
CLRev.	Common Market Law Review
CO ₂	Carbon Dioxide
CO ₂ e	Carbon Dioxide Emissions

CRS	Congressional Research Service
CSC	Convention on Supplementary Compensation
D-MN	Democrat from Minnesota
D-MA	Democrat from Massachusetts
D-CA	Democrat from California
DEC	Department of Environmental Conservation
DG TREN	Directorate – General for Energy and Transport
DONG	Dansk Olie og Naturgas (<i>Danish Oil and Natural Gas Company</i>)
DP	Discussion Paper
EATD	Emission Allowance Trading Directive
EC	European Commission
ECCP	European Climate Change Programme
ECFR	European Charter fundamental Rights
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECN	Energieonderzoek Centrum Nederland (Dutch Energy Research Centre)
ECR	European Court Reports
ECT	Energy Charter Treaty
EDF	Electricité de France
EEA	European Environment Agency
EEC	European Economic Community
EELR	European Energy and Environmental Law Review
EFTA	European Free Trade Association
ELINI	European Liability Insurance for the Nuclear Industry
EMANI	European Mutual Association for Nuclear Insurance
EMGTG	ExxonMobil Gastransport Deutschland GmbH
EnBW	Energie Baden-Württemberg
ENI	Ente Nazionale Idrocarburi
ENTSOG	European Network of Transmission System Operators for Gas
EP	European Parliament
EPA	Environmental Protection Agency
EPRG	Electricity Policy Research Group
ERU	Emission Reduction Unit
ESB	Economische Statistische Berichten
ETS	Emission Trading System
EU	European Union
EUAs	European Union Allowances
EU ETS	European Union Emissions Trading System
EWM	Early Warning Mechanism

FEEM	Fondazione Eni Enrico Mattei
Fed. Reg.	US Federal Register
FSB	Federal Security Service
GATT	General Agreement on Tariffs and Trade
GDF	Gaz de France
GDP	Gross Domestic Product
GHG	Greenhouse Gas
GTS	Gastransportservices
GUD	Gasunie Deutschland
HFCs	Hydrofluorocarbons
H.R.	House of Representatives
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICCT	International Council on Clean Transportation
ICDR	International Centre for Dispute Resolution
ICF	Inner City Fund
ICSID	International Centre for Settlement of Investment Disputes
I-CT	Independent from Connecticut
IEA	International Energy Agency
IFCAI	International Federation of Commercial Arbitration Institutions
INLA	International Nuclear Law Association
IPCC	Intergovernmental Panel on Climate Change
IPPC	Integrated pollution and prevention control
ISO	independent system operation
ITO	Independent Transmission System
JI	Joint Implementation
JRC-SETIS	Joint Research Centre - Strategic Energy Technology Information
LCIA	The London Court of International Arbitration
LIFO	Little in from Outside
LOFI	Little out from Inside
LNG	Liquefied Natural Gas
LPG	Liquefied Petroleum Gas
Mass.	Massachusetts
MEGAL	Mittel – Europäische - Gasleitung
MEP	Member of Parliament

MGGRA	Midwestern Greenhouse Gas Reduction Accord
MFN	Most-Favoured-Nation
MOL	Hungarian Oil and Gas Company
MOU	Memorandum of Understanding
N ₂ O	Nitrous Oxide
NACE	Nomenclature statistique des Activités économiques dans la Communauté Européenne
NAFTA	North American Free Trade Agreement
NAP	National Allocation Plans
NBER	National Bureau of Economic Research
NCAs	National Competition Authorities (in EU)
NCCR	(Swiss) National Centre of Competence in Research
NEA	Nuclear Energy Agency
NEIL	Nuclear electric Insurance Limited
NFTC	National Foreign Trade Council
NIS	New Independent States
NMa	Nederlandse Mededingsautoriteit (<i>Dutch Competition Authority</i>)
NML	Nuclear Mutual Limited
NO _x	Nitrogen Oxide
NPP	Nuclear Power Plant
NRC	Nuclear Regulatory Commission
NSR	New Source Review
N.V.	Naamloze Vennootschap (Public Limited Corporation)
NWO	Netherlands Organisation for Scientific Research
NYSERDA	New York State Energy and Research Development Authority
OECD	Organisation for Economic Co-operation and Development
OGEL	Oil, Gas & Energy Law Journal
OJ	Official Journal
ONEIL	Overseas NEIL (see NEIL)
OU	Ownership Unbundling
PCA	Agreement on Partnership and Cooperation
PEEREA	Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects.
PFCs	Perfluorocarbon
PINC	People. Ideas. Nature. Creativity.
PPC	Public Power Corporation S.A.
PRES	Press Release from the European Union
PSA	Production Sharing Agreements
PSD	Prevention of Significant Deterioration
PSR	Performance Standard Rate

RECIEL	Review of European Community and International Environmental Law
RES	Renewable Energy Source
RFF	Resources for the Future
RGGI	Regional Greenhouse Gas Initiative
R-MA	Republican from Massachusetts
R-SC	Republican from South-Carolina
RMU	Removal Units
RUE	RosUkrEnerg
RWE	Rheinisch-Westfälisches Elektrizitätswerk
S.A.	Société Anonyme
SCC	Stockholm Chamber of Commerce
SDRs	Special Drawing Rights
SET-plan	Strategic Energy Technology Plan
SF ₆	Sulfur Hexafluoride
SPV	Special Purpose Vehicle
SSNIP-test	Small but Significant and Non-transitory Increase in Price test
TAG	Trans Austria Gas
tCER	Temporary CER (see CER)
TEU	EU Treaty
TENP	Trans Europa Naturgas Pipeline
TFEU	Treaty on the Functioning of the European Union
TSO	Transmission System Operator
TWh	Tera Watt hours
UK	United Kingdom
UN	United Nations
UNCLOS	United Nation Convention on the law of the Seas
UNCITRAL	UN Commission on International Trade Law
UNFCCC	United Nation Framework Convention on Climate Change
UPM	United Paper Mills
U.S.C.	U.S. Code
USD	United States Dollar
US	United States
USDA	U.S. Department of Agriculture
USSR	Union of Soviet Socialist Republics
VP	Virtual Trading Point

List of Abbreviations

WCI	Western Climate Initiative
WTO	World Trade Organisation
WWF	World Wildlife Fund

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FOREWORD

The editors are very pleased to present the *European Energy Law Report VII*. The *European Energy Law Report* is an initiative taken by the organisers of the European Energy Law Seminar which has been organised on an annual basis since 1989 at Noordwijk aan Zee in the Netherlands. The aim of this seminar is to present an overview of the most important legal developments in the field of EC and national energy law. Whereas the first seminars concentrated on the developments at EC level, which were the results of the establishment of an Internal Energy Market, the focus has now gradually switched to the developments at the national level following the implementation of the EC directives with regard to the internal electricity and gas markets. This approach can also be found in these reports.

Similar to the *European Energy Law Reports I, II, III, IV, V* and *VI* which were presented at the following European Energy Law Seminar, this Report is also the result of the papers presented at the seminar which was held on 20 and 21 April 2009. The current report contains four sections representing the following legal topics: “Climate Change Developments in the EU and the US”, “Liberalising the EU Energy Sector: Third Energy Package and Beyond”, “Liberalising and Securing Energy Supply: A New Role for Nuclear”, and, finally, “Securing European Energy Supply: The Role of Russia”.

We are grateful for the support of the speakers at the seminar and their co-operation in rewriting their papers for the purpose of this book. We also would like to thank the authors and co-authors who were not speakers at the seminar but were willing to participate in this project so that we are able to provide you with a ‘complete’ picture of all the topics discussed. Finally, we would like to acknowledge the help and support of the publisher in publishing this book. We are confident that these reports will be part of a good and long-term tradition.

Martha Roggenkamp and Ulf Hammer
Leiden/Oslo, 10 March 2010

INTRODUCTION

Martha ROGGENKAMP and Ulf HAMMER

The European Energy Law Report VII presents an overview of the most important developments in the field of EU and national energy law and policy as discussed at the European Energy Law Seminar which was held on 20 and 21 April 2009 in Noordwijk aan Zee in the Netherlands. The book is divided into four different parts each covering a different development in the energy sector. The order and content of these sections is not necessarily the same as the papers presented at the seminar.

CLIMATE CHANGE DEVELOPMENTS

Energy law is increasingly influenced by climate change developments. This volume of the European Energy Law Report therefore begins in Part I with an analysis of recent changes in climate change regulation. One of the main legal instruments to combat climate change is the CO₂ emissions trading scheme. Following an analysis of the EU developments in emissions trading, an overview is also given of recent changes in the US.

Chapter 1 examines recent developments in EU Emissions Trading System (EU ETS) following the 2008 agreement on the Third Energy and Climate Package, which includes the goal to reduce CO₂ emissions by 20% in 2020. Consequently, the EU ETS Directive of 2003 (2003/87/EC) has been replaced by a new directive in 2009 (Directive 2009/29/EC). Leonardo Massai first discusses the legal history of the EU ETS and the problems encountered while implementing the 2003 Directive in national law and reducing CO₂ emissions in practice. Implementing climate change regulation has been a process of learning by doing and the lessons learned have been applied when drafting the 2009 Directive. The next part of the chapter discusses in more detail the most important elements of the 2009 Directive such as the extension of the trading period to eight years, the introduction of an EU-wide cap instead of 27 national caps, the introduction of new allocation methods like auctioning of emission rights, the extension of the EU ETS to other industrial sectors and gases and the new, increased harmonised rules on monitoring and reporting. Although the 2009 Directive is still in its implementation phase as the deadline for national implementation is set at 31 December 2012, the author

concludes that the 2009 Directive is the result of a unique level of cooperation between EU institutions and that it has contributed to reinforce the EU negotiating position as regards the international climate change regime after 2012.

Chapter II focuses on one particular aspect of the 2009 Directive as it discusses the pros and cons of auctioning emission rights. These pros and cons are considered by Edwin Woerdman and Stefan Weishaar from a law and economic perspective. As described in Chapter I of the book, the EU ETS was originally based on a regime of national allocation of emission rights free of charge. The regime applied to the industrial sector of which the energy sector is responsible for half of total covered emissions. Gradually, the regime by which allowances are granted for free has been changed. Whereas under the 2008-2012 allocation period 10% of the allowances can be auctioned, the 2009 Directive requires that the auctioning rate for the electricity sector will be 100% after 2012, with the possible exception of power plants in some Eastern European Member States. The shift to auctioning is based on the assumption that an auctioning regime is more efficient and eliminates any windfall profits. Based on this assumption the authors analyse from a law and economics perspective whether the shift from awarding allowances for free to auctioning allowances indeed introduces a regime which is more 'effective', 'efficient' and 'fair'. The authors conclude that auctioning allowances is not more effective or efficient than the previous regime. The only 'pro' is the possible fairness for consumers who wish to stop any windfall profits of electricity producers under the EU ETS. However, from an economic perspective this is not a strong argument as auctioning of emission rights only reverses the financial flows: instead of a wealth transfer from government to companies, auctioning implies a wealth transfer from companies to government.

Chapter III is entitled "The Carbon Challenge to Competition – Ensuring Undistorted Competition and Competitiveness under the Current and New Emissions Trading Scheme Directive". Hans Vedder analyses the Third Energy and Climate Package and more particularly the 2009 EU ETS Directive from the perspective of competitiveness and undistorted competition. He first discusses the concepts of competitiveness and undistorted competition on the basis of the recent amendments to the EU and EC Treaties following the entry into force of the Lisbon Treaty. Despite the removal of Article 3(1)(g) EC Treaty, the existing regime ensuring undistorted competition remains the major objective of the EU. The principle of undistorted competition is obviously related to the identification of a market. One of the factors determining the geographical scope of a market is the carbon costs imposed on an industry. Differing carbon costs may result in a distortion of competition, especially between the EU and third countries, and may thus be a reason to shift production to third countries. The latter is also known as 'carbon leakage'. The new EU ETS provides some corrective measures, i.e. transitional free allocation, specific carbon leakage mechanisms and financial

instruments for industries exposed to such risks. The author concludes that there are considerable challenges to competition resulting from the new EU ETS. These challenges cannot all be met by EU competition law and follow directly from the EU's ambitious targets in relation to the international climate change negotiations. According to Hans Vedder the fundamental problem is the potential missed opportunity to engage in an international competition for the benefit of the environment.

Although the US has been one of the initiators of the introduction of a market-based instrument to combat climate changes under the Clinton administration, US policy changed in 2001 when President Bush came into office. The election of President Obama has brought about a fundamental change of US climate policy again. David Freestone and David Frenkil thus discuss in Chapter IV the US regime regarding climate change. They focus on the emissions trading regime in the US and question whether a new regime is approaching. In doing so, they distinguish between developments on federal and state level. The authors discuss several state initiatives such as the Regional Greenhouse Gas Initiative (RGGI) by ten states situated on the east coast, including New York, New Hampshire and New Jersey. The RGGI is based on a 'cap and trade' system and most allowances are distributed through quarterly auctions. Although the RGGI is the only regime currently in action, other initiatives have been established such as the Western Climate Initiative (WCI) involving six west coast states and four Canadian provinces, the Midwestern Greenhouse Gas Reduction Accord (MGGRA) involving nine Midwestern States and two Canadian provinces. In addition, California issued in 2006 the Global Warming Solutions Act setting caps for greenhouse gas emissions at 1990 levels by 2020. In absence of a Federal Government Scheme to limit greenhouse gas emissions it could be possible to link the existing initiatives as a result of which a *de facto* national regime could appear. In addition to these initiatives, individuals and even state authorities have started a series of law suits seeking the administrative agency of the US Federal Government to take regulatory action against climate change emissions. The authors analyse these law suits and discuss regulatory options such as emissions standards and permits. Subsequently the authors focus on progress made with federal climate change legislation. In 2009 the American Clear Energy and Security Act (ACES) passed the House of Senate. The Act provides emission reduction targets based on 2005 levels and envisages that emissions trading will commence in 2012. Whereas ACES aims at a 3% reduction in 2012, the targets will increase to 17% in 2020 and 83% in 2050. The authors conclude that despite the long absence of any legal measures to combat climate change, the US is now taking action. What is more, the Obama Administration wishes to play a leading role in international climate change development.

LIBERALISING THE EUROPEAN ENERGY SECTOR – THE THIRD ENERGY PACKAGE AND BEYOND

Part II concentrates on issues relating to the development of an Internal Energy Market. As in the previous European Energy Law Reports, the focus is on the impact of the Third Energy Package and the extent to which primary EU law (basically antitrust law) is applied to the energy sector.

In Chapter V, Marco Slotboom, provides an overview of “Recent Developments of Competition Law and the Impact of the Sector Inquiry”. The aim is to update the corresponding contributions in the European Energy Law Reports V and VI. His starting point is the Sector Inquiry, which found that many wholesale markets in the EU were still characterised by a predominant presence of vertically integrated incumbents. These companies still limit access by new competitors to their infrastructure, making it difficult for the latter to enter national energy supply markets. His presentation provides an overview of the attempts of the Commission and the National Competition Authorities in the EU (the NCAs) to address the issues identified by the Commission in the Sector Inquiry. First, Slotboom gives an overview of cases in the energy sector regarding Article 101 TFEU (ex Article 81 EC). Second, he presents cases in the same sector involving Article 102 TFEU (ex Article 82 EC). The chapter shows that the Commission and the NCAs have been able to put companies under a significant pressure, which has led to structural commitments. He concludes that the competition authorities seem to be able to use competition law as a tool – in addition to sector specific legislation – to create new market structure.

Subsequently, Eckart Ehlers discusses the impact of the Third Energy Package on the establishment of the internal energy market. Chapter VI is called “Third Generation of Internal Energy Market Directives: Does Further Unbundling Level the Playing Field?”. He specifically deals with the unbundling provisions in the new energy directives of 2009. His starting point is the three alternatives: the concept of full ownership unbundling (OU), the concept of an independent system operator (ISO) and the concept of an independent transmission system operator (ITO). Ehlers submits that OU prohibits energy production and supply undertakings from owning and operating energy networks in another Member State having introduced OU. This is contrary to the principle of free movement of capital as provided for by Article 63 TFEU (ex Article 56 EC). Furthermore, it is contrary to the principle of equality that publicly owned undertakings, which are vertically integrated, cannot be forced to sell their networks to private undertakings. Instead, it is sufficient that they transfer networks to other public law entities or organisationally separate state units. Consequently, publicly owned entities enjoy a privileged position versus private companies that are fully subject to OU.

In Chapter VII, Fiete Wulff focuses on another aspect involving the operation of energy infrastructure and that is the need for increasing cooperation between network operators. Under the title “Increased Cooperation of Gas System Operators in Germany – The German Gas Market is Gaining Momentum” he discusses a situation which is typical for Germany, i.e. the fact that the national energy grid consists of several integrated systems. Until recently Germany had 20 transmission system operators (TSOs), each operating in a specific market area. The management of the German system obviously requires close cooperation between these operators, which again is essential for creating a competitive German gas market. As a result of the need for further cooperation, there has been a merger of market areas. Currently there are six areas. The legal basis for the cooperation between system operators is the Energy Industry Act and the Third Party Access Model. This model implies that network users only have contracts with the operators into whose system the gas is fed in and with the operators from whose system the gas is taken. In between the contracted entry and exit points the transmission system operators cooperate with regard to the transportation of gas. The users are not part of this cooperation. From a wider European perspective, such entry-exit system and subsequent cooperation between operators is promoted by ERGEG.

In Chapter VIII, Erik Gottschal, discusses the wider European perspective in “The Relationship Between the Consolidation in the European Gas Transmission Market and the Role of Regulation”. He focuses on the cross-border trade of gas. He notes that there is a trend towards an international consolidation of energy supply companies as well as TSOs. As the current legal framework following the implementation of the 1998 and 2003 Gas Directives is national in scope, it is not adapted to efficient cross-border trade. That requires one entry-exit system with one virtual trading point for a market area crossing national borders. Although the respective legal regimes of Member States are nationally oriented, the main focus of the Third Energy Package and the 2009 Electricity and Gas Directives is to create one Internal Energy Market. But this requires a close cooperation between Member States in the implementation process, which is not the case for the time being.

LIBERALISING AND SECURING EU ENERGY SUPPLY – A NEW ROLE FOR NUCLEAR

Previous European Energy Law Reports have already noted the difficult balancing act between the aim to liberalise the energy sector on the one hand and securing a regular energy supply on the other hand. A third element complicating this balancing act is the need to protect climate change. Part III of this book addresses the impact of nuclear energy in this complicated balancing act.

Mark Newbery analyses in Chapter IX the “Privatisation of the Nuclear Energy Sector and Long-Term Liability: UK Example”. The author notes a revival of nuclear energy and looks at some issues relating to long-term liability issues in the UK. In general, the UK energy sector is characterised by a process of privatisation previous to liberalisation. As the nuclear generating industry (apart from the fuel manufacturer) was part of the privatisation and restructuring process, the legislator was forced to deal with issues concerning decommissioning and long-term storage of waste. The Energy Act 2004 ushered a new regime for managing the decommissioning of nuclear facilities in the UK with the creation of the Nuclear Decommissioning Authority (NDA), the latter also being responsible for transferring (responsibility for) certain properties to other entities. The Energy Act 2008 establishes a new regime for nuclear decommissioning as a result of which the full costs of decommissioning falls on the operator of the plant/the licensee. In addition, other corporate bodies can be held liable as well. The author then compares the UK regime with the regime applied in France (world leader in nuclear technology) and in Finland and Spain (also experiencing a revival of nuclear energy). He concludes that the licensing regimes in these countries differ as well as the provisions to be made to cover any costs resulting from decommissioning and long-term storage of nuclear waste. As nuclear is likely to play a more important role in the EU energy sector, a closer cooperation between regulators and even harmonisation of national rules or standardisation of requirements seem to be a next but inevitable step when applying nuclear energy in the EU.

Tom Vanden Borre then discusses the issue of third party nuclear liability in Chapter X. Under the title “Nuclear Liability: An Anachronism in EU Energy Policy?” the author discusses the role of nuclear energy in securing energy supply and combating climate change in the EU. Any market party interested in developing nuclear energy will be confronted with rules on nuclear liability. The rules on civil liability for damages resulting from a nuclear incident are laid down in international conventions and not in EU law. The author discusses whether these rules provide a sufficient level of harmonisation amongst EU Member States. The author also notes that whereas the US and EU liability rules were rather similar in the 1960s, this is not the case anymore 50 years later. Although only 14 out of 27 Member States operate nuclear energy plants and nuclear covers about 14% of total electricity generation in the EU, most EU Member States (except for five not involved in nuclear) have joined the nuclear liability conventions. The high degree of participation in nuclear liability conventions has resulted in the harmonisation of the main principles of nuclear liability but leave considerable freedom for the contracting parties (member states) as far as the liability amounts are concerned. It means that the current nuclear liability regime in the EU may distort competition on the EU energy market. The author therefore argues that the EU regime should be further harmonised so that liability amounts can be set

at EU level. Such a regime would also entail the need for an EU regulatory body to adjust liability amounts.

SECURING EUROPEAN ENERGY SUPPLY – THE ROLE OF RUSSIA

Part IV deals with another aspect of European energy supply security, i.e. the role of Russia in supplying hydrocarbons. In previous European Energy Law Reports the focus has been on the impact of the Energy Charter Treaty on supply security. The current report deals more specifically with Russia as an energy exporter and recent developments regarding the production and transport of natural gas.

In Chapter XI, Sergej Seliverstov presents an analysis from a Russian perspective on the production of natural gas in the Barents Sea. Under the title “Securing Future Energy Supply by Developing the Barents Sea: An International and National Law Perspective” he discusses existing and possible challenges for the development of the Barents Sea Region energy potential and the solutions that both international and national legal regimes may provide. He first states that the general understanding of the concept of security of energy supply is largely the same for Russia and the EU. The difference subsists in the factual circumstances: Russia is the energy exporter and the EU is the energy importer. This determines a difference in approach. Seliverstov then focuses on the Barents Sea, and presents the international regime governing oil and gas activities in this area, which in general is complicated by the absence of a general delimitation treaty between Russia and Norway. This creates difficulties in exploiting the natural resources of the region. He then presents the Russian legislation applying to this area. *De facto* it means that only Gazprom, Rosneft and their subsidiaries may be granted licences to exploit hydrocarbons on the Continental Shelf of the Barents Sea. Foreign companies can buy shares in these companies according to the Law on Strategic Investments, but such transactions are subject to government approval. Seliverstov concludes that solutions adapted to each specific project will become inevitable in almost every project.

In Chapter XII, entitled “Russian Energy Policy and Dispute Settlement – An Overview”, Kaj Hobér then discusses the current status of Russian energy policy and dispute settlement mechanism. First, the chapter sets out Russia’s influence on gas transit in Europe and the disputes that have erupted in part due to Russia’s energy policy. Secondly, the chapter explains Russia’s attitude towards dispute settlement in the energy sector. In the latter regard, investment disputes, gas transit disputes and disputes involving gas contracts between Russian and Ukrainian companies are analysed. Finally, Hobér proposes an arbitration regime that will more efficiently resolve future disputes in the European energy sector. Parties

should contemplate agreeing on an arbitration regime for gas transit disputes that allows emergency arbitrators to order interim measures and that allows for expedited arbitration under the auspices of an arbitral institution in the event that a dispute does occur.

Finally, Jan-Gerrit Westerhof examines in Chapter XIII from an EU perspective the transit conflict between Russia and Ukraine. In “The Transit Conflict between Russia and Ukraine from a Legal Perspective” he describes the Russia-Ukraine transit conflict of January 2009 that also affected gas supply to several Member States of the EU. He analyses the principle of freedom of transit which is reflected in several treaties and agreements, including the Energy Charter Treaty (ECT) and the Partnership and Cooperation Agreement (PCA) between the EU and Ukraine. Westerhof notes that the parties did not invoke a dispute settlement procedure, despite the different possibilities available. The author concludes that the Early Warning Mechanism did not work and advocates that the dispute settlement mechanisms should be adapted. Several institutions are currently preparing a rapid dispute settlement procedure. Additional ideas for solving a transit crisis are laid down in the draft Transit Protocol developed within the ECT. Adopting this protocol would secure transit to an even larger extent than foreseen in the ECT.