The European Union is poised to establish a genuine European Energy Union with the new powers conferred on it by the Lisbon Treaty. The European Energy Union aims to provide secure, sustainable and affordable energy throughout the cycle of production, transport and consumption by 2030. This book outlines, analyses and evaluates the legal regime underpinning this regulatory strategy, which integrates EU law with international law and with the law of member states and affiliated states. It demonstrates that and how these legal orders work together in achieving the universally shared objective of governing and transforming the European and global energy systems. This book will appeal to scholars and students of energy law and policy and the emerging global regulatory law at international, European and nationals levels.

**Volker Roeben** is Professor of Energy Law at the Centre for Energy Law, Petroleum and Mineral Law and Policy at the University of Dundee and concurrently Visiting Professor of Law at the China University of Political Science and Law, Beijing, and Adjunct Professor at Turku University. He was interim legal adviser of the European Energy Charter, a Senior Research Fellow at the Max Planck Institute of Public International Law and a Professor at Swansea University College of Law and Criminology, as well as Professor at the University of Bradford School of Law. He has written widely on public international law and European Union law, and is currently working on the project concerning citizenship rights post-Brexit commissioned by the European Parliament.
TOWARDS A EUROPEAN ENERGY UNION

European Energy Strategy in International Law

VOLKER ROEBEN

University of Dundee
For Petra, Johanna, Karl, Georg and Lukas. May fortune smile.
CONTENTS

Preface and Acknowledgements page xiii

Introduction 1

1 The Argument of This Book 3

2 Concept and Functions of the European Energy Union 3

3 Regulation 5

4 Co-evolution 6

5 Integration 6

6 Global Regulatory Law 7

7 A Holistic View of EU Law 7

8 Assumptions of Multi-Tiered Regulation, Integration and Global Regulatory Law 8

9 Literature 9

10 Scope and Structure of This Book 10

1 Establishing the European Energy Union 15

I From the Lisbon Treaty to the Strategy for a European Energy Union 17

II The Energy Union Strategy: Context 22

1 Goals 22

2 Dimensions of Action 24

III Governance 26
viii  CONTENTS

IV International Cooperation: The External Energy Union  28

V Regulating Energy in International Law, European Union Law and National Law  28
  1 Public Good Regulation of European and Global Energy  29
  2 Multi-Tiered Regulation, Its Legal Regime and Organising Principles  33
  3 European Energy Strategy in International Law  33

2 Rules-Based Energy Governance Worldwide: Regulation of Energy in International Law  36

I Internationalising Energy  37
  1 The Universal Norm of Sustainable Energy  38
  2 Implementing Sustainable Energy in International Law  42

II Developing Energy-Specific International Law  45
  1 The Energy Charter Treaty: International Energy Regulation  45
  2 The Energy Community: Regional Energy Market Integration  65
  3 International Law for Transnational Energy Purchases and Projects  68
  4 Institutionalised Cooperation in Energy  69
  5 Sovereignty of States over Their Energy Resources and Energy Mix  70

III The Provision for Energy under the Sectoral Orders of International Laws  71
  1 The Global Economy and Energy  72
  2 Protection of the Environment and Energy  86
  3 The Oceans and Marine Energy  95
  4 Managing Energy Security  99
  5 Development and Human Rights  102

IV International Regulation of Energy and Its Legal Regime  103
  1 Regulating the Global Energy Cycle  103
  2 The Complex International Legal Regime of Energy  107
CONTENTS

3 The International Rule of Law and Energy 109
4 International Regulation of Energy and Its Enabling and Constraining Effect for the European Energy Union 112

3  Realising the European Energy Union in EU Law: Internal and External Regulation of the Energy Cycle 114

I The Constitutional Boundaries of the European Energy Union 115
   1 EU Energy Policy within the Lisbon Federalism 116
   2 Constraints: Dual-Representative Democracy, the Rule of Law and Fundamental Rights 126

II Programme, Functions and Trajectory of Regulatory Change 130
   1 The Programme of Regulatory Intervention 131
   2 The Energy Market 136
   3 Secure Energy 144
   4 Renewable Energy 148
   5 Efficient Energy 152
   6 Interconnected Energy Infrastructure 156
   7 Decarbonising the Energy System 158
   8 Energy Innovation 165

III Constitutional Order of the External European Energy Union 168
   1 Enabling an External EU Policy on Energy 169
   2 Dual Representative Democracy, the Rule of Law and Fundamental Rights as Constraints on External Energy Action 172

IV Realising the External European Energy Union 178
   1 Programme of External Regulatory Action 179
   2 The External Energy Market 182
   3 Securing External Supply 184
   4 Promoting Renewables, Energy Efficiency and Research 191
   5 Decarbonising the Global and European Energy Systems 192

V Conclusions 196
4 The Role of Coordinated Member State Law in a European Energy Union 199

I Constitutional Guarantee of Autonomous Member State Policy and Law-Making on Energy 200

II Coordinating Broad Member State Energy Policy 201

III Member State Law-Making on Energy on the Objectives of Article 194(1) TFEU and the Constraints of the Internal Market and Environmental Protection 204
1 The Energy Market 205
2 Security of Supply 210
3 Renewables 211
4 Energy Efficiency 219
5 Infrastructure Development 219
6 Decarbonisation 220

IV Member State Treaty-Making on Energy 221

V Exclusive Competence of the Member States for Their Energy Mix 223
1 Nuclear Energy and the Internal Market 224
2 Shale Gas 226
3 Coal and the Subsidisation of Fossil Fuels 227

VI Conclusions 228

5 Regulating Energy through an Integrated Legal Regime: Formation, Normative Questions and Global Regulatory Law 230

I Forming the Integrated Legal Regime of Energy 232
1 Responsibility 233
2 Normativity 235
3 Unifying Concepts 238
4 Convergence 239

II Legitimacy 240
CONTENTS

III Global Regulatory Law 244
IV Conclusions: European Energy Strategy in International Law 248

Index 255
PREFACE AND ACKNOWLEDGEMENTS

Providing clean energy for present and future generations is one of the key challenges of the twenty-first century. The European Energy Union is a strategic project for the transformation of the European and indeed the global energy system in the period up to 2030. The ensuing dynamic regulatory change has an internal and equally important external dimension. As a result, EU-level governance of the energy cycle will come to be based on a legal regime that integrates three normative orders: international law, EU law and the domestic law of member states and affiliated states. This book analyses the trajectory of this regulatory change. For this purpose, it proposes a different perspective on the law of the European Union. Rather than being isolated, it is embedded in a broader normative context. The book then makes a methodological plea: normative orders ought to be understood as working towards strategic objectives that they can achieve only by working with others. This has concrete implications for the way each is to be interpreted. The essence of the emerging global regulatory law, as the law underpinning governance of global priorities, lies in this integration of international law, European Union law and other regional and domestic law. Energy exemplifies this global regulatory law.

This book reflects the law as it stood on 18 January 2017, although I have been able to include some essential updates.

This book could not have been written without the support at the College of Law and Criminology of Swansea University. Over the course of writing, I have discussed ideas, concepts and concrete questions with many colleagues, and the results of these discussions are reflected in this book. I thank Jukka Snell, Andrew Halpin, Stefan Oeter, Joel Trachtman, Udo Di Fabio, Rüdiger Wolfrum, Frank Hoffmeister, Michael Wood, Arwel Davies, Kong Qingjiang, Paul Craig and Robin Churchill who gave generously of their expertise, knowledge and time. Petra Minnerop has read and debated with me the entire manuscript. Robin Hill provided invaluable assistance. All remaining errors are mine.

xiii