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Energy in WTO law and policy

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KEY MESSAGES

• The regulation of energy in international law is highly fragmented and largely incoherent. We submit that pertinent issues should be addressed by a future Framework Agreement on Energy within WTO law.

• Successful regulation of energy requires a coherent combination of rules both on goods and services. Energy services require new classifications amenable to coherently deal with energy as an integrated sector.

• Rules on subsidies relating to energy call for new approaches within the Framework Agreement on Energy. A distinction should be made between renewable and non-renewable energy. Moreover, disciplines need to be developed in the context of emission trading.

• The Framework Agreement should address the problem of restricting energy production and export restrictions.

• Disciplines on government procurement are able to take into account policies of green procurement, but a number of changes of the GPA Agreement will be required to make green procurement more effective and attractive.

• In view of the close interactions between the energy sector and climate change, formulating effective rules to address energy under the WTO system will catalyse coherence and complementation between the climate and trade regimes

A. Introduction

60 years ago, when the rules of the GATT were negotiated, world energy demand was a fraction of today's and so were energy prices. While energy has always been in crucial factor in geopolitics, at that time liberalizing energy trade was not a political priority. The industry was largely dominated by state run monopolies and thus governed by strict territorial allocation. International trade in energy resources and products was heavily concentrated, cartelized and controlled by a few multinational companies. This explains why the rules of GATT, and now the WTO, do not deal with energy as a distinct sector. It was felt that general rules, including the disciplines on state trading, may adequately address trade in energy. Also, no special agreement on trade in energy eventually emerged when GATT entered into sectorial agreements ever since the Kennedy Round. Yet since basic WTO rules are applicable to all forms of trade, they also apply to trade in energy goods and services.2 Today,

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these rules can be enforced through the WTO dispute settlement mechanism even if they were not primarily negotiated with energy in mind.  

Certain features of energy sector make it different from other industries in many ways. First, energy goods have peculiar physical characteristics, which influence means of storage, transportation and distribution. Then, particular challenges are associated with the existence of natural monopolies, as well as with the role of state-owned enterprises that are dominating some national energy markets. Furthermore, in the Uruguay Round WTO Members tried to but could not manage to address effectively the practice of using dual energy prices and export restrictions. They also undertook very limited commitments to grant access to their energy markets to foreign service operators. Hence, we submit that current WTO rules do not deal properly with trade in energy.

In the last years, energy topics started reappearing on the negotiations agenda. There are several reasons for this:

- Several energy-exporting countries recently joined the WTO and others are currently negotiating their accession, bringing to the WTO a substantially enlarged part of energy trade;
- Increasing energy needs have led to a growing interest in competition rules and export restrictions practices;
- Progressive unbundling of vertically integrated state-owned entities gave a way for private operators to enter energy markets;
- The relationship of trade and environment and the debate on sustainable development heavily touches upon energy. Correlation between trade, energy and climate change and the role of biofuels are also bringing attention to the trade in energy under multilateral trade regulation.

Energy has been discussed in the ongoing Doha negotiations. For the first time, Members have been discussing energy as a specific services sector. Energy issues motivate discussions on export taxes and export restrictions on raw materials. Another part of the on-going round of negotiations is a balance between promotion of environmental goods and services and fossil fuel subsidies. Finally, energy related negotiations in the current round focus on biofuels. While dealing with biofuels there is a need in balance between climate change and energy security concerns on one hand, and their impact on agriculture in order to avoid new environmental problems.

Thus, energy and trade is an unsettled field. A number of issues were taken up in PhD research and working papers within an overall project. They essentially relate to allocation of energy to goods and services and the issue of classification. They relate to energy subsidies, to the experience of emission trading in EC law, to the status of OPEC in WTO law and the climate change mitigation potentials of energy efficient government procurement policies. We submit in conclusion that these issues would best be dealt within a future WTO Framework

World Trade Organisation Rules and the National Competition Laws’.  
1 P. Lamy, speech at the 20th World Energy Congress on 15 November 2007 in Rome.  
2 For more on dual pricing see J. Selivanova, “Energy Dual Pricing in WTO Law” (Cameron May, 2008).  
3 Saudi Arabia, Oman, Ukraine have recently became WTO Members, while Russia, several Central Asian countries, Algeria, Libya, Iran and Iraq are currently observers.  
4 For a comprehensive overview of the interlinkages between trade and climate change see T. Cottier et al (eds), International Trade Regulation and the Mitigation of Climate Change: World Trade Forum (Cambridge University Press, 2009).  
5 P. Lamy, speech at the 20th World Energy Congress on 15 November 2007 in Rome.
Agreement on Energy. It would allow bringing about greater coherence.

B. The Current Status of Energy in WTO Law (Oil, Gas, Coal and Electricity)

I. Oil, Gas and Coal

Traditionally, the energy industry did not distinguish between energy goods and energy related services. This is because energy services were perceived as a value added to energy goods which could not be dealt with separately. Privatisation and liberalisation of the sector led to market reform which resulted in a conceptual separation of goods and services trade. Hence, the need of the clear legal framework to address this distinction emerged.

Oil and solid fuels like coal clearly fall in the category of goods; they are easily stored and traded across borders. Crude oil is treated as a global commodity and has been traded internationally since the 1860s. Crude trading represents the key link between the two poles of the industry: upstream and downstream, and crude prices give signals to both.\(^8\)

The same applies to natural gas. It is traded across borders via pipelines and although it can be stored in its gaseous form, more and more often it is liquefied for purposes of transportation to remote regions and storage.

It is commonly understood that under the WTO rules production of energy goods comes within the scope of the GATT, while energy related services, including transmission and distribution, fall under the scope of the GATS.\(^9\)

II. Electricity

Modern society and production is inconceivable without electricity. It is a secondary energy source which results from the conversion of other sources of energy, like coal, natural gas, oil, nuclear power, wind and solar energy. Unlike oil and gas it is not a physical substance that can be stored easily. Electricity is a physical process happening throughout the wires that carry it and has to be generated more or less exactly as it is being used.

The invention of the generator producing alternating current is at the root of the present structure of the power industry – a system which generates electricity in large power stations at remote sites and carries it over long distances to reach its final users.\(^10\) Its value chain consists of four activities: generation which converts energy sources into electricity, transmission which occurs when electricity is transmitted over high voltage networks to major demand centers; distribution which is the process by which transmitted power flows to final consumers such as factories and homes; and supply – the name given to the metering, billing and other services provided to the final consumers.\(^11\)

The WTO law does not contain any specific provisions on electricity. Given the lack of disciplines on services under GATT 1947, electricity was defined as a good irrespective of its

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\(^9\) WTO, Energy Services, Background Note by the Secretariat, S/C/W/52 (9 September 1998), para 36.

\(^10\) For more on functioning of power industry see W. Patterson, Transforming Electricity (Earthscan, London, 1999).

peculiar physical properties, in the HS Nomenclature\(^\text{12}\) on the codification of commodities. The definition is followed by the WTO tariff schedules. Electrical energy is classified under the position 2716. Accordingly, electrical energy qualifies as a good under WTO law and is, as such, subject to the rules of the GATT 1994. The same is true for the European Energy Charter and European Community law. Until the end of the 1980s, EC law hardly intervened in the organisation of electricity utilities. Though two of the three founding treaties of the EC were specifically directed at regulating energy\(^\text{13}\), electricity was not dealt with explicitly by any of the three Treaties. For a long time, it thus remained uncertain whether the provisions of the EC Treaty apply to electricity.\(^\text{14}\) It was only in the ‘Almelo’ case in 1994\(^\text{15}\) that the European Court of Justice [ECJ] explicitly recognised that the rules on the free circulation of goods of the EC Treaty also applied to electricity.

### III. WTO and Other Instruments of International Energy Law

WTO law is a minor fraction of international law addressing energy. A multiple array of sources and instruments need to be taken into account. Also, it is recalled that international trade in energy is mainly based upon contracts subject to international private law and commercial arbitration.\(^\text{16}\)

Energy issues around the world today are dealt with in a fragmented manner and some energy specific agreements and institutions are described below.


   OECD is an international organisation, established in 1961, with 30 member countries and a budget of EUR 342.9 million (as of 2008). The OECD’s affiliate organisation, the IEA is a forum for co-ordinating the energy policies of 28 industrialised countries. The IEA addresses all types of energy sources. The IEA’s objectives comprise the following: “improvement of the world energy supply and demand structure, more efficient use of energy, development of alternative energy sources to reduce dependence on any one source, assistance in the integration of environmental and energy policies and the promotion of cooperative relations between oil-producing and oil-consuming countries”.\(^\text{17}\)

2. **Energy Charter Treaty**

   The Treaty entered into force in 1998, however some Members are still pending ratification.\(^\text{18}\) Several of the WTO member states engage in energy cooperation under this treaty. The ECT covers various issues related to investments and investor relations. The main

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\(^{12}\) The HS Nomenclature is governed by the Convention on the Harmonized Commodity Description and Coding System, and was elaborated under the auspices of the World Customs Organisation (WCO).

\(^{13}\) On the role of EC law in energy regulation see below paragraph B.III.5

\(^{14}\) ECJ Case 6/64, *Costa v ENEL* [1964] ECR 1141.

\(^{15}\) ECJ, Case C-393/92 *Almelo and Others* [1994] ECR I-1477, par. 28.


\(^{17}\) OECD, Energy: The International Energy Agency. Available at http://www.oecd.org/document/45/0,3343,en_2649_37459_1921517_1_1_1_1,00.html

\(^{18}\) All members have ratified the Treaty except for five: Australia, Belarus, Iceland, Norway, and Russia. Belarus and Russia have accepted provisional application of the Treaty, which means that – pending ratification – they have agreed to apply the Treaty to the extent that it is consistent with their own constitutions, laws and regulations.

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elements of the ECT include: “investment protection”\(^{19}\) (e.g. by granting investors non-discriminatory treatment – national treatment and most-favoured nation treatment – compensation in case of expropriation and other losses, free transfer of capital); trade in energy, energy products and energy related equipment, based on the WTO rules; freedom of energy transit; international dispute settlement, including investor-state arbitration and inter-state arbitration; promotion of energy efficiency, and attempts to minimise the environmental impact of energy production and use”.\(^{20}\)

3. Organization of the Petroleum Exporting Countries (OPEC)

OPEC is a permanent intergovernmental organization, currently consisting of twelve oil producing and exporting countries, spread across three continents America, Asia and Africa. The main goal of OPEC is the coordination and unification of the petroleum policies of Member Countries, working out ways and means of ensuring the stabilisation of prices in international oil markets with due regard given to the interests of the producing nations and to the necessity of securing a steady income to the producing countries; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on capital to those investing in the petroleum industry.\(^{21}\) When OPEC was founded on 14 September 1960, none of its five founding members\(^{22}\) was a contracting party to the GATT. This picture has been changing recently.

4. Multilateral Environmental Agreements

Energy is also addressed by a number of Multilateral Environmental Agreements (MEAs), in particular those relating to climate change, including the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol. Anthropogenic climate change affects the energy sector and threatens the foundations of energy security systems.\(^{23}\) At the same time climate change mitigation measures catalyse energy efficiency and motivate energy sustainability policies. Recognising this fact, the climate regime avoided the approach adopted by a number of earlier MEAs which require Parties to those agreements to use trade restrictive rules against non-parties to the agreements.\(^{24}\)

Reduction of GHG emissions is considered a necessary precautionary measure which must be taken in order to avert what both the IPCC reports and the Stern Review Report of 2006 warned would be catastrophic to the future well-being of the eco-system. While the IPCC reports gave the scientific analysis of the climate change scourge, the Stern Review report highlighted the economic costs of inaction or delay in action. Thus, precautionary principle as an environmental protection strategy is well entrenched in the climate change regimes.\(^{25}\)

The relationship of WTO law to these instruments shares the traits of a complex constellation under the Vienna Convention on the Law of Treaties, addressed in a number of cases in WTO dispute settlement. From the point of view of international law, all instruments find themselves on the same footing, with more specialised or more recent agreements enjoying

\(^{19}\) Unless otherwise specified, investment rules apply to energy sector.


\(^{22}\) Kuwait, Iraq, Iran, Saudi Arabia, and Venezuela.


preferred application vis-à-vis general rules. From the point of view of WTO law, other instruments may only apply to the extent that they influence the application and interpretation of WTO rules. It is even controversial whether an agreement, to which not all the Members of the WTO are Parties to, can be applied in WTO dispute settlement.

5. Regional Level: European Union (EU) and North American Free Trade Agreement (NAFTA)

The European Community (EC) has evolved since the European Coal and Steel Community (ECSC) Treaty of 1952 which covered an energy policy for coal. The ECSC did not address external relations. Indeed, the six initial member states were free in shaping their relations with third countries. In 1957, two other fundamental treaties were signed: the Euratom and the European Economic Community. In 1967, the Merger Treaty allowed for the unification of the institutions of these Communities, covering all the main economic activities, including the rational use of natural resources. At an international level, the EC is active within the international organizations. Being a full member, alongside its Member States, of the WTO, the Energy Charter Treaty, and the Kyoto Protocol, the EC has attempted to establish the leadership in promoting international norms of energy trade.

Implementation of NAFTA began on January 1, 1994. The agreement aims at removing trade barriers between the United States, Canada, and Mexico. NAFTA covers various issues related to energy trade, including investment, cross-border services, measures related to trade in energy services, limitations and barriers and measures related to investments in the territories of the parties and cross-border trade.26

IV. Role of Government Procurement

Government procurement (GP) is the purchase by government of goods and services needed to perform its functions. It is an area of international trade earlier curved out of the non-discrimination obligations. The GPA imposes the national treatment and MFN obligations but it binds only those WTO members that subscribe to it. Energy efficient GP was identified by the IPCC as a possible policy tool to address climate change. Accordingly, countries began implementing “green” public procurement (GPP) as a part of their policy package for climate change.

In terms of the size, government procurement represents up to 18% of the GDP in the OECD countries, and in the EU for instance it amounts to 10-25% of GDP.27 This percentage may well be higher in the case of developing countries. GP apparently play a major role in promoting the use of environmentally friendly products and motivates market for, climate-friendly technology.

V. Unresolved and Controversial Issues

The interface of trade and climate change mitigation and adaptation is at the heart of contemporary legal developments in energy law. It was the subject of the World Trade Forum Conference in 2007 with different angles extensively addressed. Yet, the challenges of climate change merely amount to the tip of the iceberg of unresolved and controversial issues relating to the status of energy in international law. The picture is one of fragmentation with multiple instruments involved. The bulk of regulation is with domestic law, and the role of

26 NAFTA Article 603.
regional and global law in addressing energy and secure production and supplies has remained unclear and unsettled. Doctrines of multilayered governance hardly have been applied to the sector.

The fundamental divide between goods and services does not offer an appropriate basis to address and regulate energy in an integrated manner both in domestic and international law. Electricity is an example in point. It is traditionally addresses as a good, but in fact it is, by its nature and dependence upon grids, much closer to a service, perhaps in the end a mixture of both. There is no clear perception of defining energy in terms of goods and services, and there is a lack of properly defining services in relating to energy under GATS.

Different and competing forms of energy therefore are subject to strongly divergent international rules, depending as to whether they qualify as good or service. The same applies to the operation of trade remedies, in particular due to the absence of disciplines on subsidies in services. Moreover, existing disciplines on subsidies in goods may not be suitable to address a distinction of renewable and non-renewable energy under GATT, the Agreement on Subsidies and Countervailing Duties (ASCM). The Agreement on Agriculture, again, offers different disciplines. It thus makes a fundamental difference as to whether a product is classified as an industrial or an agricultural product.

Unresolved and basic questions also relate to competition policy and thus the relationship of WTO law and OPEC as a producer organization. The crucial question is whether oil exporters, when they join the WTO, will still be able to support oil prices through the regulation of oil production, or whether they could face challenges on the basis of GATT/WTO rules and provisions? The question arises as to whether additional rules in WTO on competition are required to properly address the relationship of trade and production in the sector of energy.

Finally, the relationship of energy and government procurement remains unclear. WTO law disciplines on government procurement seek to facilitate market access and even playing fields in purchases of goods and services by governments. The current rules on government procurement both within and outside the WTO do not systematically address the linkage to green procurement. It is therefore controversial to what extent Members are entitled to condition government procurement in the light of goals set forth by the Kyoto Protocol.

WTO law thus suffers a number of basic incoherencies and open questions which should be addressed. They were partly addressed in papers and the PhD projects of Individual Project No 6 of the NCCR Trade Regulation and the World Trade Forum 2007. Main findings are discussed within the following agenda of reform.

C. Agenda for Reform

I. Towards a WTO Framework Agreement on Energy

Energy requires an integrated approach and does not lend itself to sectoral negotiations, depending upon different forms applied to competing energy sectors. The sector includes fossil and non-fossil fuels and energy. It includes oil, gas, coal, wood, electricity, atomic energy and renewable forms of electric energy production (solar, wind, wave, tidal), as well

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29 Trade in atomic energy is subject to more stringent set of security regulations and safety standards both at national and international levels. The experts of International Atomic Energy Agency (IAEA) warn that the introduction of a nuclear power programme involves a commitment of at least 100 years. See IAEA Staff Report

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as biofuels. All these forms of energy basically should be subject to the same rules and thus conditions of competition. The production and transmission of energy entails a complex operation which often entails both goods and services. It also entails technology and thus is affected by intellectual property rights. The sector shows a high level of governmental involvement which calls for coherent rules on competition and government procurement.

In the effort to enhance coherence and overcome unnecessary fragmentation in regulating trade in energy, the problems identified above and the shortcomings can best be addressed in seeking comprehensive negotiations within the WTO. As much as the Uruguay Round produced a special agreement on agriculture, we submit that future negotiations should turn to work on a comprehensive sectoral agreement on energy. Negotiations would enable Members to address all the pertinent problems, ranging from issues of classification of goods and services, to disciplines on subsidies, to issues of competition and state trading, as well as intellectual property rights and government procurement. It allows defining authoritatively the relationship to other international agreements, in particular the UNFCCC and the Kyoto Protocol and future global systems of emission trading. It allows to define the relationship of trade and regulation of production and thus of WTO and OPEC.

A comprehensive sectoral agreement on energy, encompassing both goods and services, does not render the current structure of WTO Agreements obsolete. Recourse to a framework convention implies that its provisions may refer to pertinent provisions of other agreements of the WTO, in particular GATT and its instruments, GATS, TRIPs and the Agreement on Government Procurement. This is not new and has been done before, for example in defining the relationship of SPS and GATT, or the agreements on agriculture and on industrial subsidies. They may also incorporate provisions of agreements outside the scope of the WTO, as did the TRIPs Agreement for the Paris and Berne Conventions on industrial property and copyright. Or, they allow referring to other provisions without incorporating them, for example a future and revised UNFCCC or Kyoto Protocol. Both reference and incorporation allow building a comprehensive and coherent agreement on energy within the WTO. It is within such a framework that the following issues and proposals for reform should be dealt with.

II. The Basic Classification of Energy and Energy Services

The basic structure of the proposed Framework Agreement on Energy is to be defined by appropriate classifications of energy and energy services.

Disciplines on goods imply an independent physical property which is distinct from the production process and channels of distribution. Fossil fuels, in particular oil, gas, and coal are thus bound to remain goods to be dealt with in accordance with established principles and rules of GATT 1994. The matter is different in relation to energy dependent upon networks and grids. They are, in our view, much closer to services, albeit physical properties remain to some extent. This is true in particular for gas which can be properly stored to some extent that thus detached from a pipeline system. It is, however, different for electricity.

With the advent of disciplines on services, including energy related services, existing legal definitions of electricity should be reviewed. Electricity is a typical network industry the components of which can best be dealt with under the principles of progressive liberalization and conditionalities available under the GATS Agreement. It is submitted that electricity should be defined as a services and no longer be treated as a good. Electricity is not a physical substance, nor is it a fuel. It cannot be stored and must be consumed as it is produced.

Accordingly, the use of electricity should not be subject to tariff protection, but to service related fee structures responding to the needs of maintaining power production and dissemination. In order to maintain existing levels of market access under definitions of goods, the agreement would secure existing obligations of national treatment under GATT and incorporate them in terms of commitments into the Framework Agreement.

1. Trade in Energy Services

Energy services are an essential ingredient of any energy markets. They vary and depend on the type of energy used. As markets become more open and competitive the role of energy services will keep increase. The major entry barrier is associated with significant investments in infrastructure. It is well recognized that private-sector participation is frequently necessary to channel the needed capital and expertise to the sector, and developing countries are stimulated to create “an attractive enabling environment” and facilitate investment by trans-national energy companies.

2. Reform of Classification of Energy Services

The international trading in energy resources and its associated services has always posed special problems and classification of energy services has been one of the topics of debates among various interest groups. Energy sector was traditionally dominated by the state owned companies or under direct control of government of particular nation. This resulted in endless negotiation for classification of energy services and neither the WTO "Services Sectoral Classification List" nor The United Nations Provisional Central Product Classification (UNCPC) lists energy services as separate categories. Clarifying classification issues is an important precondition to successful negotiations on energy.

Currently, some of the energy related products and services are listed under different headings. One is "transportation of fuel" described in the CPC as "transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas". This comes under the broad category of transport services which is not truly appropriate. It is a fact that transportation of energy-related products and services are very specific and technically complicated procedures. Concerns of safety and security are always attached to it. Classifying energy services sector into a separate category will simplify the regulatory process for transmission and transportation of energy products and services.

The upstream related activities for oil and gas fall under the category of ‘Other Business Services’. It is "services incidental to mining" described as "services rendered on a fee or contract basis at oil and gas fields, e.g. drilling services, derrick building, repair and dismantling services, oil and gas well casings cementing services". At the same time, such the essential to energy industry services as oil and gas field exploration and geological surveying services are not covered by this category and classified as "Geological, geophysical and other scientific prospecting services", under "Engineering related scientific and

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30 Energy is also considered to be one of national security concerns. This reiterates the need in a coherent set of FDI rules to avoid protectionism.
32 WTO, Services Sectoral Classification List MTN.GNS/W/120 (10 July 1991).
33 Department of Economic And Social Affairs, Statistics Division Statistical Papers Series M No. 77, Ver.1.1, UN, New York.
34 CPC subclass 71310.
35 Division 88.
36 Subclass 86751.
technical consulting services".\textsuperscript{37} Such classification does not provide a clear view or complete information at one place and may lead to confusion in commitments.

The third energy specific entry relates to: "Services Incidental to Energy Distribution"\textsuperscript{38}, listed under "Other Business Services" category. It refers to "transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to household, industrial, commercial and other users".

In practical terms the fragmentation of different activities relating to energy service sector while placing them under different sub heading unnecessarily complicates trade in energy. In order to understand the various aspects of classification of services under W/120, one has to go to entirely different sub headings of the schedule. It needs to be considered that the energy industry is a chain of activities that are interconnected and often one cannot function without another. Hence, in order to function adequately, an energy service provider requires a set of coherent market access rights in a list of sectors. And in the current situation when energy services are spread throughout the classification system, the actual market access conditions may not be always clear, jeopardising both, energy security and competition.

With a view to avoid the present confusion in the energy services classification, in the W/120, it is therefore advisable to identify the core energy services and confine the present negotiations in those areas. One way of identifying core services is to agree that core services are those which form an essential part of the chain of supply and without which it could not function. In addition, it would entail services that are mainly an input for the energy industry. Such core energy services could be listed under two subcategories on the basis of upstream and downstream activities.\textsuperscript{39}

\textbf{III. Energy and the Rules on Subsidies}

In the field of goods,\textsuperscript{40} the emphasis of research and findings firstly addresses the relationship of fossil fuels and renewable energy. Both are treated alike and neglect environmental concerns. Moreover, a dual regime exists between fossil fuels and biofuels.\textsuperscript{41}

1. Renewable Energy and the WTO Law of Subsidies

Subsidies are extensively granted across the world to the energy sector for various reasons. Regardless of effectiveness of such policies in achieving their goal, both fossil fuel sector and renewable and alternative energy sectors have benefited from these subsidies. However fossil fuels’s share in the allocation of energy subsidies worldwide has been disproportionately higher than other forms of energy. Moreover while environmental protection has been stated as a policy objective behind promoting renewables through subsidy programmes, these policies have occasionally produced perverse results for instance in the biofuels sector in some countries.

The magnitude of subsidies available for the renewable energy (RE) sector is growing worldwide as a policy response to energy security concerns and climate change. The

\textsuperscript{37} Class 8675.
\textsuperscript{38} CPC 88700.
\textsuperscript{40} For discussion on subsidies disciplines in GATS see P. Poretti, ‘Waiting for Godot: Subsidy Disciplines in Services Trade’ in M. Panizzon et al (eds) \textit{GATS and the Regulation of International Trade in Services} (Cambridge University Press, 2007) pp. 466-489.
introduction of new incentive schemes to promote RE has become increasingly common especially in the US and EU region. In this context, the question of the status of RE subsidies in WTO law is highly relevant.\textsuperscript{42}

\textit{a) Areas of potential conflicts}

In fact much of the support provided to the RE sectors takes the forms which fit the definition of subsidy according to Article 1 of the ASCM.\textsuperscript{43} These RE subsidies are specific within the meaning of Article 2; if they are contingent upon export- or import-substitution or they cause adverse effects, RE subsidies are likely to result in trade disputes of different kinds and hence are vulnerable under the WTO system.

Yet, under a different scenario, the use of certain trade-distortive subsidies for environmental purposes may be justified. In this context, the absence of a GATT Article XX provision in the ASCM should be given serious consideration.\textsuperscript{44} However, it is argued that any attempt to introduce particular environmental exceptions into the SCM Agreement should entail a necessity test similar to GATT Article XX (b) to ensure that such exemptions will not be hijacked by domestic interest groups to the detriment of both trade and the environment.

\textit{b) A case for mutual supportiveness}

A top-down approach of simply imposing national targets as pursued in the Kyoto Protocol has not and will not work without being coupled with other reinforcement strategies such as addressing harmful energy subsidies at the multilateral level. In this context there is a positive and effective role for the WTO to enter into the field of reform of these subsidies.

Dealing with subsidies that are environmentally harmful is not alien to the WTO. The current ‘fisheries subsidies’ negotiations serve as a good example of cooperation between environmental NGOs, international organizations and the so-called ‘friends of fish’; a group of WTO Members who took the initiative to raise concerns about the contributory effect of these subsidies on fish stock depletion.\textsuperscript{45}

There seems to be prospects of following a similar approach for energy subsidies in light of the similarities and differences between these two areas of environmentally harmful subsidies. The stakes are higher in the realm of energy due to political, social (poverty implications) and energy security issues involved here. On the practical level, the first challenge is to collect reliable data on current and future levels of support. The second is to define the criteria for ‘harmfulness’: as discussed above, not all fossil fuel subsidies, let alone energy subsidies, increase CO\textsubscript{2} levels (consider fuel switching subsidies (e.g. from coal to gas)).

As a first step, the crucial need for filling the gap in the data on energy subsidies may be

\textsuperscript{42}Currently the US is being challenged by Canada’s complaint regarding the US subsidies for corn and other agricultural products. (See the Request for Consultations by Canada, WT/DS357/1, January 2007). Brazil has further challenged, inter alia, the gasoline and diesel tax exemptions for biofuels. (WT/DS365/1, Request for Consultations by Brazil, July 2007). A single panel was established to deal with both cases in December 2007.


\textsuperscript{44}The applicability of the general exceptions under Art XX of the GATT with respect to subsidies covered by the SCM is still an open question. Many trade lawyers share the view that under the status quo GATT Article XX does not apply to the ASCM. At the same time, many others argue the opposite. For more on the discussion see L. Rubini, The Definition of Subsidy and State Aid. WTO and EC Law in Comparative Perspective (Oxford University Press, 2009), p.195.

\textsuperscript{45}For more see S.Z.Bigdeli ‘Will the ‘friends of climate’ emerge in the WTO? Applying the ‘fisheries subsidies’ model to energy subsidies’ (2008), in 2(1) Carbon and Climate Law Review, 78-89.
addressed by establishing a subsidy-watch committee as a subsidiary of the Committee on Subsidies and Countervailing Measures in accordance with Article 24.2 of the ASCM. This new committee’s function, in contrast to that of the current Permanent Group of Experts whose duty is more focused on the nature and legality of subsidies, will be to examine whether each Member’s energy subsidy notifications sufficiently represents the level of support in this sector. Later, these functions would be assigned to a committee servicing the Framework Agreement on Energy.

After collecting reliable data on all Members’ energy subsidies, the second step would be to provide countries with deadlines by which they would have to prepare a national roadmap for subsidy reforms, adapted to their own priorities, intended to phase out ‘environmentally harmful energy subsidies’ with an appropriate timeline. The committee could have an advisory or compulsory role in identifying which subsidies are indeed ‘harmful’ and how and over what period of time they should be phased out.

Eventually all the roadmaps for subsidy reforms should be submitted to the committee and be approved by Members to become an integral part of the Members’ WTO commitments. This whole process from the very beginning should be conducted in full cooperation with the UNFCCC Secretariat and be linked to negotiations on the post-Kyoto Regime.

2. Emission Trading and Subsidies: The Experience of the European Union

With a view to linking subsidies reform in international trade regulation with climate change mitigation efforts under the UNFCCC, it is helpful to learn from the experience of the EU, assessing the European Union emissions trading scheme (EU ETS) and its relationship to EC disciplines on subsidies. 46

The system was launched in 2005 to cap CO₂ emissions from energy-intensive industry. 47 The key feature is the allocation process, which determines the reduction target within each Member State (‘cap’) and the way allowances are distributed among the covered operators. 48 In the first two allocation phases running from 2005 to 2012 Member States had to set up a national allocation plan (NAP), which had to be submitted to the Commission for approval. 49 Member States were conferred a considerable degree of freedom to fix the caps. 50 The main restriction was that at least 95% of the allowances had to be allocated for free in the first and 90% in the second trading periods. 51

Most Member States chose to distribute all their allowances for free. For existing installations the amount of allowances was usually calculated according to historical emissions or expected needs, whereas new entrants were granted allowances with regard to certain benchmarks, which may be fuel-, technology- or output-related. Special rules were also set out for closures, early action or co-generation.

As a result, a wide variety of allocation rules existed, leading to considerable distortions of...
competition. The latter were exacerbated by a phenomenon called ‘windfall profits’, which significantly increased the benefits of certain operators, especially CO₂-intensive installations in the power sector that had received the lion’s part of the allowances. The reason for these extraordinary profits is that many of these firms could largely pass on the price of the allowance to their customers, even though they had been granted the allowances for free.  

The question thus arose whether the large economic rents conferred on certain big players, in particular in the power industry, amounted to state aid prohibited by Article 87 EC Treaty. The relevance of this query is, however, not limited to European law. Many countries, such as the United States, Australia, Japan, that plan to implement emission trading schemes and also the Member States of the EU and the EU itself will have to deal with this issue under the law of the WTO, which establishes a regime bearing many similarities with the provisions of the EC Treaty. Hence the free grant of emission allowances may well not be immune from challenges under the WTO rules.

a) **The prohibition of state aid (Article 87 par. 1 EC Treaty)**

Art. 87 EC Treaty (‘EC’) bans any State aid granted by Member States unless it complies with the derogations provided for it by the Treaty. Generally it is incumbent on the Commission to verify whether the aid meets the conditions that might exceptionally justify its grant. Member States are hence requested to notify any aid to the Commission and await its decision before implementing it.

The following conditions must be fulfilled.

i) **The financing by the State or through State resources**

Aid must be imputable to the State and be granted directly or indirectly through State resources. When assessing the NAPs, the Commission consistently held that this condition was fulfilled if more than the mandatory amount of allowances was granted for free and if banking was allowed. The notion of State resources includes not only the direct or indirect transfer of State resources to an undertaking, but also the waiving of revenue, which would otherwise have been paid to the general budget. This is not the case if the financial burden of a measure relies exclusively on private undertakings.

ii) **The existence of a selective benefit for an undertaking**

The transfer of State resources must confer an economic advantage on the recipient undertaking. The Commission takes the view that this condition is fulfilled if allowances are granted for free. The revenues in many cases exceed the costs and the ‘windfall profits’ accrue to the operator without any environmental counterpart.

An economic benefit granted by a Member State constitutes State aid only if it displays a certain degree of selectivity. In the case law, this condition entails to verify whether the methods of allocation adopted by Member States favoured certain undertakings in comparison

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53 See Articles 87 (2) and (3) and 88 and 89 EC Treaty.

54 European Commission, Decision on the second Slovakian national allocation plan, 29.11.2006.

55 ‘Banking’ means that allowances issued for one compliance period may be used by the recipient in a later compliance period.

56 European Commission, Decision on the first Danish national allocation plan, 7.7.2004.

57 See European Commission, Decision on the first French national allocation plan, 20.10.2004, par. 5.
with others that are in a comparable situation in the light of the objective pursued. Due to the large discretion left to Member States the amount of allowances allocated to the covered installations varied significantly between sectors but also within comparable categories of undertakings. As a result, the allocation rules largely favoured certain undertakings at the expense of others, in particular existing operators with respect to new entrants and CO2-intensive with respect to less emitting installations.\textsuperscript{58} These effects were exacerbated in the power sector, where cost abatement differentials are important and operators could largely pass on the price of the allowances to their customers.\textsuperscript{59}

iii) Distortion of competition and effects on trade between Member States

These two conditions are generally considered as fulfilled if the financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade. Applied to the EU ETS, this means that any allocation methodology, which favours unduly some undertakings at the expense of others is likely to distort competition and to affect trade. In its review of the NAPs the Commission generally considered both criteria as fulfilled.

\textit{b) The derogations of the prohibition of State aid (Art. 87 par. 3 EC)}

The Commission enjoys a wide, but not unlimited discretion when evaluating the compatibility of State aid with the common market. It has to examine whether the aid is appropriate to meet one of the objectives mentioned in Article 87 par. 3 EC Treaty and to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition. When appraising the NAPs, the Commission did not conduct a formal state aid investigation, but limited its assessment to provisional evaluations. It primarily verified whether the Member States distributed more allowances than needed to their installations.\textsuperscript{60} With respect to the second phase, it considered this condition as fulfilled if the caps set by Member States violated criteria 1-3 of Annex III of the Directive\textsuperscript{61}, if individual installations were given more than they needed and if the information provided by Member States was purely subjective. Extending its analysis to specific allocation methodologies, it held, moreover, a German\textsuperscript{62} and a Polish\textsuperscript{63} allocation rule incompatible with the common market as the former discriminated between comparable installations and the latter used a non representative baseline with respect to average emissions of installations. The principles established by the Commission when appraising the NAP were by and large confirmed in the recently adopted ‘Community guidelines on state aid for environmental protection’\textsuperscript{64}, which provide the basis for the Commission’s assessment until the end of 2012.

\textit{c) Conclusions}

Despite evidence accumulating that the EU ETS has conferred large economic rents on CO2-
intensive operators, reducing thereby the economic efficiency of the scheme, the Commission has used its powers under the state aid provisions parsimoniously. So far, it has only taken provisional decisions, in which it addressed clearly discriminatory rules and the most patent cases of over-allocations. Quite surprisingly, it considers that the free allocation of allowances is compatible with the common market if the amount of allowances does not exceed expected needs, though this amounts to sanctioning business-as-usual practice.

The Commission’s concern of ensuring a smooth functioning of the scheme can also be witnessed in its practice regarding complaints of affected operators. As the case EnBW v Commission[65] shows, the endeavour to challenge an allocation rule the Commission has evaluated positively in its NAP decision is fraught with difficulties. In casu, the Commission merely informed the plaintiff, an operator of a nuclear power station, in a so-called ‘service-letter’ that there were “insufficient grounds” for opening a state aid procedure, thus depriving the plaintiff from challenging its act. [66]

The fear that the Pandora’s box might be opened if operators were given the right to challenge an allocation rule that has been provisionally approved by the Commission, seems to be shared by the Court of First Instance. By considering that EnBW lacked an interest in the annulment of the Commission’s decision on the German NAP inasmuch as the latter had not rejected it, the court effectively forestalled any legal action aiming at challenging an allocation method the Commission has prima facie considered compatible with the rules on State aid. As a result, the Commission remains the sole gatekeeper of the European state aid rules and it will principally depend on its willingness and political clout to stop the massive “windfall” profits of certain operators that jeopardise the environmental effectiveness of the EU ETS.

Discontented competitors might, however, find a way out of the stalemate by availing themselves on the rules of the WTO. As a matter of fact, the revenue from the sale of the allowances in many cases exceeds the costs incurred in abating emissions. Accordingly it may well be argued that the free allocation of allowances amounts to a subsidy actionable under the ASCM. [67] The question hence arises whether a reform of the ASCM should be envisaged in the context of the Framework Agreement on Energy to take into account the specificities of the introduction and the implementation emission trading schemes.

Two aspects should be considered here. On the one hand, the presence of massive windfall profits of the European electricity industry clearly indicates that to offset the financial burden imposed by the EU ETS only a small quantity of allowances would have to be grandfathered. On the other hand, the introduction of emission trading schemes for industry sectors exposed to strong international competition may well be politically possible only if a part of the allowances is initially granted for free. As a result, we recommend that in a reform of the rules on subsidies a temporary exemption similar to the former green-light category of the ASCM is foreseen, which allows grandfathering up to 20% of the distributed allowances for industry sectors that are exposed to strong international competition from regions which are not subject to an equivalent carbon regulation.

IV. Energy Production Controls and Export Restrictions (OPEC)

The Framework Agreement on Energy would also need to deal with the issue of production and export controls, thus clarifying what today is an unresolved and controversial issue in

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66 To be challengeable, the letter must come from the College of the Commissioners and be addressed to the Member States, which was not the case here. See Article 25 of Council Regulation No 659/1999.
67 Art. 5 ASCM.
relation to OPEC Members who increasingly are also Members of the WTO. The preamble of the Marrakesh Agreement Establishing the World Trade Organisation recognizes that expanding the production of and trade in goods and services should be exercised allowing the optimal use of the world's resources. Recognition of a nation's permanent sovereignty over its own natural resources is another fundamental principle of contemporary international law which OPEC member countries can constantly invoke to explain their supply management practices.

There is a difference of opinion as to the legitimacy of OPEC. The United States government considers the organisation to be contrary to the spirit and objectives of the GATT. The developing countries, which are members of OPEC, rely on Article 5 of the (non-binding) Charter of Economic Rights and Duties of States for the legitimacy of producer organisations such as OPEC. According to most Western countries a producer organisation is not as such illegitimate, though its actions can be. Moreover, it is controversial whether production controls violate disciplines of WTO law.

1. Production controls versus export restrictions

Article XI of the GATT 1994 includes a fundamental prohibition of quantitative restrictions: quotas, import and export licenses 'or other measures having equivalent effect'. Therefore, it is not the legal form of the measure but its effect on trade which is important. In particular, the GATT Panel in \textit{Canada-Measures Affecting Exports of Unprocessed Herring and Salmon} concluded that provisions of Article XI:1 apply to any measure of a contracting state in respect of export restrictions, ‘irrespective of the legal status of the measure’. Therefore, the argument that OPEC decisions on production cuts are non-binding will not be sufficient in order to argue that they are outside the scope of Article XI. In \textit{Argentina-Hides and Leather} the Panel discussed the relevance of the actual trade effect of the measure and found that although actual trade effects did not have to be proven in order to establish a violation of Article XI:1, trade effects carried weight, as an evidentiary matter, for establishing the existence of a \textit{de facto} restriction.

In order to evaluate whether production controls amount to export restrictions, which from the prospective of free trade constitute the most stringent and distortive trade policy instrument, a several steps test of OPEC’s decisions should be performed. A Panel would have first to determine whether OPEC practices constitute ‘measure’ within the meaning of Article XI:1 and then consider if such measures impose a restriction on exportation. OPEC's activities clearly effectuate a quantitative limit on the amount of oil available on world markets. In this regard, OPEC measures generally have the same motivation and effect as quantitative export restrictions. Furthermore, the language of Article XI, in particular the notion of ‘other

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72 According to Article 11C of OPEC Statute all decisions of the Conference, other than on procedural matters, require the unanimous agreement of all Full Members and made in the form of Resolutions.
measures’, provides with broad scope and coverage\textsuperscript{77} and allows to fit production restrictions into this category as measures that interfere with the free flow to the market of a given product.

Despite of the broader reading of Article XI:1, it is submitted that there are limitations. A interpretation of the provision that implies that one WTO member could have recourse to Article XI:1 in order to commit another member to produce more of its natural resources to satisfy world demand likely exceeds those limits\textsuperscript{78} It would, in our view, be at odds with the fundamental principle of national sovereignty of natural resources.

2. Restrictions made effective through state trading operations

Another unresolved issue relates to the nature of restrictions on production operated. It is well-established in GATT/WTO jurisprudence that only governmental measures fall within the ambit of Article XI:1. Past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed governmental if there is sufficient governmental involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.\textsuperscript{79}

In order to identify the restrictive character of a measure in the context of OPEC, it is important to note that this restriction can be made effective through state-trading operations.\textsuperscript{80}

The Panel on \textit{India — Quantitative Restrictions} addressed the phrase “restrictions made effective through state-trading operations”. In its analysis, which was subsequently not reviewed by the Appellate Body, the Panel emphasized that the fact that imports were effected through state-trading operations did not \textit{per se} mean that imports were being restricted: ‘It should be noted, however, that the mere fact that imports are effected through state trading enterprises would not in itself constitute a restriction. Rather, for a restriction to be found to exist, it should be shown that the operation of this state trading entity is such as to result in a restriction.’\textsuperscript{81}

3. Available exceptions

The GATT regulation on quantitative restrictions, however, has a limited effect because of the many exceptions. In addition to the ones set out in Article XI:2, further exceptions are contained in Article XII, XX and XXI of the GATT 1994; these exceptions are frequently utilised to pursue other legitimate policy goals.\textsuperscript{82}

One exception occasionally cited as meeting the needs of OPEC members is the Article XX(g) exception for measures relating to the conservation of natural resources.\textsuperscript{83} Indeed, assuming that a panel determined that production controls are contrary to the principles of GATT Article XI, then Article XX(g) is an exception that OPEC members could invoke.

\textsuperscript{77} See Panel Report, \textit{India – Quantitative Restrictions}, referring to the panel in \textit{Japan - Semiconductors}.
\textsuperscript{79} Panel Report, \textit{Argentina — Hides and Leather}, citing the Panel Report on \textit{Japan — Film}.
\textsuperscript{80} Note \textit{Ad} Article XI of GATT.
\textsuperscript{81} Panel Report \textit{Korea – Various Measures on Beef}, para 115.
\textsuperscript{82} T. Cottier and M. Oesch, International Trade Regulation. Law and Policy in the WTO, the European Union and Switzerland, Cases Materials and Comments, Cameron May Ltd. London, 2005, p. 662.
\textsuperscript{83} In Shrimp/Turtle, the WTO Appellate Body indirectly recognized petroleum as an exhaustible natural resource. See Appellate Body Report, \textit{US – Shrimp}, para. 128.
4. Lack of competition rules in WTO

In contrast to the situation regarding fundamental WTO principles, there is no unified body of jurisprudence relating to the application of the fundamental principles of competition law and policy at the multilateral level. Rather, the jurisprudence that exists is developed with reference to diverse national laws and policies.\(^\text{84}\)

That is why so far all the efforts of the United States to challenge OPEC and its member countries were focused on application of American antitrust law to the production restrictions. Civil proceedings against OPEC have been launched three times until today.\(^\text{85}\) In the first two claims the discussion focused on privileges OPEC might probably enjoy, whereas the last proceeding concentrated in details on questions of U.S. civil procedure rules.\(^\text{86}\)

On 22 May 2007, the U.S. House of Representatives passed the “No Oil Producing and Exporting Cartels Act of 2007” and a similar bill was passed in the Senate on 19 June 2007. NOPEC is aimed at OPEC and its oil supply management practices and designed as a response to some unsuccessful legal actions brought against OPEC in the US. It restricts the sovereign rights of states to manage their natural resources, that it is why the Bill will be also applicable to other oil exporting countries of the world.

5. Conclusion

Returning to the idea of fragmentation of the international trade regulation, it is challenging to judge whether OPEC supply management activities are illegal. To answer this question there should be a coherent set of rules on competition which the WTO currently lacks. In this sensitive area and with the global concerns, which are now on the international agenda, the balance should be found between the right of states to exercise the sovereignty over their natural resources, energy security, fair competition and climate change concerns.\(^\text{87}\) This challenge can be left to the regulatory competition.\(^\text{88}\) Competition can be globalised so that national blinders are removed and the analyst takes a comprehensive world view; not a nationalistic perspective.\(^\text{89}\) We submit that these issues should be addressed in a future Framework Agreement on Energy.

V. Energy and Government Procurement as a climate change mitigation policy tool

1. Green public procurement (GPP) in the context of UNFCCC/KP and the WTO Agreement on Government Procurement (GPA): the need for regulatory coherence

Finally, we turn to government procurement. GPP involves the use by public authorities of


\(^{88}\) For the notion of regulatory comstinence and need for competition rules under the WTO see Chapters of IP 9 and IP 7 respectively.

environmental and energy efficiency considerations in the specification of preferred goods and services purchased for governmental functions. An example is the EU green energy procurement policy.\textsuperscript{90} As government procurement is regulated by the GPA,\textsuperscript{91} it is pertinent to investigate the extent to which GPA Parties could pursue their climate change goals using the GPP tool while also safeguarding their non-discrimination obligations under the GPA.\textsuperscript{92}

2. GPP and the trade concerns

Trade effects in GPP arise where the description of the goods or services preferred by procuring an authority in tender notice results in differential treatment between otherwise “like products”, or between local and foreign suppliers. GPP could constitute a non-tariff barrier,\textsuperscript{93} which may amount to discrimination contrary to the GPA Article VI. This Article permits the use of international standards, technical regulations and other specified sources to define the “technical specifications” of the products and services, and the service suppliers. The cardinal rule in the GPA is that standards and/or technical regulations “shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.”\textsuperscript{94} Similarly, any technical specifications inserted in the tender “shall be in terms of performance rather than design or descriptive characteristics.”\textsuperscript{95}

The concern thus is in the possibility of a procuring entity to insert non-product related climate-friendly specifications in such a way as to discriminate between like products or services.\textsuperscript{96} Similarly, by virtue of GPA Article VIII provisions, a condition for participation which requires suppliers to show evidence of compliance with specific environmental management system may also constitute a barrier to the participation of that supplier in the procurement. The GPA thus provides that any such requirement should relate only to the technical and or financial ability of the supplier to perform the particular job in questions.\textsuperscript{97}

The PPMs and the “like” products debates in the WTO jurisprudence are well-known.\textsuperscript{98} GPP practices for climate change mitigation are essentially based on environmental and energy-efficiency related considerations, and are therefore essentially in the nature of non product-related PPMs. Such PPMs are not accepted in the WTO as basis of discrimination between like products, services or service suppliers.

3. GPP and the Environmental Exceptions

Article XXIII of the GPA however, provides for environmental exceptions similar to those

\textsuperscript{90} For this see, G. I. Malumfashi, ‘Procurement policies, Kyoto compliance and the WTO Agreement on Government Procurement: the case of the EU Green Electricity Procurement and the PPMs debate’, in T. Cottier et al (eds), International Trade Regulation and the Mitigation of Climate Change: World Trade Forum (Cambridge University Press, 2009).

\textsuperscript{91} WTO, Marrakesh Agreement Establishing the World Trade Organisation, Annex 4: Plurilateral Trade Agreements: Agreement on Government Procurement, done at Marrakesh on 15\textsuperscript{th} April 1994 entered into force I January 1996.


\textsuperscript{94} GPA Article VI.

\textsuperscript{95} Ibid.


\textsuperscript{97} GPA Article VIII(b).

found under GATT Article XX(b) and (g), to permit otherwise discriminatory measures taken by the Parties to address non-trade concerns, including environmental protection. These exceptions arguably apply to permit climate-motivated GPP policies. This view is also re-enforced by the Preamble to the WTO treaty which recognises “sustainable development’ and “protection of the environment,” as part of the objectives of the WTO system.99 The Preamble was cited by the WTO Appellate Body (AB) in the US-Shrimp case in 1998,100 as a guide in interpreting the environmental exceptions.

However, in extending this interpretation [of the GATT XX (b) and (g)] to climate-friendly procurement under the GPA Article XXIII this study entertains two concerns, thus: first, there are some textual variations in the wording of the GPA Article XXIII as compared with GATT Article XX (b) and (g). One such variation is that the GPA Article XXIII, in fact, does not contain the equivalent of the words “relating to conservation of natural resources,” namely, the (g) part of GATT Article XX. The question is whether this omission is material enough to make substantial difference between the said GATT and GPA exceptions? The second concern relates to the burden of proof for measures aimed at climate mitigation. Under the conventional WTO jurisprudence, the onus is on the Party invoking the GATT Article XX exceptions to prove that the particular measure not only is covered by the exceptions, but is also “necessary” in the circumstance to achieve the legitimate objectives, and that it is not applied in a discriminatory manner. Thus, in event of a challenge, a GPA Party maintaining climate-motivated procurement policy will have to shoulder this burden of proof.

This study believes that in view of the urgency associated with the climate change problem, and the fact that climate change measures are based on precaution in the face of scientific uncertainty, the GPA should more explicitly recognise climate-motivated GPP and make it a positive norm, rather than an exception. With this then, the burden of proof in matters related to climate change will shift to the complaining country to prove discrimination or that the measure is not targeted at climate ends.

The said approach is not entirely new in the WTO jurisprudence. It is recalled that the AB in the EC - GSP101 did take a view closely similar to this suggestion, when considering that the development motive of the Enabling Clause for developing and least developed countries under the WTO system gave the Clause (which was an exception to GATT Article III) a “special status”102 akin to a positive norm. Thus, a developing country complaining against a developed country measure based on the Enabling Clause should bear the burden of proving discrimination.103

The Doha negotiations on liberalisation of environmental goods and services can help in this regard. Specific list should be generated for goods and services and technology, as well as projects and programmes targeted specifically at climate-change ends out of the various lists currently being examined. Then this list should be included as an appendix to the GPA so to form a basis for all GPP measures.

The study notes that the Revised GPA 2007,104 which is not yet in force permits, explicitly, the Parties to consider environmental factors in their procurement processes.105 This new

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99 See Recital 1 to the WTO Agreement.
102 Ibid.
105 Ibid Article XI:6
provision ostensibly, made up for the GATT Article XX (g) missing in the GPA Article XXIII. To this extent, the new provision does not seem to fundamentally change the status quo, especially as relates the burden of proof question.

D. Overall Conclusions

Existing WTO rules do not address appropriately all the needs of energy trade in the modern times. Ensuring security of supply and addressing the climate change mitigation, creating an effective incentives mechanism to reduce CO2 emissions are the first priority. Therefore, we recommend a move towards a comprehensive sectoral agreement on energy, that would encompass subsidies reform, introducing a temporary exemption similar to the former green-light category of the ASCM; creation of a check-list of core and related energy services that would facilitate making additional commitments; and re-drafting of Article X:6 of the revised GPA 2007 to make more explicit recognition of climate-related measures.

The WTO, with its currently 153 Members\(^{106}\), can make an important contribution to the complex energy reform. More predictable and transparent trade rules could benefit both energy-importing and energy-exporting countries, and will contribute to preventing eruption of energy conflicts.

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