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ARTICLE

The WTO in the Emerging Energy Governance Debate

Gabrielle Marceau*

Although they were not initially designed to address energy issues per se, several World Trade Organization (WTO) rules are relevant and 'applicable' when assessing the WTO compatibility of energy-related actions that could have an impact on trade. This paper begins by describing the GATT/WTO rules, that may be relevant in the trade in energy debate. It then discusses some of the energy-related issues that are covered by the ongoing Doha negotiations and in some of the WTO accession agreements before pointing to a few energy-related issues, that are currently debated informally in the WTO and which call for more reflection and analysis. Finally, some of the normative and institutional issues involved in the conceptualization of new or improved rules on energy governance are addressed.

1. Introduction

The rules of the General Agreement on Tariffs and Trade (GATT) and those introduced upon the formation of the World Trade Organization (WTO) were not initially designed to address energy issues per se, but several of them are nonetheless relevant and applicable when assessing the WTO compatibility of energy-related actions that could have an impact on trade. These rules will be the focus of the first part of this paper. I will then discuss briefly the energy issues that are covered by the ongoing Doha negotiations and in WTO accessions as well as some that call for further reflection and analysis. Finally, I will explore some of the normative and institutional issues that need to be addressed when considering negotiating new or improved rules on energy governance.

One important preliminary issue is to define what we mean by 'energy' or 'trade in energy' or 'energy trade'. Should we define energy in terms of products like oil, gas, electricity, hydrocarbons, biofuels, firewood and charcoal, or in terms of their use? We could try to define energy as the action (product and process) through which energy rich natural resources are consumed and transformed to respond to a series of societal and individual human requirements for heat and power. Is energy – electricity, for example – a good or a service? This is important as WTO rules treat goods and services differently, but the industry does not distinguish energy in terms of goods and services. In fact the energy sector would seem to include aspects of both trade in goods and in services. The WTO jurisprudence is clear that a single commercial activity and even a single measure can be covered by the rules of both the GATT and the General Agreement on Trade in Services (GATS). Since the GATT disciplines are generally applicable to all products (while all the GATS disciplines are not necessarily applicable to all services), we need to clarify which aspects of trade in energy are covered by what rules of WTO Agreements.[1]

Another important characteristic of the WTO rules in relation to the energy debate is that, since many of the energy-related activities are covered by the disciplines of the GATS, several obligations in this sector are also reflected in Members' services schedules of specific commitments. The drafting and interpretation of commitments in schedules require a well-informed understanding of the operating functioning of the energy industry.

Finally, there are the pollution and climate-change dimensions of this energy debate. It is also important to understand the distinction between the broader

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1 In this context one may recall that recently the WTO *China-US audiovisual* panel AB decided that audio-visual material – which trade experts long assumed were covered exclusively by the GATS rules on audio-visual (WT/DS 363) – were also 'goods' and therefore subject to the general prohibition on quantitative restrictions of the GATT.

energy issues and our climate change problems , which are the consequence of our misuse of polluting forms of energy. Until 1850, people mostly used renewable forms of energy: wood, water, wind, human and animal power. Nowadays 85% of the energy the world uses comes from fossil fuels – coal, petrol and gas – which are non-renewable and polluting. This shift has had disastrous impacts on the natural environment, threatening the very survival of our species. But our individual and societal energy needs cannot be that easily reduced, and energy policies require multifaceted economic and political considerations.

2. Existing Rules in GATT/WTO Agreements

The WTO has rules on trade in goods, trade in services and on trade-related intellectual property rights. The GATT and WTO rules impose disciplines on all trade in products, past, present and future. To the extent that energy (oil, natural gas or coal for example) is a product, then all WTO provisions that contain disciplines on trade in goods are applicable. The same is true for energy-related services: all rules of GATS are potentially applicable to their operations.

2.1. WTO Rules on Trade in Goods

The rules prohibiting discrimination between like products – whether among imported products (most-favoured nation (MFN), GATT Article I) or between imported and domestic products (national treatment, GATT Article III) – are relevant to trade in energy. One basic issue in that context is to determine whether two products are 'like' and the WTO case law has determined that two products are a priori 'like' if they 'compete' with each other in a specific market. So, one issue would be to determine whether energy-efficient products are like non-energy-efficient products and thus whether regulatory and tax distinctions can be based on energy-related criteria. This brings into play the long debate on process and production methods (PPMs) and whether non-product-related criteria can be used to distinguish two otherwise like products, and to what extent energy used in production can be considered to be integrated into a product and thus a characteristic of, and part of, this product.

The basic GATT rule (Article XI) prohibiting quantitative restrictions applied at the border is also relevant. Members have expressed concerns in relation to licensing requirements governing access to oil and gas pipelines and other export distribution networks, which could have the effect of restricting the volume of oil and gas exported, and could therefore be inconsistent with the requirements of GATT Article XI.

Another basic rule of the GATT is included in Article V that prescribes freedom of transit and prohibits, in that context, MFN and national treatment (NT) violations as well as unreasonable charges and regulations imposed on the traffic of products in transit.

The GATT and other WTO rules that require that Members respect tariff commitments (and other WTO scheduled commitments), can also become relevant. Adding additional or specific commitments to Members' Goods and Services schedules to include various considerations relating to the specificities of energy could be useful in energy-trade commitments.[2]

The GATT and many other WTO Agreements contain provisions for general exceptions that allow governments to deviate from their WTO obligations when they want to give priority to non-commercial policies, such as the protection of human health or of the environment. Therefore, in the context of a climate-change programme, for instance, these exception provisions may allow a government to treat differently products that are otherwise similar and competing by introducing appropriate regulatory distinctions based on environmental considerations such as the CO_2 content level.

The WTO's general rules on subsidies, prohibiting export subsidies and allowing specific domestic subsidies so long as they do not cause adverse effects are also important to consider in the energy debate. More generally, contingent trade remedies (whether countervailing, anti-dumping or safeguards) have been invoked in respect of energy products and in respect of products benefiting from low-cost energy inputs. Provisions under Article 8 of the Agreement on Subsidies and countervailing duties (SCM Agreement) that deemed certain government assistance, including for research and development (R&D) and to promote adaptation of existing facilities to new environmental requirements, non-actionable, expired at the end of 1999, short of a consensus of Members to extend them, as requested by Article 31 of the SCM Agreement. Numerous commentators have called for re-instating such a provision to provide a safe haven for subsidies for renewable energy or for climate-change mitigation or adaptation, although as of now these calls have not been reflected in any proposals or even discussion by Members in the Negotiating Group on Rules.

Note

2 Recall the evolving use of schedules in the GATT and WTO from tariffs to subsidies, government procurements and services, thus allowing for better 'adapted' commitments.

Maintaining dual-pricing may be a considered as a form of 'subsidy' that provides benefits, but this does not mean that it is necessarily inconsistent with the SCM Agreement.

However, if dual-pricing cannot be shown to be applied solely in accordance with 'commercial considerations' – that is, that the state trading enterprises respect non-discrimination in their sales and purchases and afford the enterprises of other Members adequate opportunity to compete for participation in such purchases or sales – it could be contrary to the state-trading provisions of GATT Article XVII. At least some of the energy monopolies of countries in the process of accession to the WTO, if not all of them, would seem to be covered by this provision and should therefore avoid discrimination and 'behave' commercially. Some Members have argued that if domestic prices for natural gas are set by decree (thus not through market forces) and do not reflect production costs and a reasonable profit, they are, therefore, not determined 'solely in accordance with commercial considerations' as prescribed by Article XVII(b). Members have also argued that state monopolies that maintain domestic prices for natural gas at levels well below that of their long-term marginal cost of production, are acting contrary to Article XVII. Recall that during the winter 2006 dispute over the transit of natural gas from Ukraine to the EU through Russia, some noted the absence of 'market prices' for oil and transit fees between Ukraine and Russia as most problematic. In other words, some argued that one of the causes of this difficult situation was arguably the fact that the actors in that dispute – the state monopolies – were not trading commercially, hence engaging in non-commercial behaviour making not solely commercial choices.

The WTO rules on agricultural subsidies, allowing for export and domestic support subsidies below scheduled commitments and allowing for non-limited green subsidies, are also relevant to energy trade (for instance the issue of biofuels and other forms of subsidized agricultural fuels). WTO rules applicable to agriculture notably those on subsidies, will become very relevant as agriculture is one of the sectors most affected by climate change.

The WTO Agreement on Technical Barriers to Trade ('the TBT Agreement') could also be highly relevant to the extent that it encourages the adoption of efficient technical regulations and favours their international harmonization. The TBT Agreement also confirms that technical regulations can restrict trade in their implementation of WTO-legitimate objectives, so long as their effects are not more restrictive than necessary. Another fundamental principle of the TBT/SPS agreements provide that if a national regulation or other measure complies with an existing international standard, it is presumed to be WTO consistent. This is very important as regards, for example, all efficiency requirements relating to electricity, fuel and energy in general.

2.2. WTO Rules on Trade in Services

The GATS applies to all measures that affect trade in services – a very broad reach. Therefore, all services related to trade in energy can be covered by the GATS. Thus the GATS tentacles touch a multitude of aspects of the energy trade.

Under the GATS, all Members are bound by a number of general obligations and disciplines, among which the MFN principle (Article II) is the most important discipline for energy-related services. It requires each Member to treat all other Members' services and service suppliers in a non-discriminatory manner; but it does not impose on any Member the obligation to accept foreign services and services suppliers in its market (e.g., to give access to its national oil service market). However, if such a Member provides to another WTO Member access for a particular service, it must do so in favour of all WTO Members' services and service suppliers equally.

The GATS general rules on monopolies and exclusive services suppliers (Article VIII) are also of particular relevance to energy services where monopolies are very common. Article VIII requires each Member to ensure that: (i) the incumbent monopoly in a given market does not act in a manner inconsistent with MFN and with its specific commitments (discussed below); and (ii) the monopoly supplier does not abuse its monopoly position in supply of a service outside the scope of its monopoly rights that is the subject of a specific commitment by that Member.

Article VI of GATS establishes general disciplines on domestic regulation. Regulatory issues are particularly relevant for energy services as the sector is highly regulated and network-based, with the existence of incumbent suppliers and where the supply of services depends on the right of access to infrastructure (e.g., gas pipelines, electricity grids, gas storage facilities, liquefied natural gas (LNG) terminals).

GATS also contains a number of specific obligations that are applicable only to sectors in which specific commitments have been scheduled. In GATS, commitments are scheduled along four modes of supply, and by sectors, mostly in accordance with a widely used, non-mandatory classification. This generally accepted classification of services is the Sectoral Classification List (W/120), drafted on the basis of the United Nations Provisional Central Product Classification (CPC) of 1991. Neither the W/120 nor the CPC includes a distinct comprehensive category for energy services. Nevertheless, the W/120 contains three subsectors that are explicitly related to energy activities: services incidental to mining, services incidental to energy distribution, and the pipeline transportation of fuels.

In addition to these three subsectors, a number of sectors and subsectors listed in the W/120, such as road, rail or maritime transport, distribution, construction, engineering, and consulting, may also cover energy-related activities, but are not exclusive to the energy sector. Thus, while all energy-related services are covered in principle by the W/120, it is not easy to identify them individually.[3]

Obligations of market access (Article XVI) and national treatment (Article XVII) apply through the inscription of specific commitments under the GATS. Market access and national treatment WTO-consistent restrictions in energy services are similar to those in other sectors, including nationality and residency requirements, restrictions on foreign investment, discriminatory treatment of foreign suppliers, the existence of exclusive rights and monopolies, arbitrary business and licensing requirements. High duties and requirements of local procurement for energy-related equipment and materials can also pose barriers to energy services.

Many hold the view that additional disciplines on domestic regulation and competition are needed for energy services. In fact, requests for additional commitments (Article XVIII) on regulatory transparency and non-discriminatory treatment in access to and use of networks have been put forward in negotiations on energy services.

2.3. WTO Rules on Regional Trade Agreements

The WTO rules on both goods (Article XXIV) and services (Article V) allow for regional preferences – subject to certain conditions and so long as they do not affect trade with third countries. It is usually accepted that WTO consistent regional trade agreements (RTAs) can lead to some discriminatory restrictions on trade, so long as they are inherent and necessary to the formation of the RTA. But it is far from clear whether RTAs can justify discriminatory pricing or regulations. To the extent that countries may develop regional energy policies, the WTO rules and flexibilities provided for RTAs may become very relevant.

In this context, preferential and general rules of origin based on energy or climate change related action could become crucial.

2.4. WTO Rules Allowing for Preferences for Developing Countries

The WTO Enabling Clause allows developed countries to provide tariff preferences to imports of goods from developing countries and Article VI of the GATS contains similar flexibilities for trade in services. The recent Appellate Body report on *EC – Generalized System of Preferences* (GSP) seems to suggest that such preferences can be conditioned upon the respect of development-related requirements, if applied objectively and fairly. Arguably, access to energy is an inherent part of development and GSP schemes could arguably include energy-related criteria.

2.5. WTO Rules on Government Procurement

The WTO rules on government procurement[4] – which apply only to signatories of the agreement – cover for governmental purchases basic principles of national treatment and non-discrimination (Article III); the (GPA) also contains disciplines on technical specifications (Article VI), which aim at avoiding 'creating unnecessary obstacles to international trade'; and ensuring that, to the greatest extent possible, specifications are prescribed in performance terms and in keeping with international standards. The GPA also allows Members to impose justifiable conditions that can include energy-related criteria. For instance, some Parties (e.g., Canada, the EC and the US) cover, as part of their non-sensitive defence procurement items, products that are either from the energy sector (e.g., fuels and lubricants, nuclear reactors) or may have a use in the energy sector (e.g., mechanical power transmission equipment, electrical machinery and equipment, pumps, compressors and boilers).

2.6. Conclusion

In summary, the Marrakesh Agreement Establishing the 'the WTO Agreement' has a very broad scope of application and reach over several energy-related commercial activities. The great difficulty is to determine 'how' the WTO disciplines would operate

Notes

3 Typically, the Plurilateral Request in this sector, tabled by interested Members in the wake of the Hong Kong Ministerial Meeting lists a range of energy-related subsectors – from engineering and integrated engineering services to retailing services of fuel oil, bottled gas, etc. – that are scattered across the W/120. (Remarkably, two of the three energy-specific subsectors – services incidental to energy distribution and pipeline transportation – are not contained in this request.)

4 It is also unfortunate that the relevant negotiations under Art. XIII of the GATS on government procurement on services are stalled.

with specific energy-related activities or practises. In this context, one should remember that the WTO has no investigative powers, so only Members can challenge the actions of another Member, either politically in relevant regular committees, or before the Dispute Settlement Body where Members' measures are always presumed to be WTO consistent as members are presumed to be acting in good faith and in a WTO-consistent manner until proven otherwise. In disputes, all Members are also presumed to have sufficient economic and legal interest to initiate an adjudication process on whether a WTO obligation has been violated de jure or de facto without having to demonstrate the negative trade impact of the challenged measure. The WTO jurisdiction is compulsory, exclusive and relatively rapid. It is interesting to note that the very first dispute in the WTO concerned exports of gasoline from Brazil and Venezuela to the United States.

3. Rules Currently Being Negotiated in the DDA

The ongoing Doha Development Agenda (DDA) negotiations include negotiations on liberalizing trade in environmental goods, a category that has not been defined but which could cover technologies such as wind turbines, solar panels, geothermal energy sensors, fuel cells, electricity meters and associated parts and components. Paragraph 31(iii) of the DDA also calls upon negotiators to remove barriers to trade in environmental goods and services, but those discussions have not yet progressed very far at all.

There are also negotiations on trade facilitation where the issue of transit is being negotiated to improve the conditions for the transit of goods. For oil and gas exporters, the areas of the negotiations that are likely to be of the most importance concern: the scope of application of the Article V disciplines on transit; whether to strengthen provisions on non-discrimination; disciplines on fees and charges; disciplines on formalities and documentation requirements; and regional transit arrangements.

In the ongoing DDA negotiations on industrial tariffs (NAMA), some have put forward proposals for disciplines on export taxes and export restrictions. Recall that Article XI of GATT prohibits export restrictions, but there are no GATT disciplines on export taxes. Wide differences of opinion separate WTO Members on this issue.

Energy services is an important topic in the ongoing services negotiations. In the market-access negotiations, Members have the opportunity to undertake new GATS commitments on a number of energy-related services activities (services incidental to mining, services incidental to energy distribution, engineering, construction, etc.).

In the Rules negotiations, one delegation has proposed prohibiting the provision of input goods (including energy) to domestic production on more favourable terms than the terms under which the goods are exported (so-called 'dual-pricing').[5]

4. Energy Issues in WTO Accessions

Energy may be an important topic, but many of the most important players are still outside of the WTO. Interestingly, several energy-exporting countries (e.g., Algeria, Iran, Iraq and Russia) are now in the process of acceding to the WTO. It is accordingly in the ongoing accession processes that energy issues have become the most discussed. Recall that, in accessions, WTO Members can impose additional obligations (not included in the WTO treaty) on acceding Members. In all cases, an accession working party is a very informative forum, where the views of existing Members are expressed on all issues of concerns with the acceding country. For example, on the transit issue, some Members have expressed concerns with regard to the fees charged for the transit of energy products through pipelines when set in a non-competitive, non-transparent environment contrary to GATT Article V. Others have argued that the differential transport fees on different oil-transit routes conflict with the freedom-of-transit provisions of GATT Article V.

GATS does not oblige Members to liberalize any sector per se; specific commitments can be negotiated in chosen sectors. In the accession negotiations on services to date, with the exception of the Ukraine, acceding governments have not undertaken any specific multilateral commitments on the liberalization of their energy sectors. Only some specific commitments have been undertaken and have been recorded in the Schedules of Specific Commitments under mode 3 (commercial presence) of the GATS. Similarly, there is no GATS obligation regarding privatization and no specific multilateral

Note

5 TN/RL/GEN/135.

commitments (including commitments in the energy sectors) have been made by acceding governments on issues relating to state ownership and privatization other than the commitment to provide WTO Members with annual reports on the status of privatization.

Given the inherent complexities of addressing dual-pricing through the SCM, there have been efforts to address the practise specifically in the accession processes of energy-producing countries, such as the Russian Federation and Saudi Arabia. The Saudi Arabian accession package incorporates an explicit commitment by an acceding government on energy pricing.

Members have required acceding governments to agree to detailed commitments on state-trading enterprises, fleshing out what they feel are missing details in the wording of Article XVII and its GATT 1994 Understanding.

Members have also systematically examined the regulatory framework governing energy transportation and distribution networks in the context of the investment regime of acceding energy-producing countries. Specifically, the countries of the Commonwealth of Independent States (CIS) have asserted that they consider the transportation of oil, oil products and natural gas through the pipeline networks (as well as the transmission and distribution of electric energy) to be an activity characterized by the existence of a natural monopoly – that is, an activity for which the existence of a competitive market is not economically viable.

The case of Ukraine is special. In its Working Party Report, Ukraine's commitment on transit (enforceable through its Protocol of Accession) differs in that it makes a specific reference to 'energy' goods; and, in addition to the standard reference to laws and regulations, it adds 'other measures … such as those governing charges for transportation of goods in transit' to the list of provisions that would be bound by the disciplines of GATT Article V.

In its services schedule: Ukraine's specific commitment on pipeline transportation goes further than commitments undertaken by other new Members in this services subsector. To appreciate what GATS can add to GATT, consider the additional commitment that Ukraine has taken in respect of pipeline transportation of petroleum products and natural gas:

> Ukraine commits itself to provide full transparency in the formulation, adoption and application of measures affecting access to and trade in services of pipeline transportation. Ukraine undertakes to ensure adherence to the principles of non-discriminatory treatment in access to and use of pipeline networks under its jurisdiction, within the technical capacities of these networks, with regard to the origin, destination or ownership of product transported, without imposing any unjustified delays, restrictions or charges, as well as without discriminatory pricing based on the differences in origin, destination or ownership.

Ukraine is now pushing other acceding countries to accept the same commitments. This makes sense if we think in terms of a European-wide pipeline network. Generally, one may consider using the language and practise developed in accession protocols as a possible basis for future multilateral negotiations.

5. A Few Relevant Issues that Call for More Research and Thinking

5.1. Export Quotas, Export Taxes, Restrictions on Export versus Restrictions on Production

GATT Article XI prohibits export restrictions but does not address production per se. There are no obligations imposed on Members to extract and produce energy resources, and this is where the difficulties lie, as some Members are trying to guarantee their access to supplies of petroleum, natural gas, coal and uranium in foreign countries. In fact this is somehow what Members are trying to secure – a guaranteed right to purchase hydrocarbons in particular from other Members. More thinking is needed to find out how to better exploit and share natural resources. Could we change the traditional principle of sovereignty over natural resources by a principle that deems such resources world common resources or common goods? In any case, energy resources are clearly 'natural resources' and we are already seeing many of the exporters improve their domestic efficiency in use – in line with the requirements of Article XX(g) of the GATT that some members may want to invoke to justify import or export restrictions.

GATT Article XI does not address the issue of export taxes, which are therefore not generally prohibited (subject to specific commitments on accession protocols). Economists would, however, argue that, whether in the form of taxes or quotas, export limitations are detrimental to exporting and importing countries. One must wonder whether export taxes can be factually equivalent when at a high enough level. An important dispute has been initiated against some of China's export restrictions on energy goods and natural resources. This dispute should bring some clarity to some of the issues relating to export restrictions but also to the specific issue of China's specific commitments concerning the use

of such measures that are regulated in its Protocol of accession.

5.2. The Transit Issue: A Goods or Services Issue?

5.2.1. Transit as a Trade in Goods Issue

An important issue is the scope of application of the GATT transit obligation (on goods) and whether it covers trade by pipelines. Traditionally Article V applies to transport over land or via inland waterways, via rail, road or barge. Article V states that it is applicable to the 'means of transportation of a good'. Russia and some Members argue that pipelines are not 'means of transportation' because, unlike lorries, trains or ships, they do not move. On the other hand, some Members have argued that even if train railroad tracks do not move, they support and allow trains to move, and most people would argue that train tracks are an integral part of the means of transportation defining transport by trains. Having said this, the fact that exports of petroleum and natural gas must transit through third countries – say, from Russia to the EU through Ukraine, or Kazakhstan through Russia to EU – places no obligation on Russia or Kazakhstan to extract and export their hydrocarbons. States are sovereign over their natural resources, and unless foreign companies are entitled to establish and invest in that country or unless specific promises to export are agreed, it is difficult to see how states can be forced to exploit and commercialize their natural resources.

Crude oil and petroleum products have been transported by sea tankers and in trucks for a very long time, but new methods of transporting gas are also being developed, such as specially designed ships for transporting liquefied natural gas (LNG). So it will generally be important to clarify what is meant by 'transportation' in GATT Article V.

In the first dispute panel report on transit in respect of Panama's complaint against Colombia's indicative prices and restrictions on ports of entry (*Colombia – Ports of Entry*), the Panel found that 'goods in international transit from any Member must be allowed entry whenever destined for the territory of a third country'. It added that, 'a Member is not required to guarantee transport on necessarily any or all routes in its territory, but only on the ones "most convenient" for transport through its territory'. It also found that the MFN obligation in GATT Article V applied not only when a WTO Member was a transit state (i.e., when the goods were passing through its territory en route to a third country), but also when it was the final destination of the goods. Clearly, the Panel wanted to accord the GATT transit obligation its full potential.

5.2.2. The Service Transportation Issue

The services dimension of those transportation activities is generally different: it is concerned with issues relating to who will provide the pipeline transportation services and how: for instance, what national consumers of pipeline service transportation can and cannot do.

Even if transit is essentially an issue relating to trade in *goods*, there are innovative developments in the context of the 'GATS additional commitments'. It is in the additional commitment of the Ukraine that the EU and others tried to secure further market-access obligations. These additional commitments are very similar in essence to the goods transit provision of Article V of the GATT and therefore deal more with the conditions of the passage of the good ('delays, restrictions, charges, pricing', and 'origin, destination and ownership of the product transported') than with conditions of access for individual or commercial consumers of pipeline services. However, to a large extent the two elements are inextricably linked (i.e., a proper non-discriminatory access to a pipeline implies that the goods transported (covered by GATT) are also treated in a non-discriminatory manner). Geography is obviously a key consideration when evaluating the utility of these commitments.

A lot of research and new thinking is needed on the issue of transit – not only to define what is covered by transit, but also how to best discipline the right of passage, apply national treatment and MFN obligations, process papers and formalities, and tackle the bilateral and RTA transit agreements, all of which issues are now under negotiation in the context of trade facilitation. Since GATT and GATS rules are different, clarifying the applicable disciplines to the various dimensions of trade in energy generally, will become necessary.

5.3. Subsidies

Energy-related sectors are often highly subsidized. WTO Rules on subsidies and on countervailing duties are thus especially relevant and may call for new considerations.

5.3.1. Energy Input Subsidies and Dual-Pricing

WTO rules do not explicitly directly address the issue of dual-pricing of energy products – that is, the sale of identical products at different prices (domestically and for export). In the context of energy pricing, of course, the concern relates to situations where the domestic price of energy is lower than the export price. Dual-pricing per se is not WTO inconsistent – it depends on each system, particularly on how it is operates in fact.

The SCM Agreement has been the principal instrument used to evaluate the WTO compliance of dual-pricing policies of acceding energy-producing countries. To date, the most comprehensive multilateral examination of issues related to trade in energy goods and services has taken place in the Working Parties of the Russian Federation and Saudi Arabia. The Saudi Arabia accession package was the first to incorporate an explicit commitment by an acceding government on energy pricing in the Report of the Working Party.

There is no ambiguity as to the more general proposition that government provision of an input to the production of a traded good for less than adequate remuneration – for example, the sale of electricity or natural gas to domestic consumers at a preferential price – constitutes a subsidy, which if specific, is fully subject to the SCM Agreement.

We need to continue to discuss dual-pricing practises, including whether it constitutes a subsidy under the SCM Agreement and whether such subsidies would be WTO consistent. However, two general points can already be made. First, whether the government provision of a good or service, such as an energy input, is a subsidy is to be established in relation to 'prevailing market conditions in the country of provision or purpose', rather than export prices.[6] Second, if a subsidy in the form of a low-priced energy product is generally available within the economy of the subsidizing government (i.e., available without restriction to all users), then, although a subsidy, it would fall outside the scope of the SCM as it would not be 'specific'.

It has also been argued that a dual-pricing scheme can only be maintained through export restrictions, and there have been a number of attempts to treat export restrictions resulting in lower domestic prices as a subsidy. However, one panel has decided that export restrictions are not themselves financial contributions and hence cannot be treated as subsidies (*US – Export Restriction*). The logic here is to invoke in their place export restrictions' disciplines, such as Article XI, discussed above.

5.3.2. Countervailing Measures on Energy Products

Indeed, there are many examples of countervailing measures being applied on final products on the basis of the provision of subsidized inputs, including energy.[7]

The implications of the SCM Agreement are not limited to subsidized energy inputs. Trade in energy and energy-related products can itself be affected. For example, countervailing measures have recently been imposed by the EC on imported biodiesel, while the United States maintains undertakings on uranium from France, Germany and Italy, resulting from countervail cases.[8] As governments increase support for renewable energy and the products needed to generate it, the potential trade impacts, and consequent use of countervailing measures, may be expected to increase.[9]

5.3.3. Green Subsidies (AoA – SCM)

Provisions under Article 8 of the SCM Agreement that deemed certain government assistance, including for R&D and to promote adaptation of existing facilities to new environmental requirements, as non-actionable, expired at the end of 1999, short of a consensus of Members to extend them, as requested by Article 31 SCM. Numerous commentators have called for the reinstatement of such a provision to provide a safe haven for subsidies for renewable energy or for climate-change mitigation or adaptation.

The WTO Agreement on Agriculture (AoA) is of relevance to energy-subsidies benefiting agriculture, such as subsidized fuel for farm machinery and subsidized electricity for irrigation, and for energy produced from agriculture. Whether subsidies for the production of non-traded crops (e.g., Miscanthus, switchgrass) that are used as raw materials for biofuel production are covered by the disciplines of the AoA is still uncertain. Moreover, while ethanol, the leading biofuel, is covered by the AoA, biodiesel and biojet fuel are not, though any agricultural by-products

Notes

6 ASCM Art. 14(d). The Appellate Body has clarified that, while this usually implies a reference to the prices charged by private providers, reference max be had to alternative benchmarks where the government is the sole or predominant supplier of the input. *US – CVD on Lumber from Canada*, WT/DS257, AB/R, para. 100.

7 See, for example, Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 66 Fed. Reg. 50410 (3 Oct. 2001) and Pure Magnesium and Alloy Magnesium from Canada, 57 Fed. Reg. 30946 (13 Jul. 1992). In both investigations, the US Department of Commerce treated the provision of electricity at preferential rates as a countervailable subsidy.

8 *Council Regulation* (EC) No. 598/2009.

9 The use of other contingent trade remedies on energy and energy-related products is also not precluded. Most dramatically, US petitioners have (unsuccessfully) sought antidumping (and countervailing) duties on crude oil imports. See Certain Petroleum Oil Products from Iraq, Mexico, Saudi Arabia and Venezuela, 64 Fed. Reg. 44480 (16 Aug. 1999) (petition dismissed for lack of standing).

from their subsidized production (e.g., oilseed meal) presumably would be. Is it sustainable to maintain such different disciplines?

5.4. Technical Standards

The presumption of the TBT Agreement that domestic regulations that comply with international standards are presumed to be WTO consistent, that comply with could become very powerful in the energy debate. Consider, for example, minimum energy performance standards (MEPS), or sustainability standards for biofuels or low-carbon fuel standards. But does this presumption include regional standards? The case law has determined that such standards do not need to have been adopted by consensus; but are there any minimum requirements? Does this presumption cover private standards? If, for instance, a sectoral agreement takes place among the cement industry, can it be presumed to be WTO consistent ? If a WTO Member relies on it for its domestic regulation? Can it be invoked as evidence of Co2 related action sufficient and arguably 'comparable' to the one in place in the importing country? How to treat private standards generally in the climate change and energy debate where they are booming?

5.5. Technology

The development of new technologies, effective access to technology, and appropriate choices in applying technologies – is central to the debate about the energy sector, its impact on the environment and its role in fulfilling development aspirations. The climate change debate epitomizes this linkage between energy technology and broader concerns about the environment and equitable access to energy infrastructure. In turn, this debate has led to close scrutiny of the intellectual property system as a key policy tool influencing innovation and the diffusion of technology and the international rules on intellectual property protection established in the WTO Trade-Related Aspects of Intellectual Property (TRIPS) Agreement. Intellectual property law and policy pivots on setting a dynamic balance between fostering innovation and productive investment and technology partnerships through the grant of exclusive rights and facilitating access to the practical fruits of innovation by encouraging its diffusion through licensing and the maintenance of a healthy public domain.

TRIPS captures this policy balance, at the level of general principle, allowing flexibilities for governments to adapt and apply this balance in a manner tailored to their particular development priorities and economic circumstances. An emerging debate, provoked by the sense of urgency in climate-change negotiations, is considering whether the TRIPS rules are appropriate and sufficiently flexible to address two main concerns: favouring investment in sustainable, environmentally beneficial energy technologies, and then ensuring what has been termed 'energy justice' – equitable access to energy infrastructure. While the TRIPS rules are likely to be found to be broadly effective and sufficiently flexible to enable the necessary international and national policy initiatives to foster and disseminate new, environmentally sound energy technologies, debate will continue over what is the full range of domestic regulatory choices legally available within this general framework, and then over what choices would achieve optimal policy outcomes – in short, a legal debate over the scope of flexibilities available under TRIPS, and a policy debate over how best to deploy those flexibilities.

6. Institutional Issues

There are also several institutional issues that must be addressed when considering whether, how and where to initiate the energy-related discussions and negotiations.

6.1. Is the WTO the Right Forum?

Would negotiations to develop a new international governance structure for energy have to take place in the WTO? There are existing WTO rules that are applicable today to trade in energy. There are also already aspects of trade in energy that are being discussed in the trade facilitation (transit) and in the NAMA contexts (export taxes); energy-related services (including pipeline services) are also negotiated at the WTO. Moreover, several basic WTO provisions, including those relating to transit, state-trading, subsidies, regulatory controls and a broad range of energy-related services, already deal directly with energy trade. So, even if new rules on trade in energy were to be negotiated outside the WTO, and even if an international organization were set up to deal with 'energy' issues, WTO Members would still need to develop rules on the relationship between relevant WTO rules and non-WTO rules affecting trade in energy.

The WTO institutional framework is for some an appealing forum to initiate trade in energy discussions, and its advocates point to the maturity and sophistication of the WTO system. The WTO has established the rule of law among its Members, and the equality of its Members has demonstrated the power of consensus; it has developed extensive practices of notifications and transparency; it is a very

inclusive negotiating forum and its monitoring and surveillance system would be very useful in sectors like energy that bring together multifaceted economic and political issues which dispute settlement cannot always address properly.

Others argue that the WTO is not a forum where technical norms are traditionally negotiated and that the WTO Members and WTO Secretariat staffs are traditionally trade experts not energy experts. One option is for the negotiations to start in another forum, like the Energy Charter (as it was the case for government procurement and ship-building for which negotiations started in the OECD and were continued in the GATT) or any new forum. The results of the negotiations could then somehow be 'transferred' to the WTO or 'cross-referred' or 'integrated' into the WTO framework. Such an approach was used with the SPS and TBT presumptions of compatibility in favour of international standards negotiated in expert forums. This is the sort of linkage that is explored in the ongoing negotiations on the relationship between the WTO and multilateral environmental agreements (MEAs).

One should also bear in mind the limits of the WTO dispute settlement system and its institutionalized system of counter measures when dealing with some of the potential trade in energy disputes. Several energy-exporting countries do not have diversified economies, which means therefore that the energy-importing countries would not have much retaliatory power against a non-compliant energy-exporting Member. The retaliation would logically lead to import restrictions on energy – which is the opposite of what energy-importing Members would want. This is true for instance in the relationship between the EU and Russia and other CIS countries over natural gas, for which the EU has few alternative suppliers.

In addition, energy is often under direct or indirect governmental control; do we need to expand the coverage and the reach of the WTO's Plurilateral Agreement on Government Procurement, which at the moment only applies to a fraction of the WTO Membership? For the same reasons, the WTO's rules on state-trading enterprises would need to be further developed possibly in line with the language inserted in the recent accession protocols.

Finally, another weakness of the WTO is that there is no comprehensive system of rules on investment or competition and it is impossible to properly and fully address energy concerns without taking into account those dimensions of energy in international relations of today.

6.2. Would There Be a Need for a New WTO Agreement on Energy within the Single Undertaking?

If energy-related negotiations were to take place in the WTO, Members would need to consider how to do so whether a separate WTO agreement on energy is needed? Everybody seems to agree that new definitions and some specific rules for energy would in any case be needed, but where would they be located in the WTO Agreement?

– We could possibly 'add' a new energy agreement that would include a series of specific rules on energy – as was done with the Agreement on Agriculture, or the Textile Agreement in the WTO. Members would also have to decide whether such an agreement should be multilateral or plurilateral. WTO Members could also consider an agreement based on 'critical mass', which is considered final even if not all Members participate in the negotiation but benefiting from the MFN application, as Members did with the WTO Telecom Agreement.

– An alternative would be to add energy-specific provisions throughout the existing WTO Agreements – which means an amendment to WTO provisions for which energy-related aspects are added. Such amendments would have to be agreed according to Article X of the WTO Agreement.

– Another approach would be for Members to adopt an 'Interpretation Decision' clarifying how the rules of the WTO apply to some specific energy sectors. This could be adopted by consensus by the General Council – a much simpler process than an amendment.

But one thing is clear: WTO Members would need to take into account the existing case law on the implications of the WTO Single Undertaking whereby Members are expected to comply with all their WTO obligations simultaneously. Therefore, if, for instance, WTO Members want to adopt special rules on energy subsidies (as they did with agriculture subsidies), they would have to decide collectively on how the new specific rules applicable to energy-subsidies would relate to the general rules on subsidies.

The WTO system contains enough institutional flexibilities to allow its Members to adapt the system fairly easily to meet their pragmatic needs. A good example is the legal route followed to expand the access to medicine. First, in 2001 WTO Members adopted a political Declaration on the TRIPS Agreement and Public Health[10] in which the WTO

Note

10 WT/MIN(01)/DEC/2. Note also that para. 17 of the general Doha Declaration also refers to the specific actions on TRIPs and the separate Decision on TRIPS and health.

Ministerial Conference instructed (in paragraph 6 of the Declaration) the Council for TRIPS to find an expeditious solution to the problem of the difficulties that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the TRIPS, for certain very dangerous diseases. Then, after two years of intensive negotiations, as a second step, WTO Members adopted a temporary waiver[11] to the relevant TRIPs provisions; finally WTO Members adopted a formal amendment of the TRIPs agreement.[12] Therefore energy provisions can be integrated in the WTO systems in various ways.

6.3. Relationship with Provisions of the Energy Charter and Other Non-WTO Energy Provisions

Another issue to be reflected upon is how the more detailed rules of the Energy Charter or of other bilateral or regional agreements containing energy-related provisions would relate to the WTO rules and how they would be used in the context of a WTO dispute: to what extent could the clarifications contained in the Energy Charter and in particular in its Transit protocol be used as part of the historical or legal context in the interpretation of GATT Article V? Some may even argue that, between two signatories, the provisions of the Energy Charter could become applicable law before a WTO panel, while others would clearly oppose such an approach.

7. Conclusions

When thinking of global governance on energy, we know that market mechanisms have proved their value. Markets remain the most efficient way to allocate resources. We know that markets must be governed by transparent and predictable rules. But is the WTO the best forum for discussing and negotiating the main parameters of those energy regulations? If Members go ahead, do we need a new separate agreement on energy or should we adapt existing provisions to fit better with trade in energy? At the moment it seems that the Doha Development Agenda is too choked to consider adding a new item as large as energy, but afterwards?

One risk is that, if nothing is done, and no negotiations are undertaken anywhere, energy-related tensions could lead to disputes in which the WTO dispute settlement system would have to adjudicate conflicts using just the existing WTO rules, which were not negotiated with the specificities of the energy sector in mind.

At present, Members seem to keep pushing acceding countries to deliver maximum commitments to build a basis of common denominators and an opportunity to shape the future agenda. Despite this trend, the jury is still out on where those broader energy negotiations should take place.

Whether WTO Members should develop in the WTO a new framework for discussing energy-related issues is an open question. But what seems clear is that since there are already several WTO disciplines that are applicable to trade in energy, if states negotiate outside the WTO rules on energy that affect trade directly or indirectly, they will necessarily have to reflect on how to bridge the existing energy relevant provisions of the WTO with other non-WTO energy-related treaty provisions. And if (some of) such negotiations take place in the WTO, Members will also have to reflect on the implications of the WTO Single Undertaking for that matter.

Finally, and more importantly, 'energy' never disappears completely, it only gets transformed; and this is all the more true with fossil fuels. Indeed, it could be said that our climate situation is largely a consequence of our mismanagement of energy production and management. Energy consumption will need to be reconciled with sustainable growth, and for this to happen we will have to change our way of life. This cannot be done by the WTO, even if, as I personally believe, the WTO evolves to reflect the ever-changing priorities of society.

Notes

11 WT/L/540 and Corr. 1, 1 Sep. 2003.

12 WT/L/641 8 Dec. 2005 – Amendment of the TRIPS Agreement, Decision of 6 Dec. 2005. See <www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm>.

GUIDE TO AUTHORS

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