

Global Challenges at the Intersection of Trade, Energy and the Environment

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Panel 2: Import, Export and Production Restrictions on Energy Goods and Services¹

Background paper

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Panel 2: Import, Export and Production Restrictions on Energy Goods and Services

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Overview

In order to discuss the application of the WTO Agreements in the context of energy and the environment, we should first define the scope of the relevant WTO rules and commitments. We must also understand the process and politics of how the various rules and commitments are undertaken.

At the outset, we must acknowledge that the scope of the WTO Agreements is limited. For example, WTO rules do not speak to most aspects of investment, competition, labor and immigration policies, or exploitation of national natural resources, not to mention control over national borders and citizenship – even though these topics can affect trade. Even in the many areas covered by the WTO Agreements, Members may implement measures inconsistent with the rules under exceptions for public morals, health, environmental protection, and national security.

The scope of the WTO Agreements and the application of existing rules and commitments, including on energy and the environment, does not satisfy the diverse interests of the WTO Membership. The introduction of new rules requires the consensus of all Members (in the form of support or silence). Under such a rule-making system, stakeholders must obtain broad agreement on new rights and obligations so as to avoid alienating supporters and undermining consensus. In addition, the meaning of existing rules can be “clarified and improved” through multilateral agreement or interpreted through dispute settlement proceedings. Improved multilateral market access commitments affecting energy and the environment can only be obtained through WTO multilateral negotiations.

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Production Restrictions

No WTO rules apply to Members' decisions on whether or not to produce natural resources, including water, agricultural products, timber, ores, and energy resources like coal, oil, and natural gas. Arguments have been made that decisions to regulate natural resource production could be considered "export restrictions" under Article XI of the General Agreement on Tariffs and Trade (1947), which prohibits quantitative export restrictions. However, most Members consider that the exploitation of natural resources is reserved permanently and exclusively to nations' internal sovereignty and remains outside the scope of the WTO Agreements.

The Organization of Petroleum Exporting Countries (OPEC) comes to mind in this context because its mission is

to coordinate and unify the petroleum policies of Member Countries and ensure the stabilization of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers and a fair return on capital to those investing in the petroleum industry.⁴

OPEC pursues this goal by recommending crude oil production targets for its member countries. The pertinent question for WTO purposes is: whether decisions concerning whether and at what rate to produce natural resources should be considered *de facto* quantitative restrictions on exportation. If this was the case, there would be huge implications for other natural resources (like water and forestry products) which are more accessible, tradable, and renewable.

When Members have considered this issue in the trade context outside of the WTO, they have introduced legal certainty and reassured the public that even the most advanced international trade and investment agreements will not intrude on natural resource sovereignty.

The Energy Charter Treaty (ECT) is the most ambitious treaty concerning investment, trade and transit of energy. ECT Article 18.3, Sovereignty over Energy Resources, unequivocally confirms the parties' State sovereignty over energy resources:

Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, [and] the optimization of their recovery and the rate at which they may be depleted or otherwise exploited[.] (Emphasis added.)

⁴ <http://www.opec.org/home/> (visited 3 September 2009).

Although in 1994 North American Free Trade Agreement (NAFTA) broke new ground in setting high standards for economic integration, the parties confirmed that since water was not considered to be a good or product subject to international trade rules, the NAFTA had no implications for natural water resources.

In view of natural resource sovereignty issues, WTO Members should consider whether the clear affirmation of sovereignty principles in the WTO context would create confidence and facilitate multilateral discussions on energy-related issues.

Business Effects of Existing Policies and Trade Barriers

Import and export barriers “distort” international trade in goods and services, and therefore affect business opportunities, conditions of competition and investment decisions.

Although the WTO agenda has been broadened to address increasingly complex “behind the border” issues, stakeholders must not neglect tariffs as the most fundamental barriers to international trade. New WTO bindings on non-agricultural market access (or NAMA) may in some cases create new trade flows, but in all cases increase the level of security and predictability of international trade. Although some WTO Members base negotiating requests on “new trade flows,” the realistic target in most cases is the reduction of bound rates toward applied tariff rates of “trade security.” While the business community would certainly like to enjoy new trading opportunities, they also understand the intrinsic security of WTO bindings.

In the case of primary and downstream energy products, applied tariffs are low, but bound rates remain high, or even completely unbound, in some important sectors. The Doha Round includes plan to reduce tariffs on “environmental goods.” The trouble is, Members cannot decide what goods are environmental... And, notwithstanding the continuing importance of tariff negotiations, non-tariff measures are an increased source of trade distortion and therefore trade friction.

With respect to energy services, a strong case can be made for commitments under the General Agreement for Trade in Services (GATS) reflecting existing levels of openness. This is especially the case of environmental services, where Members have even more reason to make commitments that would support competition and the development of increasingly efficient services. However, as in the case of goods trade, many Members have concerns over “sovereignty” issues related to GATS commitments. Institutional efforts need to be undertaken to

address such fears and to encourage Members to make commitments without concerns about maintaining national resource sovereignty.

Trading Alternative and Conventional Energy Products

Since “alternative” energy competes against “traditional” energy, established interests can be expected to protect their markets from new competitors. Governments therefore face requests to maintain tariff protection, to classify imports in categories with high tariffs, and to introduce technical regulations that impose burdens in “alternative” products.

Currently, the most important “alternative” energy products take the form of renewable “biofuel” products including biodiesel, bioethanol and biomass products. These products face high tariffs, unfavorable tariffs classifications (that result in higher tariffs), distortions caused by national subsidy programs, and regulations that require conformance with technical regulations and sanitary and phytosanitary requirements. In addition to the legal and regulatory restrictions in place, infrastructure limitations need to be overcome by companies engaging in the “alternative” areas of trade.

Traditional energy products also face their share of trade barriers, including unbound tariffs or bindings at high rates, and internal tax policies. Differential rates of internal taxation apply among “traditional” energy products, like oil and coal (mostly favoring the latter), and between “renewable” and “traditional” energy sources (favoring the former). In addition, most countries apply high internal taxes to traditional energy products whether or not they produce such products at all.

Some Members apply export tariffs on energy products that in effect maintain prices in their domestic markets below international market prices. Export taxes are legal and in the view of this fact most countries remain outside of the WTO “bargain.” However, some Members nevertheless attempt to obtain commitments on export duties in the context of WTO accession negotiations and in the Doha Round.

As concerns wholesale and retail trade in fuels, the GATS system specifically provides for commitments on these services, but actual market access and national treatment obligations depend on specific commitments undertaken by individual Members. Members’ schedules of specific services commitments should be studied to confirm where market opportunities exist and where further engagement is needed. However, even where Members have not undertaken

specific commitments, the most-favored nation (MFN) principle requires equal treatment of all trading partners. Therefore, Member state practice should also be reviewed to consider where the operation of the MFN principle creates market opportunities.

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