

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

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# Incentives to Stimulate Renewable Energy?<sup>1</sup>

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**INCENTIVES TO STIMULATE  
RENEWABLE ENERGY**

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**SUMMARY**

- Scope Of Incentives For Renewable Energy
- Role Of The WTO
- Examples For Discussion
  - Biofuels
  - “Black liquor”
  - Free allowances under “cap-and-trade”
- Outlook

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**SCOPE OF INCENTIVES**

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**GLOBAL**

- According To UNEP (September 2009),
  - US\$ 3.1 trillion in global stimulus packages
  - Approximately 15% are “green” in nature
  - US\$ 250 billion in “perverse” subsidies to fossil fuels remain in the G20
- According To Deutsche Bank Report (February 2009)
  - US\$ 200 billion commitment to new technologies
  - More than 250 policies to support alternative energy

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**UNITED STATES**

- Emergency Economic Stabilization Act (EESA)
  - US\$ 185 billion in tax cuts and credits (including US\$18.2 billion for clean energy)
- American Recovery and Reinvestment Act (ARRA)
  - US\$ 94 billion of “green spending” (out of US\$ 787 billion)
  - Includes incentives for energy efficiency, renewable energy, water and waste, mass transit and rail
- “Clean Energy” Proposals In Pending Climate Change And Energy-Related Legislation

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**EUROPEAN UNION**

- France
  - US\$ 6.1 billion (of US\$ 34 billion) in “green” investments
  - Dominated by sustainable transport, buildings, and renewable energy
- Germany
  - Transfer Renewable Energy and Efficiency (TREE): US\$ 130 million for development of renewable energy to over 50 countries
- European Energy Programme For Recovery
  - Contribute to economic recovery, security of energy supply, and GHG emissions reductions
  - Budget of EUR 3.98 billion for gas and electricity infrastructure, offshore wind energy, and CCS

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## CHINA

- UNEP Reports US\$ 218 Billion In “Green” Investment
- Share Costs Of The Development Of Solar Power Capacity
- 11<sup>th</sup> Five-Year Plan
  - US\$ 71 billion in all forms of energy conservation
  - US\$ 214 billion in renewable energy
- Possible Stimulus Of US\$ 440 Billion For Renewable Energy And Development Of “Clean” Power

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## ROLE OF THE WTO

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## PRACTICAL ASPECTS

- What Are The Relevant Agreements?
  - Trade in goods: renewable energy versus the products to make it (solar power versus solar panels)
  - Trade in services: limited scope of specific commitments in energy, environmental, and other key services sectors
  - Intellectual property: development and protection of new technologies will be critical
- Who Will Challenge?
  - Few WTO Members with “clean hands”
  - Dispute settlement panel unlikely to find violations absent clear evidence of protectionism

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## THE SCM AGREEMENT

- Relevance Dependent On Trade In Energy-Related Products
  - Incentives to produce renewable energy versus incentives to develop/produce goods
- Most Incentives Will Likely Constitute Specific Subsidies
  - Financial contribution by a government or public body conferring a benefit to a particular industry
- Unlikely To Be “Prohibited” So Will Need To Demonstrate Adverse Effects
- WTO Complaints Versus Countervailing Duties

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## EXAMPLE FOR DISCUSSION: BIOFUELS

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## BIOFUELS

- What Are “Like” Goods?
  - Mineral fuel versus biofuel
  - Biodiesel from rapeseed versus soybean oil
  - Ethanol (sugarcane, corn, cellulosic)
- Tax Credits/Exemptions, Grants, Loan Guarantees, RFS/LCFS, Offsets, Etc.
  - Discriminatory under GATT Article III?
  - Actionable subsidies?
- Role Of The GATT Environmental Exceptions
  - Applicability to SCM Agreement
  - Treatment of “lifecycle” GHG and environmental effects (fuel efficiency, indirect land use, etc.)

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## EXAMPLE FOR DISCUSSION: “BLACK LIQUOR”

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## UNINTENDED CONSEQUENCES?

- U.S. Excise Tax Credit Of US\$ 0.50 Per Gallon
  - For alternative fuel mixtures used as fuel by a producer containing at least 0.1% of “taxable fuel,” such as diesel fuel
  - No distinction between imported versus domestic alternative fuel mixtures
- Certain U.S. Paper Producers Claimed The Credit By Mixing Diesel Fuel With “Black Liquor”
  - “Black liquor” is a byproduct of the paper production process
  - In December 2007, the U.S. tax authority determined that it qualified as a “liquid hydrocarbon derived from biomass”

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## THREAT OF WTO COMPLAINT

- Several WTO Member Countries Claimed That The Excise Tax Credit As Applied To Black Liquor Amounted To Massive Subsidies To The U.S. Paper Industry
- Does It Amount To A Specific Subsidy Under The SCM Agreement?
- Is It Causing Adverse Effects?
- Highlights Circumstances Where WTO Members Are More Likely To Challenge Renewable Energy Measures

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## EXAMPLE FOR DISCUSSION: FREE ALLOWANCES

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## ARE FREE ALLOWANCES A WTO INCONSISTENT SUBSIDY?

- Free Allowances Versus Performance Standards
- Do Free Allowances Constitute A “Subsidy”?
  - Financial contribution by a government (or public body) conferring a “benefit”
- Is The Subsidy Specific?
- Does The Subsidy Cause Adverse Effects?
  - Serious prejudice
  - Material injury
- Do The GATT Environmental Exceptions Apply?

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## ARE FREE ALLOWANCES A FINANCIAL CONTRIBUTION?

- Yes
  - Allowances have monetary value
  - Normative benchmark that allowances must be purchased for every ton of GHG emissions
  - Government revenue due that is foregone or not collected
- No
  - Allowances are a regulatory right to emit (not funds)
  - Obligations set differently for different industries (no general overall obligation to submit allowances)

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## DO FREE ALLOWANCES CONFER A BENEFIT?

- Yes
  - Recipient receives an advantage and is better off than without free allowances
  - Compensation for higher regulatory costs does not preclude a finding of benefit
- No
  - Different allowance requirements apply to different industries
  - Recipient is no better off than any other comparable industry

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## IS THE SUBSIDY SPECIFIC?

- Yes
  - *De jure* specific
    - If eligibility is based on a defined, closed list
    - In any event, criteria are not “economic in nature”
  - *De facto* specific
    - Objective is to limit eligibility to certain energy-intensive industries
- No
  - Not a defined, closed list (broad range of sectors)
  - Eligibility determined by objective criteria that are “economic in nature”
  - Negotiating history demonstrates broad interpretation

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## IS THE SUBSIDY CAUSING ADVERSE EFFECTS?

- Yes
  - Serious prejudice by displacing or impeding imports of other WTO Members into the U.S. market (using a counterfactual “absent the subsidy”)
  - Serious prejudice through adverse price effects
  - U.S. exports may be causing material injury in foreign markets
- No
  - Changes in relative market shares unlikely following adoption of climate change regulation
  - Other factors likely to break any causal link

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## DO THE GATT ARTICLE XX EXCEPTIONS APPLY?

- Yes
  - SCM Agreement is simply elaborating on GATT Articles VI and XVI
  - Similar to the AB’s finding that GATT Article XIX must be applied cumulatively with the Safeguards Agreement
- No
  - SCM Agreement is self-standing (like the TBT and SPS Agreements) and prevails over GATT
  - Provisions on non-actionable environmental subsidies expired
  - Text cross-references other agreements where applicable
- “Conservation” Of Exhaustible Natural Resources?

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## OUTLOOK

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## KEY QUESTIONS

- When Will Technology Be Sufficiently Mature And Commercial Scale Be Achieved?
- How Should Breakthroughs In Technology Be Shared?
- How Will The “Losers” In The Race For Renewable Energy Alternatives Treat The “Winners”?
- Should A Multilateral Solution Be Negotiated?

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