

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

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The WTO in the emerging energy governance debate¹

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1. Although they were not initially designed to address energy issues *per se*, several GATT and more recent WTO rules are relevant and "applicable" when assessing the WTO compatibility of energy-related actions that could have an impact on trade. This will be the focus of the first part of my talk. This paper then discusses the energy issues that are covered by the **ongoing Doha negotiations** and in **WTO accessions**. 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**.

2. 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, hydro-carbons, 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.

3. Is energy—like electricity—a good or a service? **The WTO rules treat goods and services differently**, but the industry does not distinguish energy in terms of goods and services, although the energy sector would seem to include aspects of both goods and 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). As the GATT disciplines are generally applicable to all products (while all the GATS disciplines are not applicable to all services), therefore, we would need to clarify which energy aspects are covered by the rules of these and other WTO Agreements.³

4. Another important characteristic of the WTO trade in 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' schedules of specific commitments on services**. The drafting, and the interpretation, of commitments in schedules require a very informed understanding of the operating functioning of the energy industry. This energy expertise is very precious.

5. And, finally, there are the **pollution and climate-change dimensions**. Until 1850, people only 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.

6. It is also important to understand the **distinction between energy issues and climate change**, which is the consequence of our misuse of polluting forms of energy. Our individual and societal energy needs cannot be that easily reduced, and energy policies require multifaceted economic and political considerations.

A. EXISTING RULES IN GATT/WTO

7. **The WTO has rules on trade in goods, trade in services and trade-related intellectual property** rights. GATT and WTO rules impose disciplines on all trade in products, past and future. To the extent that energy (oil, natural gas or coal for example) is a product, then all WTO provisions that

³ In that context one may recall that recently the WTO *China-US audiovisual* panel decided that films — which trade experts long assumed were covered exclusively by the GATS rules on audio-visual materials — were also "goods" and therefore films were subject to the general prohibition on quantitative restrictions of the GATT.

contain disciplines on trade in goods are applicable. The same is true for energy-related services: all rules of GATS are potentially applicable.

8. Therefore, the rules prohibiting discrimination between like products (whether among imported products (**most-favoured-nation, Art. I**), or between imported and domestic products (**national treatment, Art II**), are relevant. One issue 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 one another in a specific market (art I and III). So, for example, whether energy-efficient products are like non-energy-efficient products are WTO issues of great commercial consequence.

9. The GATT rule (Art. 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.

10. Another basic rule of the GATT is included in **Article V that prescribe freedom of transit** and prohibits in the transit, and prohibit in that context MFN and national treatment violations as well as unreasonable charges and regulations imposed on traffic in transit.

11. The GATT and other WTO rules which require that Members respect **tariff commitments** (and other WTO scheduled commitments) are also relevant. Adding additional commitments to Members' schedules to include various commitments relating to the specificities of energy could be useful in energy-trade commitments.⁴

12. The GATT and many other WTO Agreements contain **provisions for general exceptions** that allow governments to deviate from their WTO obligations so that they may give priority to a non-commercial policy, such as the protection of human health or the environment. Therefore in the context of a Climate change programme, for instance, these exception provision may allow a government to treat differently products that are otherwise similar and competing in introducing regulatory distinctions based on the environment considerations such as the Co2 impact of different products.

13. 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 relevant. More generally, contingent trade remedies (whether countervail, anti-dumping or safeguards), can and 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 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 Art 31 SCM. 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.

14. **Dual pricing** is an issue discussed in detail in a panel later in the workshop. Dual pricing may be a "subsidy" that provides benefits, but this does not mean that it is necessarily inconsistent with the WTO Agreement on Subsidies and Countervailing Measures ("the SCM Agreement"). It may not be inconsistent if: access to the lower price is not conditional on the export of a good (thus not an export subsidy); it is not "specific" (thus not actionable); and, even if it *is* specific, it does not cause adverse effects to another Member.

⁴ 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.

15. But if dual pricing cannot be shown to be applied solely in accordance with "**commercial considerations**" — i.e., 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 Art. XVII.

16. 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 argued also 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 Art. XVII.

17. Recall that during the 2006 dispute among Ukraine, Russia and the EU over the transmission of natural gas, Pascal Lamy noted that the absence of "market prices" for oil and transit fees between Ukraine and Russia was in his view problematic. Mr Lamy was arguing that the actors in that dispute — the state monopolies — were not trading commercially, hence engaging in non-commercial choices and behaviours.

18. 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.

19. 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 important provision of the TBT provides that if a national regulation or other measure complies with an existing international standard, it is presumed to be WTO consistent. This is very relevant, for example, for all efficiency requirements relating to electricity, fuel and energy in general.

20. It is also clear that the **GATS applies to all measures that affect trade in services**, a very broad reach. 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.

21. Under the **GATS**, all Members are bound by a number of general obligations and disciplines, among which the **MFN** (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; 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). But if such Member's schedule guarantees access for a particular service, it must do so in favour of all WTO Members' services and service suppliers equally.

22. 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: (a) the incumbent monopoly in a given market does not act in a manner inconsistent with MFN and with its specific commitments (discussed below); and (b) the monopoly supplier does not abuse its monopoly position in supply of a service outside the scope of its monopoly rights which is the subject of a specific commitment by that Member.

23. Article VI 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).

24. 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 sub-sectors 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 sub-sectors, a number of sectors and sub-sectors 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.⁵

25. Obligations of **market access and national treatment** (Art. XVI and XVII) apply through 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.

26. 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. We shall see later how the additional commitments were made in the case of Ukraine's accession to the WTO.

27. **The WTO rules on both goods (Art XXIV) and services (Art IV) allow for regional preferences** – subject to certain conditions and so long as they do not affect third countries' trade. It is usually accepted that WTO consistent Regional trade agreements (RTAs) can tolerate 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.

28. **The WTO also allows for trade preferences for developing countries' trade in goods and services** which arguably 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.

⁵ 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 sub-sectors - 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 sub-sectors - services incidental to energy distribution and pipeline transportation - are not contained in this request.)

29. The **WTO rules on government procurement**⁶ - which apply only to signatories of the agreement – covers 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 extent possible, specifications prescribed are in performance terms and to 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 of the energy sector (e.g. fuels and lubricants, nuclear reactors) or may have use in the energy sector (e.g. mechanical power transmission equipment, electrical machinery and equipment, pumps, compressors and boilers).

30. In sum, the **Marrakesh Agreement Establishing the World Trade Organization** ("the WTO Agreement") has a very broad scope of application, and reach application over energy-related commercial activities. The great difficulty is "how" the WTO disciplines would operate and whether specific activities or practice would be WTO consistent.

31. Recall that **the WTO has no investigative powers**, so only Members can challenge the actions of another Member, either in relevant regular committees, or before the Dispute Settlement Body. In disputes, all Members are 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. The WTO DSM also contains specific rules on enforcement and countermeasures. 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.

E. RULES BEING NEGOTIATED NOW

32. The on-going **DDA negotiations** include **negotiations on liberalizing trade in environmental goods**, a category that has not been defined but which is likely to include 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 services**, but those discussions have not progressed far.

33. 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 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.

34. In the NAMA (industrial tariffs) negotiations, 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.

35. 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.).

⁶ It is also unfortunate that the relevant negotiations under Art. XIII of the GATS on government procurement on services are stalled.

36. In the Rules negotiations, one delegation has proposed to prohibit 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**").⁷

C. ENERGY ISSUES IN WTO ACCESSIONS

37. Energy is once again a hot topic, but **many of the most important players are still outside of the WTO**, though several energy-exporting countries (e.g., Algeria, Iran, Iraq and Russia) are now in the process of acceding to the WTO. Hence the ongoing **accession processes** are where energy issues are the most discussed. Recall that, in accessions, WTO Members can impose additional obligations (not included in the WTO treaty) on acceding Members and this was confirmed in the *China-US audiovisual* panel report. Accession working parties are also very informative forums, where the views of existing Members are expressed. 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 Art. V. Some Members have argued that the differential transport fees on different oil-transit routes conflict with the freedom-of-transit provisions of GATT Article V.

38. 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, except for 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 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.

39. Given the inherent complexities of addressing **dual pricing** through the ASCM, there have been efforts to address the practice 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.

40. 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.

41. 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, CIS countries 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** – i.e. an activity for which the existence of a competitive market is not economically viable.

42. **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.

43. In its Services schedule: Ukraine's specific commitment on pipeline transportation goes further than commitments undertaken by other new Members in this services sub-sector. To appreciate what

⁷ TN/RL/GEN/135.

Services can add to GATT, consider the additional commitment that Ukraine has taken in respect of pipeline transportation of petroleum products and natural gas (Source:):

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. [My emphasis.]

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

D. A FEW RELEVANT ISSUES THAT CALL FOR MORE RESEARCH AND THINKING

1. **Export quotas, export taxes, and restrictions on export versus restrictions on production**

45. Article XI prohibits export restrictions but does not address production. **There are no obligations imposed on Members to extract and produce energy resources**, and this is where the difficulties lie, as Members are trying to guarantee their access 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?) However, energy resources are clearly "natural resource" 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 can otherwise be invoked to justify import or export restrictions.

46. **GATT Article XI does not address the issue of export taxes**, which are therefore not prohibited. 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..

47. A very important **dispute has been initiated against China's export restrictions on energy goods and natural resources**. This dispute should bring some clarity to some of the general 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.

2. **The transit issue – a goods or services issue?**

48. Later in this workshop a full Panel will address the issue of transit from a goods and services perspective. 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 train railroad tracks do not move, yet 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. But, again, the fact that exports of petroleum and natural gas must transit through third countries — say, from Russia to the EU through Ukraine, or from Kazakhstan through Russia to EU — places no

obligation on Russia or gas from 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 the country, or unless specific promises to export are agreed, it is difficult to see how foreign governments can be forced to exploit and commercialize their natural resources.

49. 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 be important to clarify what is meant by “transportation”.

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

51. 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 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 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.

52. Finally, 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.

53. **A lot of research and 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 would be useful, as otherwise panels and the Appellate Body would need to do so first when confronted with a dispute.

3. Subsidies

(a) Energy input subsidies and dual pricing

54. WTO rules do not explicitly directly address the issue of dual-pricing of energy products – i.e. 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 but this interpretation depends on the facts of each system, particularly how it is actually operated.

55. 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.

56. 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. Indeed, there are **many examples of countervailing measures being applied on final products on the basis of the provision of subsidized inputs, including energy.**⁸

57. In this conference, there is a full panel that will be discussing dual-pricing practices, including what is a subsidy under the SCM Agreement, and discussing when such subsidies are WTO consistent. But in general two points can be noted. 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.⁹ 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".

58. It has 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 there to deal instead with export restrictions' disciplines, such as Art. XI, *supra*.

(b) Countervailing measures on energy products

59. The implications of the ASCM 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.¹⁰ 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.¹¹

(c) Subsidies green subsidies (AoA – SCM)

60. **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 Art 31 SCM. Numerous commentators have called for re-

⁸ See, e.g., *Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 50410 (3 October 2001) and *Pure Magnesium and Alloy Magnesium from Canada*, 57 Fed. Reg. 30946 (13 July 1992). In both investigations, the US Department of Commerce treated the provision of electricity at preferential rates as a countervailable subsidy.

⁹ ASCM Article 14(d). The Appellate Body has clarified that, while this usually implies a reference to the prices charged by private providers, reference may 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.

¹⁰ *Council Regulation* (EC) No. 598/2009.

¹¹ The use of other contingent trade remedies on energy and energy-related products is also not precluded. Most dramatically, US petitioners have (unsuccessfully) sought anti-dumping (and countervailing) duties on crude oil imports. See *Certain Petroleum Oil Products from Iraq, Mexico, Saudi Arabia and Venezuela*, 64 Fed. Reg. 44480 (16 August 1999) (petition dismissed for lack of standing).

instating such a provision to provide a safe haven for subsidies for renewable energy or for climate-change mitigation or adaptation.

61. The **WTO Agreement on Agriculture (AoA)** is of relevance to energy-subsidies benefitting 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 bio-jet fuel are not, though any agricultural byproducts from their subsidized production (e.g., oilseed meal) presumably would be.

4. Technical standards

62. The presumption of the TBT Agreement, that domestic standards and regulations should be based on international standards, could become very powerful in the energy debate. We can have in mind 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?

5. Institutional issues

63. **Would negotiations to develop a new international governance structure for energy have to take place in the WTO?** On the one hand, there are **already aspects of trade in energy** that are being negotiated 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 organisation were set up to deal with "energy" issues, the world would still need to develop rules on the relationship between WTO rules and non-WTO rules affecting trade in energy.

64. **The WTO institutional framework is also quite appealing.** The WTO has established the rule of law among its Members, and the equality of its Members, and demonstrated the power of consensus; it has developed extensive practices of notifications and transparency (albeit poorly applied in the case of non-agricultural subsidies); it is a very inclusive negotiating forum and its monitoring and surveillance system would be very useful in sectors like energy that bring together multi-faceted economic and political issues which dispute settlement cannot always address properly.

65. On the other hand, the **WTO is not a forum where technical norms are traditionally negotiated**, and the WTO Members are traditionally trade experts not energy experts. One option is for the negotiations to start in another forum, like the OECD (as it was the case for government procurement and ship-building) but that the results would then somehow be "transferred" to the WTO, or "taken into account" or "integrated" into the WTO framework. Such an approach would seem to be in line with the SPS and TBT presumption of compatibility in favour of international standards negotiated in an expert forum. This is the sort of linkage that is explored in the ongoing negotiations on the relationship between the WTO and multilateral environmental agreements (MEAs).

66. One should also bear in mind the **limits of the WTO dispute settlement system** and its institutionalized system of counter measures. 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 country. Moreover, the retaliation would logically lead

to import restrictions on energy — which is the opposite of what energy-importing countries 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 given the relative "youth" of LNG as an alternative.

67. Another weakness of the WTO is that there is no comprehensive system on **investment or competition** and it is impossible to properly and fully address energy concerns and issues without also looking at those dimensions of energy-related actions.

68. Finally, energy is often under direct or indirect governmental control; this means that we would need to expand the coverage and the reach of the WTO's plurilateral Agreement on **Government Procurement**, which at the moment only apply to a fraction of the WTO Membership, and hopefully fully multilateralize it. For the same reasons, the WTO's rules on state-trading enterprises would need to be further developed in line possibly with the language inserted in the recent accession protocols.

69. Even if energy-related negotiations were to take place in the WTO, would we need a **separate agreement on energy**? We probably **need definitions and some specific rules for energy but where would they be located?**

- We could possibly "add" a **new Energy agreement** that would include a series of specific rules on energy – as it was done with the Agreement on Agriculture, or the textile agreement in the WTO. Members would also have to decide whether such an agreement was to be a **multilateral or plurilateral**, and they could also consider an agreement based on "critical mass", that is considered final even if not all Members participate in the negotiation but do receive the benefit of the MFN application, as the WTO telecom Agreement.
- An alternative would be **to add energy-specific provisions throughout the existing WTO Agreements** — which means an amendment of each provisions for which energy-related aspects are added, and which would have to be agreed according to Article X of the WTO Agreement.
- Another approach would be for Members to adopt a "**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.

70. But one thing is clear: we would need to take into account the existing case law on **Single Undertaking**, whereby Members are expected to comply with all their WTO obligations simultaneously. Therefore, if all Members want to adopt special rules on 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.

71. The **WTO system contains enough institutional flexibilities** to allowed its Members to adapt the system fairly easily to meet their urgent needs. A good example is the legal route followed to expand the access to medicine: from a political declaration to a waiver, to a final amendment of the TRIPs agreement.

72. Another issue is how the more detailed rules of **the Energy Charter** or of other bilateral or regional agreements would relate to the WTO and would be used in the context of a WTO dispute. To what extent the clarifications contained in the Energy Charter and in particular in its Transit protocol can be used as part of the historical or legal context in the interpretation of Article V. Some may even argue that, between two signatories, the provisions of the Energy Charter could become applicable law before a WTO panel.

E. CONCLUSIONS

73. 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 regulations? At the moment it seems that the Doha Development Agenda is too choked to consider adding a new item as large as energy.

74. One risk is that, if nothing is done, and no negotiations are undertaken anywhere, energy-related tensions could lead to disputes in which **WTO judges would be having to adjudicate conflicts** within existing WTO rules that were not negotiated with the specificities of the energy sector in mind.

75. At the moment, 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.**

76. Finally and more importantly, "energy" never disappears completely, it only gets transformed; and this is even more so 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 have to change our way of life. This cannot be done by the WTO**, though I personally believe that the WTO can reflect the ever-changing priorities of society.

The Graduate Institute's **Centre for Trade and Economic Integration** fosters world-class multidisciplinary scholarship aimed at developing solutions to problems facing the international trade system and economic integration more generally. It works in association with public sector and private sector actors, giving special prominence to Geneva-based International Organisations such as the WTO and UNCTAD. The Centre also bridges gaps between the scholarly and policymaking communities through outreach and training activities in Geneva. Its goal is to provide an innovative research basis for solutions that address the medium-term challenges facing the world trade system broadly defined and economic integration more generally.