Energy Trade as a Special Sector in the WTO: Unique Features, Unprecedented Challenges and Unresolved Issues

Rafael Leal-Arcas and Ehab S. Abu Gosh
Energy Trade as a Special Sector in the WTO: Unique Features, Unprecedented Challenges and Unresolved Issues

[Forthcoming in Indian Journal of International Economic Law, Vol. 6(1), 2014]

By

Dr Rafael Leal-Arcas*
Ehab S. Abu Gosh†

Abstract .......................................................... 2
I. Introduction ....................................................... 2
II. The International Trade System ....................... 3
   1. The General Agreement on Tariffs and Trade (GATT) .............. 4
   2. The World Trade Organization (WTO) ................................. 5
   3. International Trade in Energy ............................................. 8
III. Special Characteristics of Energy ...................... 10
   1. Economic Aspects .................................................. 10
   2. Energy as an Asset of Strategic and Political Value ............ 11
   3. International Development ......................................... 12
   4. Diversity of Energy Sources ....................................... 12
   5. Finite Resources ................................................... 13
   7. Transportation of Energy ........................................... 15
IV. Energy Trade: Challenges and Concerns ............. 16
   1. Supply and Demand .............................................. 16
   2. Trade in Goods v. Trade in Services ................................. 18
   3. Transit via Fixed Networks: Pipelines and Grids ............... 19
   4. Combating Climate Change ....................................... 20
   5. Energy Security ...................................................... 21
V. WTO Law and Energy Trade: Selected Debates ...... 24
   1. The Applicability of WTO Law to Energy Trade ................. 25
      a. The International Trade Organization and the GATT Creation .... 26
      b. Energy Tradable Products ...................................... 26
      c. Energy Trade was not Excluded from the GATT ............. 27
      d. GATT Negotiations ............................................. 28
      e. Accession of Energy Exporting Countries to the GATT ...... 29
      f. The Uruguay Round .............................................. 32
      g. The WTO Coverage ............................................. 33
      h. Accession of Energy-Endowed Countries to the WTO ...... 34
   2. Unresolved Energy Trade Issues ................................. 35

* Reader in European and International Economic Law, Queen Mary University of London (Centre for Commercial Law Studies), United Kingdom. 2014 Research Fellow, Energy Charter Secretariat. Ph.D. (European University Institute, Florence); JSM (Stanford Law School); LL.M. (Columbia Law School); M.Phil. (London School of Economics and Political Science). Member of the Madrid Bar. Author of the books INTERNATIONAL ENERGY GOVERNANCE: SELECTED LEGAL ISSUES (Edward Elgar Publishing, forthcoming 2014); CLIMATE CHANGE AND INTERNATIONAL TRADE (Edward Elgar Publishing, 2013); INTERNATIONAL TRADE AND INVESTMENT LAW: MULTILATERAL, REGIONAL AND BILATERAL GOVERNANCE (Edward Elgar Publishing, 2010) and THEORY AND PRACTICE OF EC EXTERNAL TRADE LAW AND POLICY (Cameron May, 2008). I am grateful to Tarun Krishnakumar for his research assistance. Contact: r.leal-arcas@qmul.ac.uk

† Lawyer and research associate at Queen Mary University of London (Centre for Commercial Law Studies), United Kingdom; Ph.D. candidate, Queen Mary University of London; LL.M., Georgetown University, USA. Contact: e.abugosh@qmul.ac.uk
Abstract

WTO law governs and regulates trade relationships among WTO members. Within the scope of the WTO, energy trade is one of the most significant trade sectors, as it constitutes the largest primary commodity of global trade in terms of volume and value. For decades, the energy trade sector has been treated as a special case because of the unique features attached to the energy sector in general and energy trade in particular. This special treatment should continue due to a combination of crucial factors: firstly, the uniqueness and importance of energy; secondly, the unprecedented challenges and concerns that confront global energy industries in general and energy trade in particular; and thirdly, certain legal debates and unresolved issues that emerge from the intersection between WTO law and energy trade. This article aims to examine the various factors that distinguish energy trade from other trade sectors, highlighting those significant factors and analyzing in depth their components.

Keywords: international trade in energy, GATT/WTO law, energy-rich countries, international trade law

I. Introduction

For decades, trade in energy has been treated as a special case of international trade, different from other trade sectors and products. In fact, it is safe to consider the energy trade sector as one of the most—actually the most—significant trade sectors for a variety of reasons, including its unique characteristics and the unprecedented challenges confronting it. Moreover, the ongoing debate over the applicability/inapplicability of the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) disciplines to trade in energy further sets this sector apart. One school of thought believes that international trade in energy is included in and is
subject to GATT/WTO disciplines. It holds that international trade in energy is governed by WTO law, like any other trade in goods or services, and that it is not excluded from the coverage of the GATT/WTO law. The other school of thought holds that a combination of factors has led, de facto, to the exclusion of energy trade from the scope of GATT/WTO disciplines. To support their arguments and arrive at their conclusions, both schools of thought have examined the creation of the GATT, its founding members, the various multilateral trade negotiations, the purposes and objectives behind the GATT, the GATT rounds of multilateral trade negotiations, the Uruguay Round and the establishment of the WTO, and even aspects of the Doha Round of multilateral trade negotiations.

This article argues that, although trade in energy in general and trade in petroleum in particular were not clearly and directly included in any of the GATT provisions, according to GATT history, the contracting parties discussed energy-related matters during various rounds of GATT negotiations and, therefore, the presumption is that GATT/WTO disciplines apply to trade in energy. Had parties to the GATT not wanted energy in the trade agenda, they would have expressly mentioned so. It is therefore presumed that, since trade in energy was not expressly excluded from the GATT provisions, the GATT/WTO system applies to trade in energy. After this short introduction, Section II presents an overview of the international trade system and the reasons why trade in energy has been treated differently from other trade sectors and products, while Section III analyzes the special characteristics of energy. Section IV presents the challenges in global energy trade, while Section V analyzes the link between WTO law and energy trade. It provides a chronological evolution of international trade in energy, starting with the International Trade Organization (ITO) (which eventually did not come into being) and the GATT creation in 1947, the various rounds of GATT negotiations, the subsequent accession of energy exporting countries to the GATT, the WTO era and energy trade, and the accession of energy-rich countries to the world trading system since 1995, all of which with a view to determine whether GATT/WTO law applies to trade in energy. It further discusses certain unresolved energy trade issues. Section VI concludes the article with the view that trade in energy is governed by, and subject to, the GATT/WTO umbrella.

**II. The International Trade System**

It is important to review the main characteristics of the multilateral trade system before addressing the main issue of this article.
1. The General Agreement on Tariffs and Trade (GATT)

In the aftermath of the World War II, in 1947, 23 countries negotiated a multilateral agreement for tariff reductions. The outcome of this negotiation was the genesis of the General Agreement on Tariffs and Trade (GATT). The GATT entered into operation in January 1948 on a provisional basis. The GATT was enacted during the aftermath of World War II, in 1947. It came into operation as an international treaty that contained a series of over 200 hundred agreements, protocols and other documents. It dealt almost entirely with trade in products. Although intended to be an agreement to organize international trade in goods, the GATT has been the central international multilateral trade treaty and operated as an organization since its creation. The GATT’s establishment sought to achieve several purposes, one of the most essential purposes of which was to improve worldwide economic growth and to free and liberalize global trade. These goals were assumed to be achieved by disallowing governments from imposing or continuing a variety of measures which restrain or distort international trade, such as tariffs, quotas, internal taxes and regulations.

The GATT contains significant basic provisions that regulate international trade with respect to government actions: the “Tariff Schedules” provision, where each country commits to limiting its tariffs to a negotiated level on particular items; the “non-discrimination obligation” principle, which includes (1) the “Most-Favored-Nation” clause, which imposes on a country the duty to provide equal treatment to all the countries it imports from, and (2) the “National Treatment” clause, which rules that imported goods shall be treated no worse than domestically produced goods; and the “prohibition on quotas” principle, which prohibits quantitative

---

3 See John Jackson, William J. Davey, Alan O. Sykes, *Legal problems of international economic relations: cases, materials and text on the national and international regulation of transnational economic relations*, (5th ed. 2008) [hereinafter Jackson] at p. 219 (explaining that some countries required parliamentary ratifications in order to apply some articles of the GATT and therefore, in late 1947, signed the Protocol of Provisional Application (PPA), which came into force on January 1, 1948. Under the PPA, the signatories applied the GATT as a provisional treaty to operate under the umbrella of the International Trade Organization, which was never established).
4 See Jackson at p. 219.
5 See Jackson at p. 215, 222.
6 Id.; John H. Jackson, ‘The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited’, *J. Int'l Econ. L.* 67, 68 (2001) (explaining that a primary objective of the GATT founders in the aftermath of World War II was to avoid another war by reducing the economic conditions that were seen as evocative of conflict).
7 See Jackson at p. 217-221 (noting that there was no intention to make the GATT the principal international trade organization when the original idea was to create an International Trade Organization (ITO). However, the U.S. could not get congressional approval for the ITO (Havana) Charter. This meant the death of the ITO, and the GATT became the default central organization for coordinating national policies on international trade).
8 Id. at p. 215.
9 Id. at p. 222; Article II of the GATT.
10 Article I of the GATT; Jackson at p. 222.
11 Article III of the GATT; Jackson at p. 222.
restrictions on import and export of goods.\textsuperscript{12} In addition to these substantive provisions, the GATT includes a number of general and particular exceptions.\textsuperscript{13}

Although the establishment and operation of the GATT were meant to govern and promote international trade matters, the GATT faced a variety of problems that constituted substantial impediments for its operation and the fulfillment of its objectives.\textsuperscript{14} One of these major problems related to the use of the GATT in resolving disputes between its contracting parties.\textsuperscript{15} It is important to note that the GATT Panels’ decisions were not binding and were adopted by a “consensus” approach, which limited the efficiency of resolving disputes between contracting parties.\textsuperscript{16}

2. The World Trade Organization (WTO)

The WTO was established in 1994 by the Marrakesh Agreement and replaced the GATT in January 1995.\textsuperscript{17} The Uruguay Round results led to the creation of the WTO as a developed international organization and treaty structure, which includes almost 30 legal agreements and supplementary decisions. All its members become subject to all of the annexed agreements as a single package, except the plurilateral agreements.\textsuperscript{18} Currently, the WTO has 160 Member States, which are subject to the WTO rules and agreements in their direct and indirect international trade conducts. The WTO was founded as an improved successor of the GATT, and it was intended to be a very developed system for facilitating and unifying international trade, with the aim of eliminating protectionism and promoting free and globalized trade.\textsuperscript{19} Notably, the structure of the WTO distinguishes it as an international organization with legal personality. The WTO agreements encompass several annexes,\textsuperscript{20} including Annex 1A that consists of GATT 1994.\textsuperscript{21} This Annex is substantively the same as GATT (1947) with a number of understandings on how the GATT should be interpreted.\textsuperscript{22}

Moreover, multilateral agreements within the WTO stipulate that Member States manage their trade in accordance with the main operative provisions of the GATT with respect to the use of non-discriminatory measures such as the Most Favored Nation clause\textsuperscript{23} and the National Treatment clause.\textsuperscript{24} The WTO also discourages quantitative prohibitions or restrictions on

\textsuperscript{12} Article XI:1 of the GATT; Jackson at p. 222.
\textsuperscript{13} See Jackson at p. 216.
\textsuperscript{14} Id. at p. 220-221.
\textsuperscript{15} Id. at p. 220-222.
\textsuperscript{16} Id.
\textsuperscript{18} See Jackson at p. 217.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at p. 226-227 (describing the agreements that are included in the WTO agreements: Annex 1A the General Agreement on Tariffs and Trade 1994; Annex 1B, the General Agreement on Services; Annex 1C, the agreement on Trade-Related Aspects of Intellectual Property (TRIPS); Annex 2, the Dispute Settlement Understanding (DSU); Annex 3, the Trade Policy Review Mechanism (TPRM); Annex 4 contains the four agreements which are "optional," termed "plurilateral agreements").
\textsuperscript{22} See Jackson at p. 216.
\textsuperscript{23} Article I of the GATT; Jackson at p. 475.
\textsuperscript{24} Article III of the GATT; Jackson at p. 540.
imports or exports of products through the General Elimination of Quantitative Restrictions provision. In addition to these intrinsic obligations, WTO agreements contain many transparency and notifications requirements. The result has been a successful lowering of tariffs and reduction of quotas, which has paved the way for focusing on other, less apparent blocks, including environmental health and safety (EHS) regulation, that hinders trade and may constitute a type of protectionism. Developing countries in particular have expressed concern that EHS regulations on the part of developed countries may be a cover for protectionist measures against their products, or a means by which to impose tougher environmental standards on them in a form of “eco-imperialism”.

In addition, it should be emphasized that the WTO has the most powerful intergovernmental dispute resolution mechanism of any international agreement. In joining the WTO, Member States are held to the prescribed procedures and subject to mandatory jurisdiction, pursuant to the terms of the Dispute Settlement Understanding (the DSU). The DSU is ‘obligatory on all members’ and comprises (for the first time) a ‘unitary dispute settlement mechanism covering all the agreements listed in Annex 1’ of the Marrakesh Agreement establishing the WTO.

26 In spite of these rules and provisions, some domestic environmental policies could, either directly or indirectly, discriminate against imports from other WTO Members, or may somehow result in a quantitative restrictions. The following are examples of measures that have (at least prima facie) been at odds with the above mentioned GATT provisions: applying a minimum-size requirement to imports of lobsters (United States – Prohibition of Imports of Tuna and Tuna Products from Canada, GATT Panel Report, adopted 22 February 1982, BISD 29S/91); embargoing imports of tuna not caught in a way that minimizes the risk to dolphins (United States– Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R (May 16, 2012); taxing sales of vehicles not in compliance with mandated fuel economy standards (United States– Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade act of 1974, WT/DS6); composition standards for conventional and reformulated gasoline (United States–Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R.); placing an embargo on imports of shrimp that were not captured using technology that minimizes harm to turtles (United States–Anti-Dumping Measures on Shrimp and Diamond Sawblades from China, WT/DS422); imposing export restraints on a number of raw materials (China – Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Feb. 22, 2012)).
27 See e.g., Article X of the GATT; Article III of the GATS; Article 63 of the TRIPs; Article 2 and 10 of the Agreement on Technical Barriers to Trade (TBT); Article 7 of the Agreement on the Application of Sanitary and Phyto sanitary measures (SPS); J. Ya QIN, ‘‘WTO-Plus’ Obligations and Their Implications for the World Trade Organization Legal System An Appraisal of the China Accession Protocol, 37(3) Journal of World Trade, 483–522 (2003) at p. 491.
31 Annex 1A (GATT 1994), Annex 1B (GATS), and Annex 1C (TRIPS); Jackson, at p. 227.
The DSU is one of the most important new features of the WTO. It established a system of review and procedures for situations such as a WTO member complaining that the actions or policies of another member have harmed it through a violation of WTO rules. Typically, a complaint would be followed by consultations, possible arbitration, the formation of a panel of experts, and the Panel ruling. If the decision of the Panel is not appealed, it becomes binding after being adopted by the Dispute Settlement Body (DSB), which is a WTO body that rules on dispute settlement cases under the DSU. If the decision of the Panel is appealed, then the Appellate Body hears the appeal and its final decision becomes a binding decision, after being adopted by the DSB. The WTO’s system of settling disputes provides for specific deadlines, and is therefore quicker than the old GATT system. Its functioning is more automatic, which entails fewer obstacles compared to the GATT system. The rules concerning the establishment of the findings process are more detailed than they were under the GATT system. Panel reports and Appellate Body rulings can be overturned only by a unanimous vote of the Dispute Settlement Body (DSB). The DSB consists of all members of the WTO General Council, that is to say, all WTO Members’ representatives in Geneva, who oversee the operation of all of the constituent WTO Agreements in general. The DSB rules on actions taken under the DSU.

Only States may raise complaints under the DSU. When a WTO Member State brings a complaint against another WTO Member State, they must submit their dispute to a period of consultation “with a view to reaching a mutually satisfactory solution.” If no agreement is reached “within 60 days after the date of receipt of the request for consultations,” the complaining State may request that the Dispute Settlement Body (DSB) (comprised of all the WTO Member States) form a Panel to hear the dispute. The DSB has “the authority to establish panels” to hear particular disputes, and to make recommendations for adoption by the DSB. Either side of the dispute can appeal a panel’s ruling to the Appellate Body (AB), which is a permanent standing body composed of seven persons, “three of whom shall serve on any one case,” appointed by the DSB for four-year terms. A dispute settlement recommendation to the

---

32 Articles 16-17 DSU.
33 Id. The raison d'être of the WTO’s dispute resolution is to reduce disruptions to fair trade as far as possible. In this respect, if a party’s complaint is successful, recommendations of the Panel or Appellate Body will incline towards removing trade barriers and bringing “a measure into conformity with the covered agreements,” as opposed to payment of restitution or compensation (Article 22.1 DSU). The DSU provides detailed procedures regarding the implementation of rulings and recommendations once they have been adopted by the DSB, and the supervision of this implementation by the DSB (Article 21 DSU). Compliance with recommendations should occur within a “reasonable period of time,” (Article 21.3 DSU) which shall not exceed 18 months, “unless the parties to the dispute agree that there are exceptional circumstances” (Article 21.4 DSU). In the case that a party does not comply within a satisfactory period, “compensation and the suspension of concessions or other obligations are temporary measures available” (Article 22.1 DSU). A suspension of concessions essentially allows the prevailing party to impose tariffs against the non-complying party, equal to the economic loss that is being suffered by the winning country due to the ongoing breach of obligations under the WTO (Article 22 DSU). Such tariffs would normally be impermissible under the GATT.
35 Article 1.1 DSU.
36 Article 4.3 DSU.
37 Article 4.7 DSU.
38 Article 6 DSU.
39 Article 2.1 DSU.
40 Article 16 DSU.
41 Article 17.1 DSU.
42 Id.
DSB automatically becomes effective, and the ruling of the Panel becomes legally effective, unless the DSB “decides by consensus not to adopt the report.”  The same procedure applies to the adoption of an AB report, which the parties must unconditionally accept, “unless the DSB decides by consensus not to adopt the Appellate Body report.”

3. International Trade in Energy

The presumption is that trade liberalization will increase economic activity and therefore energy consumption. All countries require energy resources, but few possess these, and thus trade in energy (primarily oil) is crucial to fulfil global energy needs. Internationally, there is more trade in oil than in anything else. “Fully half of world trade in services is intensely energy-dependent.” Yet, the GATT/WTO has historically not preoccupied itself with energy trade. Very few energy-rich countries saw a need to join the GATT/WTO club, given that the reduction of import restrictions—one of the main goals of the multilateral trading system—is not an issue when it comes to energy. Saudi Arabia, the main energy-producing country in the world, only joined the WTO in 2005 and many energy-producing countries are still not WTO Members.

All forms of energy should be subject to the same rules. Energy may become part of the WTO agenda in the near future. Given that current WTO rules are far from addressing all the needs of energy trade today, is it necessary to have a WTO Agreement on trade in energy? If so, can and should the Energy Charter Treaty be used as a model? Moreover, since Russia finally joined the WTO on its own in 2012 (and not as a customs union along with Belarus and

43 Article 17.2 DSU.
44 Under pre-WTO dispute settlement procedures for GATT disputes, a recommendation did not become effective unless positively adopted by consensus of all GATT Parties.
45 Article 16.4 DSU.
46 Article 17.14 DSU.
52 On this point, see the views of Cottier, T. et al. “Energy in WTO law and policy,” in Cottier, T. and Delimatsis, P. (eds.) The Prospects of International Trade Regulation: From Fragmentation to Coherence, New York: Cambridge University Press, 2011, pp. 211-244 (arguing that, since the regulation of energy in international law is highly fragmented and largely incoherent, pertinent issues should be addressed by a future Framework Agreement on Energy in the context of WTO law).
Kazakhstan and since energy is one of its greatest assets in economic terms, would this be the right time to include energy trade as part of the WTO Agreements? Those energy-rich Middle Eastern countries that are not yet WTO Members, but wish to become WTO Members, will most likely follow Russia. These Middle Eastern countries should prioritize the conclusion of negotiations to enter the WTO in order to fully integrate into the global trading system and protect their growing interests on world markets. WTO membership will certainly help eliminate any discrimination against them in their trade and investment.

Trade in energy, *lato sensu*, encompasses various aspects and issues of transnational trade, including trade in goods, trade in services, investment matters, intellectual property, subsidies, *et cetera*. In addition, it involves different sorts of energy products, including oil, gas, coal, hydroelectricity, nuclear, and renewable energy, *inter alia*. However, the most predominant “line” of trade in energy, both historically and currently, is trade in fossil fuels, oil and gas. In 2010, fossil fuels supply comprised more than 80% of the global energy supply. Predictions are that, for many years to come, the world energy system will remain a fossil-based system. That said, the various aspects of trade in energy and the different components of energy are beyond the scope of this article.

At this initial stage and from an international trade perspective, it is worth clarifying the different statuses of countries in the energy sector, chiefly in terms of importing and exporting countries. In this respect, it has to be emphasized that not every energy-endowed country is an energy-exporting country, nor is every energy-producing country an energy-exporting country. Currently, there are two types of energy-endowed countries that produce energy: the first are energy-endowed countries that are both energy-producing and exporting countries, such as Saudi Arabia, Russia, and Norway. In this case, the country’s volume of energy production exceeds domestic demand, hence the country exports its energy surplus to the international market. The


second type are energy-endowed countries that, in spite of their energy production, are considered to be energy-importing rather than exporting countries, such as the US and the UK. In this case, the country’s volume of energy production is less than domestic demand, and it therefore has to import energy resources from exporting countries in order to satisfy domestic consumption.\textsuperscript{58}

The fact that trade in energy has been treated differently from other trade sectors and products stems from a combination of factors that will be addressed below. They include:

1) the special characteristics of energy;
2) the challenges that confront the global energy industry in general and trade in energy in particular; and
3) ongoing debates and unresolved issues that emerge from the intersection between WTO law and energy trade.

Let us proceed with an analysis of each factor.

III. Special Characteristics of Energy
Energy is one of the most crucial elements of modern daily life. As a result, trade in energy constitutes, for every country, a major sector of international trade. There is a variety of reasons that makes trade in energy critical and unique.

1. Economic Aspects
Firstly, from an economic perspective, it has been known for decades that trade in energy products constitutes the largest share of international trade, in terms of value and share of “world merchandise export”.\textsuperscript{59} According to data published by the WTO, in 2011 the value of fuel exports was $ 3,171 billion and comprised 17.8% of world merchandise exports.\textsuperscript{60}

\textsuperscript{58} This general classification refers to actual production \textit{vis-à-vis} demand in a given country, regardless of its energy reserves or capacity.


\textsuperscript{60} According to WTO data, in 2011, chemical products were the second largest export after fuel, with an export value of $ 1,997 billion. Chemicals comprised 11.2% of world merchandise exports; see the WTO, International Trade Statistics 2012 (Geneva: WTO, 2012) p. 61, Table II.1, available at http://www.wto.org/english/res_e/statis_e/its2012_e/its2012_e.pdf; see also J. Gault, “A Word of Introduction from
Moreover, almost all sectors consume energy and critically rely on energy. This is in addition to the fact that the “regularity and quality of the energy supply to economic operators” is as important as the energy prices.\textsuperscript{61} It is also clear that low energy prices can “boost all other sectors of the economy”.\textsuperscript{62} The cost of energy impacts the prices of all other products and services and, as a result, affects the entire economy.\textsuperscript{63} Additionally, the increase or decrease of energy prices in some countries leads to an increase or decrease in export prices of products and services, which then either impedes or enhances international competitiveness.\textsuperscript{64} Energy therefore plays a crucial role in countries’ economies, and heavily impacts national and global economic development as well as international competitiveness.

2. Energy as an Asset of Strategic and Political Value

Secondly, since the exploration of petroleum, and particularly since the beginning of the 20\textsuperscript{th} century, energy’s significance is not only measured by its economic value. Rather, energy products and resources have also been recognized as strategic political assets.\textsuperscript{65} During the 20\textsuperscript{th} and 21st centuries, energy resources, markets and trade have been the direct motives or influencing factors in several international and regional conflicts. It is worth noting some of these famous conflicts: World War I (1914), World War II (1939), the Suez War (1956); the Six-Day War (1967); the oil embargo (1973); the Arab-Israel War (1973), the Iranian revolution (1979), the Iran-Iraq War (1980-1988), the invasion of Kuwait (1990), the Gulf War (1991) and the Iraq War (2003).\textsuperscript{66} These wars and conflicts highlight the strategic importance and influence
of the geopolitics of energy. Moreover, most energy products are known as scarce products, underscoring energy’s importance for political stability and national sovereignty. Undoubtedly, energy resources critically impact the security and political stability of international, regional and national regimes.

3. International Development

Thirdly, the energy sector is important for national and global development. Indeed, it played a decisive role and influenced a wide array of important developments in the aftermath of the world wars. Currently as well as in the near and distant future, energy appears to be the most important factor for modern global development. It is also worth mentioning that the energy sector has huge importance and an increasing influence in the development of other industries, including manufacturing products and providing services. In addition, the availability and affordability of energy products on international and national markets have significant impacts on “social development and quality of life”. These and other factors accentuate the importance of energy for international development.

4. Diversity of Energy Sources

Fourthly, energy trade is unique in that it involves different kinds of energy products and services that are derived from a variety of primary energy sources worldwide. Primary

---


71 See Y. Selivanova, “The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector”, ICTSD Trade and Sustainable Energy Series Issue Paper No. 1, (Geneva, 2007) at p. 12; see also Y. Selivanova, “The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector”, ICTSD Trade and Sustainable Energy Series Issue Paper No. 1, (Geneva, 2007) at p. 12; Melly UNCTAD at p. 164; Energy Charter Secretariat, Trade in Energy: WTO Rules Applying under the Energy Charter Treaty (Brussels, 2001) at p. 11 (explaining that energy is significant to everyone and has a precise social function; therefore, it is important to secure an affordable supply of energy for everyone including “rich and poor, young and old, employed and unemployed”); Selivanova Goldthau at p. 49.
energy sources can be divided into two groups: conventional energy sources, known as non-renewable, and nonconventional energy sources, known as renewable. Non-renewable energy sources include fossil fuels (oil, coal, and natural gas) in addition to nuclear energy. Renewable energy sources encompass bio-energy, wind, solar, geothermal, and tidal energy. Although electricity is a secondary energy source that is generated through the conversion of primary sources of energy, it constitutes a crucial energy source. Indeed, all energy resources vary in terms of their features and trade-related issues, which distinguish them from other traded objects subject to the WTO regime.\textsuperscript{72} One major distinguishing feature relates to energy’s peculiar physical composition, which affects the ways energy products are stored, transported and distributed.\textsuperscript{73} Therefore, the distinctive features of energy resources necessitate applying appropriate treatment and trade regulations to address specific trade and investment issues pertaining to each one of the various energy resources, products and services.

5. Finite Resources

Fifthly, the lion’s share of energy trade revolves around the fossil fuel resources of oil, coal and natural gas, which are non-renewable resources with finite amounts available within proven natural reserves.\textsuperscript{74} Importantly, only some countries are fossil-fuel endowed and exporting countries, while the vast majority of the world is composed of energy-importing countries.\textsuperscript{75} In this sense, energy is the largest globally traded commodity and currently global usage is composed, almost entirely, of finite and non-renewable resources upon which the modern world is thus greatly dependent. The sale of energy products is controlled only by some countries, while the majority of countries are energy purchasers. Also, the multifaceted vulnerability of international trade and markets to the availability, stability and affordability of a sustainable and steady supply of these non-renewable energy resources poses an additional challenge to the energy trade sector.


\textsuperscript{74} See Selivanova Goldthau, p. 49 (explaining that fossil fuel resources are distributed worldwide in “uneven” manner, thus they are found to be “under sovereign control of a limited number” of energy-endowed countries).

\textsuperscript{75} See Selivanova Goldthau, at p. 49.
6. Energy Security

Sixthly, the significance of energy and reliance of exporting and importing countries on energy trade emphasize national and global energy security issues.\textsuperscript{76} Notably, the energy market is one market, thus any event that considerably impacts the supply of or demand for available energy on the market will affect energy export and import prices alike. Thus, events in any major oil importing or exporting country impact all other countries,\textsuperscript{77} and, in fact, various historic events have given rise to deep and ongoing concerns over energy supply and demand for exporting and importing countries, respectively. This includes, \textit{inter alia}, the era when the majority of the global oil industry was controlled by the international oil companies (IOCs) known as the “seven sisters”;\textsuperscript{78} the oil embargo; the oil shocks; the rise of and increased concerns pertinent to climate change and carbon dioxide emissions; the financial crises; and the fluctuations of oil prices, mainly the unprecedented fluctuations of prices\textsuperscript{79} during the last decade.\textsuperscript{80} Therefore, the availability and affordability of energy in the international and domestic markets affect global as well as national energy security.\textsuperscript{81}

Moreover, global trade in energy was neither regulated by suitable rules and regulations specific to trade in energy, nor conducted \textit{de facto} by written or transparent rules. Instead, trade in energy was managed for decades through interstate relations influenced by political and diplomatic considerations. This politicized rather than regulated way of trade lacks transparency, certainty, stability and predictability. Furthermore, trade in non-renewable energy resources demonstrates the conflict of trade interests that exists in the intersection between the two interdependent groups of energy trading countries: the energy importing countries, i.e., the vast


\textsuperscript{77} See Strange at p. 6.

\textsuperscript{78} The term ‘seven sisters’ is a term coined by Enrico Mattei to refer to the following oil companies: the Standard Oil Company of New Jersey (later Exxon), the Standard Oil Company of New York (Socony, later Mobil, which eventually merged with Exxon), the Standard Oil Company of California (Socal, later renamed Chevron), the Texas Oil Company (later renamed Texaco), Gulf Oil (which later merged with Chevron), Anglo-Persian (later British Petroleum), and Royal Dutch/Shell. See U.S. Department of State, Office of the Historian, available at http://history.state.gov/milestones/1921-1936/RedLine.

\textsuperscript{79} During the 2008 global financial crisis, oil prices increased rapidly to record on 3 July 2008 an all-time high price of US$145.31 a barrel (West Texas Intermediate WTI); see U.S Energy Information Administration, ‘Petroleum and Other Liquids,’ available at http://www.eia.gov/dnav/pet/hist/leafhandler.ashx?n=pet&s=rwtc&f=d.


\textsuperscript{81} See Yergin, Daniel, “Ensuring Energy Security,” \textit{Foreign Affairs}, 85, No. 2 (March/April 2006). See also Desta World Trade at pp. 523–524 (discussing the negative economic impact of high prices of oil and the role of sharp rises in oil prices in slowing down growth and causing recessions in many developed countries as well as globally, based upon data from ECOSOC, \textit{World Economic and Social Survey}, 2001).
majority of the world’s countries, and the energy-endowed exporting countries, i.e., a small number of countries. While the first group is interested in securing an affordable (at the “lowest price”) and steady supply of energy, the second group seeks to gain the maximum income and rent from the sale of its natural wealth for the benefit and development of its nations and economies.82 The direct consequence is that the availability, stability and affordability of traded energy resources in the domestic and international markets influence to a huge extent the "political stability and economic survival”83 of exporting and importing countries, the international community as well as national and global energy security.

7. Transportation of Energy

Seventhly, energy products are transported differently from other products. A significant share of trade in energy is network-dependent.84 This means that trade in energy, chiefly in the cases of natural gas and electricity, does not cross borders as other products do, but rather its transportation is usually linked to a “fixed infrastructure.”85 In the case of natural gas, it is transported via fixed pipelines, while electric power is transported via fixed grids.86 Because of its peculiar physical limitations, 75% of natural gas is transported internationally via fixed pipelines, and only 25%, as liquefied natural gas (LNG), is transported by sea.87 Meanwhile, crude oil usually is transported by sea.

The dependence of natural gas trade on a fixed pipeline infrastructure could explain why the volume of international trade in gas resources is much lower than that of international trade in other energy products.88


83 See Desta World Trade at p. 523.

84 T. Wälde and A. Gunst, “International Energy Trade and Access to Competing Networks,” Energy and Environmental Services: Negotiating Objectives and Development Priorities, UNCTAD (New York & Geneva 2003), p. 118 (noting that trade in electricity and gas is “as a rule network dependent”, with the exception of the LNG transported via ships, and explaining, from a trade and investments perspective, that “network dependence” means that it is not enough to eliminate import barriers for freeing trade effectively, but there have to be “proactive measures” towards opening transportation networks for energy transit, including establishing new networks).


87 See Rakhmanin, at p. 123, footnote 122.
trade in oil resources.\textsuperscript{88} Moreover, given the necessity of transporting gas via pipelines and electricity via grids, trade in these energy resources has been largely restricted to regional trade between those States that are connected through adequate networks.\textsuperscript{89} Remarkably, the network dependence of energy transportation points to the substantial capital and investment required for the construction of new pipelines and transmission grids infrastructure, as well as for the maintenance of old and new transportation networks.\textsuperscript{90} The intrinsic reliance on fixed infrastructure of gas and electricity transportation stresses greatly the interdependence and complexity of energy trade, essentially the transit of energy resources, in the international market.

The significance and unique characteristics of energy mentioned above distinguish trade in energy from other sectors of trade. Thus, this predominant sector of global trade requires and necessitates a special treatment.

\textbf{IV. Energy Trade: Challenges and Concerns}

The second factor that explains why trade in energy has been treated differently from other trade sectors and products has to do with the challenges that confront the global energy industry in general and trade in energy in particular.

\textbf{1. Supply and Demand}

The global energy system is internationally interlaced and interdependent.\textsuperscript{91} The impacts of energy demand and supply are not limited to national borders; rather, energy supply and demand have global consequences and implications for a variety of sectors.\textsuperscript{92} An increasingly significant example of this global interdependence is the link between trade and energy. Recently, the international trade regime has been increasingly focusing on energy trade.\textsuperscript{93} Indeed, both fields

\textsuperscript{88} Idem.
\textsuperscript{90} See Selivanova SIEL, at p. 2.
\textsuperscript{93} See for instance a conference that linked these two epistemic communities (trade and energy): “Workshop on the role of intergovernmental agreements in energy policy,” 29 April 2013, WTO Secretariat, Geneva, available at \url{http://www.wto.org/english/tratop_e/envir_e/wksp_envir_apr13_e/wksp_envir_apr13_e.htm}. Another development that links the international trade and energy fields is a conference organized by the Centre for Trade and Economic
interact in a variety of ways and are becoming more and more interdependent.\textsuperscript{94} One of the causes for this increasing interaction between trade and energy relates to the liberalization of energy markets in many countries, which subjected trade in energy products to market rules.\textsuperscript{95}

Moreover, trade in the energy sector, as elaborated earlier, plays a very significant role for promoting both international and national economic development. However, the energy world, including trade in energy, is confronted by unprecedented concerns and challenges. The origins of these challenges are deeply rooted in the tension between expanding trade and increasing economic growth, on the one hand, and promoting efficient use of energy resources and protecting the environment, on the other hand.\textsuperscript{96} In fact, “the energy world faces unprecedented uncertainty,”\textsuperscript{97} according to the World Energy Outlook (2010) of the International Energy Agency (IEA).

Some of the most dominant concerns in the energy world are the concerns over energy supply and demand. These concerns are interconnected with different factors, including the economic growth and energy consumption of developed as well as developing countries; the availability of various energy resources; energy efficiency and sustainability; stability or fluctuations of energy prices in the international markets; financial stability or crisis; the capital of investments required to the explorations and production of energy; geopolitical matters; political stability or instability, \textit{et cetera}. Notably, the apparent economic growth of countries worldwide is accompanied by growth in energy consumption, mainly of oil and gas resources.\textsuperscript{98}


\textsuperscript{95} See Pauwelyn Challenges at p. 4; T. Wälde and A. Gunst, “International Energy Trade UNCTAD”, 18.


It is worth mentioning in this respect that during the last 20 years energy consumption increased by 45%, and over the period of 2010 to 2030 it is likely to grow by 39%. Thus, the correlated high growth of economies and energy consumption in developed and developing countries, especially in emerging economies like China, Russia and India, obviously raises the demand for energy in the long term.

A similar growth, however, is not expected on the supply side. One of the reasons for this relates to the poor investment in the energy sector. Investment in this sector, mainly in exploration and production, is slow and “lagging behind”. Other reasons have to do with the 2008 global financial crisis as well as disputes between governments and investors in the energy industry, which have negative impacts and likely restrict investments in this sector. As a consequence, energy demand will be higher than energy supply, which will lead to energy scarcity, high energy prices and even to global economic crises.

2. Trade in Goods v. Trade in Services

An additional concern is found in the clear distinction between trade in goods and trade in services in the WTO discipline, where specific rules apply to trade in goods (the GATT) and other rules apply to trade in services (the General Agreement on Trade in Services (GATS)). But the energy sector does not apply this obvious distinction between energy products and energy services, which may result in artificial determinations and intrinsic obstacles to trade in energy. Thus, this emerging debate around the dichotomy of goods and services, within trade in energy, complicates the substantial ongoing debate over the applicability and implementation of WTO


100 See IEA 2010, p. 5; IEA 2012, p. 4; Kemfert, at p. 277.

101 See Selivanova Goldthau, at p. 50.

102 Ibid.

103 See C. Kemfert at pp. 274-275 (explaining that in order to satisfy the rise in global energy demand, an increase in energy supply is expected. But the traditional and low-cost oil fields are disappearing, which necessitates exploiting other oil production sites to meet demand, including deep sea drilling. This is highly risky, especially when drilling more than 1,500 meters deep, as the accident at the Deep Water Horizon in the Mexican Gulf in April 2010 has proven); IEA 2010, at p. 6.

104 See Cossy, at p. 113 (explaining that the distinction between goods and services is inconsistent with the daily business reality. It also has various consequences, e.g., in the investment field, where it is clear that, while the GATS contains basic investment disciplines that apply and protect trade in services, the Agreement on Trade-Related Investment Measures, which applies to trade in goods, “does not protect investment per se.”).
rules to trade in energy.\textsuperscript{105}

3. **Transit via Fixed Networks: Pipelines and Grids**

Likewise, as mentioned earlier, an important challenge to trade in energy stems from the transportation of gas and electricity through fixed infrastructures, namely pipelines for gas and grids for electricity.\textsuperscript{106} This limitation of network usage for specific energy products entails spending huge capital and substantial investment, in addition to drafting appropriate investment rules in order to secure the transportation and flow of energy products.\textsuperscript{107} At the same time, WTO law was not designed specifically to address the crucial issues that arise from trade in energy through fixed networks. For example, WTO law includes more detailed rules regulating imports than rules relevant to exports, while, in the case of energy, countries are concerned more with rules on exports than imports in order to secure the supply of energy from exporting to importing countries.\textsuperscript{108}

Even though Article V of the GATT addresses the freedom of transit for goods in general, its applicability to transportation of energy through fixed infrastructures is questionable.\textsuperscript{109} Various claims surround the existing text of Article V, including: the national treatment obligation in Article V is very limited; Article V lacks the power to oblige countries to invest and construct new infrastructures needed for energy transportation; and there is an ambiguity with respect to the applicability of Article V over energy companies, which control, by monopoly enterprises, access to energy infrastructure.\textsuperscript{110} Therefore, although the WTO embraces basic disciplines addressing transit of goods, they are incomplete and lack substantial obligations with relevance to the specific challenges of energy trade.\textsuperscript{111} However, the transit issue is not the only unresolved issue with relevance to the intersection between trade and energy. It appears that WTO law was not designed to address and regulate additional critical unresolved issues, which include, \textit{inter alia}, export restrictions including export quotas and


\textsuperscript{107} See Rakhmanin p. 123; Selivanova Challenges SIEL, at p. 2.

\textsuperscript{108} See Rakhmanin at p. 124; Cossy, at pp. 113-114.

\textsuperscript{109} See Cossy at p.114, 115.


\textsuperscript{111} See Cossy, at p. 120.
duties, subsidies, dual pricing,\textsuperscript{112} countervailing measures on energy products, technical regulations and standards, monopolies and state-trading enterprises.\textsuperscript{113} The consequences are more uncertainty and more challenges to trade in energy.

4. **Combating Climate Change**

Moreover, one of the most pressing current challenges for all industries in general and the energy sector in particular is combating climate change.\textsuperscript{114} Indeed, the whole energy chain involves a severe negative impact on the environment and contributes to climate change.\textsuperscript{115} This chain includes the exploration, production, refining, storage, transportation, distribution and consumption of energy, each of which involves the combustion of energy products. The consequence is a significant increase in greenhouse gas (GHG) emissions. In 2010, the combustion of energy resources comprised 65\% of global GHG emissions.\textsuperscript{116}

Of note in this regard is the fact that fossil fuels (oil, coal and gas) accounted for 81\% of global total primary energy supply (TPES).\textsuperscript{117} This high fossil fuel share of TPES was addressed in an IEA report discussing global CO\textsubscript{2} emissions and indicating the emission quantity of each fossil fuel: coal 43\%, oil 36\%, and gas 20\%.\textsuperscript{118} Nonetheless, there are various measures that can help mitigate climate change: substituting fossil fuel energy sources (high GHG emissions) for green and less polluting energy sources, particularly energy derived from renewable sources; imposing energy efficiency plans and steps for both producers and consumers; saving consumption of energy whenever possible; increasing public awareness through various measures.

\textsuperscript{112} The dual pricing practice is a practice where countries price exported energy resources, such as natural gas, at different rates from the domestic price for the same resources.


\textsuperscript{114} On the links between climate change, energy and trade, see generally Leal-Arcas, R. Climate Change and International Trade, Edward Elgar, 2013.


\textsuperscript{116} "IEA CO2 Emissions 2012," 17, 18.

\textsuperscript{117} Ibid., figure 13, “World primary energy supply and CO 2 emissions: shares by fuel in 2010 Percent share,” p. 19.
educational plans, *et cetera*. In this respect, the legally binding obligations to reduce GHG emissions that countries made through the Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC) is a significant global effort worth mentioning here.

In spite of their environmental repercussions, the current demand and consumption of fossil fuels are still high and growing constantly. Moreover, taking into account the global population and economic growth and rise in development, it is expected that the demand for and consumption of fossil fuels will increase dramatically in the coming decades. According to a recent report published by British Petroleum, although the OECD countries will succeed in reducing GHG emissions by 2030, the fast economic growth of non-OECD countries will cause a higher degree of emissions and outweigh the OECD countries reduction. Therefore, in 2030 the aggregate projected increase in global emissions will be 28% (versus 2010). This trend of growth in the consumption and burning of fossil fuels results in a constant growth of GHG emissions that will threaten global climate. Also, this serious, complicated and reciprocal challenge between climate change and energy constitutes part of broader challenge to the fulfillment of global sustainable development. Thus, the existing pattern of escalating energy demand, supply and consumption, accompanied by energy combustion, strengthens the threat of irreversible damage to the environment and thus to humankind and global sustainable development.

5. **Energy Security**

Nowadays energy security concerns are at the top of national, regional and international

---


123 See Kemfert at p. 276-277.

agendas.\textsuperscript{125} As mentioned above, while all countries are involved in trade and consumption of energy, most of them are energy importers, as opposed to a few energy exporters. Hence, energy security and its concerns are not determined by a single definition, but rather the definition varies and the concept of energy security means different things to different countries and regions. Attempts to conceptualize energy security and its challenges were based upon various factors including energy endowment, geographic location, economic conditions, etc. Also, critical elements and factors of energy security will vary in different countries at different times.\textsuperscript{126} Therefore, to energy-endowed exporting countries, any disruption that threatens the stability of energy demand, production and prices as well as the conservation of energy resources is a challenge to their economic security.\textsuperscript{127} Whereas to energy importing countries, any factor that challenges the availability, stability and affordability of energy products supply poses a threat to their energy security.\textsuperscript{128} Taking into consideration the complexity and interdependency of the energy world, it is obvious that any risk to the supply or demand of energy is considered a challenge and threat to energy security.

However, a broad variety of factors impacts the availability and affordability of steady supply and demand, namely energy security, with some of them known and predictable, and others unknown or unpredictable. In this respect, several substantial concerns around energy security should be mentioned, which include geopolitical conflicts, volatility of energy prices, disruptions of energy supply and demand, depletion of energy resources, climate change and environmental challenges, natural disasters, \textit{et cetera}.\textsuperscript{129} Due regard has to be given also to the monopolies that control all aspects of the energy sector in many countries, e.g., Russia, Saudi Arabia and Venezuela, whose policies directly affect both national and global energy security.\textsuperscript{130} Noticeably, a few recent events highlight some challenges to national and global energy security,
such as the global financial crises compounded by fluctuations of energy prices in 2008, the accident in the Deep Water Horizon in 2010, the nuclear catastrophe at Fukushima Daichii in 2011; and the ongoing revolutions in the Middle East and North Africa region since 2011, known also as the Arab Spring. Precisely, energy security, in its national and global concepts, is a crucial constituent that challenges the energy world. Given the expected growth in trade in energy during the coming decades, and without extreme and dramatic innovation or revolution in the energy industry, it is safe to say that the more trade in energy expands, the more the challenges to energy security will increase.

In short, several concerns indicate that the global energy sector, including trade in energy, is subject to substantial challenges, especially economic, political and environmental. Although these challenges are very crucial in themselves, their importance is multiplied since energy influences all aspects of our daily modern life. It should be emphasized in this regard that existing global energy governance is ineffective and unqualified to address and resolve the above mentioned challenges. Global energy governance suffers from critical fragmentation and lack of consistent rules. Its structure includes fragmented systems across multilayered regimes such as multilateral, regional, bilateral and national systems and treaties, in addition to a variety of international institutional governors like the IEA, the Organization of the Petroleum Exporting Countries, the UN, or the G20. Therefore, the fragmentation of governance and inconsistency of rules in global energy governance will most likely cause additional tensions and uncertainties to trade in energy in particular and global energy governance in general.


V. WTO Law and Energy Trade: Selected Debates

The third dimension that makes energy distinct from other sectors of trade is the ongoing debate and unresolved issues that emerge from the intersection between WTO law and energy trade. In principle, the trade regime embraces various sectors of trans-boundary trade with the assumption that the GATT/WTO disciplines prevail over all trade sectors. When it comes to trade in energy, however, this assumption is not entirely true. As mentioned earlier, nowadays trade in energy constitutes the largest universal constituent of trade that interacts with other sectors of trade and exerts great influence on these other sectors. Therefore, managing, fostering and securing trade in energy are on national and international agendas as a top priority for energy importing as well as exporting countries. However, in spite of its high significance, trade in energy is not automatically, or by definition, included or excluded from the international trade discipline.

Notably, two major approaches have been developed in the last two decades to address the debate over the GATT/WTO disciplines and trade in energy. The first approach supports the view that the international trade discipline governs all sectors of trade including trade in energy, mainly because the energy sector was never excluded explicitly from the GATT/WTO disciplines. The other approach casts doubts about the automatic governance of GATT/WTO disciplines over trade in energy and considers trade in energy a special case that was excluded de facto, not de iure, from the GATT/WTO disciplines. As long as there is no conclusive

---


decision in this debate, the divergent approaches will more than likely be examined as a starting point in future discussions relevant to energy trade issues.

It is worth mentioning in this respect that this debate is based on a mutual significance to both sectors, namely international trade and trade in energy, and encompasses important consequences to both sectors. From the international trade system point of view, energy trade is the most significant sector of trade by virtue of being the largest trade sector in terms of share and value, as well as being crucial to other trade sectors. From the trade in energy perspective, being subject to the international trade system means being subject to a stable, agreed and predictable set of rules. Thus, the outcome of this debate reflects the distance between the existence and non-existence of a rules-based regime to regulate the most important sector of trade, and it also entails positive or negative implications for both sectors.

1. The Applicability of WTO Law to Energy Trade

In general, the source of international economic and trade law is international treaty law, rather than international customary law. Treaty law is the law formulated by the parties to a treaty. The treaty, an international contract or agreement, reflects the willingness and intention of the parties, who create the obligations of the agreement. Thus, the obligations made by the parties are the binding law that applies to the relations/transactions between the parties to the agreement. The result is that contracting parties agree between themselves which are the laws and norms that apply to them, and what is included in and excluded from this binding law.

Accordingly, in the specific case of the WTO, the founding members agreed to bind all WTO members (founders and acceding) to a set of international agreements which compose the law of the WTO and govern their trade relations. Besides, this set of agreements is known as the “single package”. Importantly, according to WTO law, when a country joins the WTO, it must accept the single package as a binding law of the WTO. This section analyzes the chronological evolution of international trade in energy, starting with the ITO and the GATT creation in 1947, the various rounds of GATT negotiations, the subsequent accession of energy exporting countries to the GATT, the WTO era and energy trade, and the accession of energy-rich countries to the world trading system since 1995, all of which with a view to determine whether GATT/WTO law applies to trade in energy.

---

a. The International Trade Organization and the GATT Creation

Although energy issues were not specifically addressed during the negotiations for the establishment of the ITO and the GATT, natural resources matters in general were brought up, discussed and agreed upon.\textsuperscript{139} During the ITO negotiations era, in parallel to the creation of the GATT, the Havana Charter addressed issues relevant to natural resources in several provisions.\textsuperscript{140} Within these provisions, several articles warrant mention in this regard: Articles 10 and 13 of the Havana Charter, which emphasized the role that natural resources play in “economic development and reconstruction”, and Article 45 of the Havana Charter, which justified measures related to the “conservation of exhaustible natural resources”.\textsuperscript{141} Similar to Article 45 of the Havana Charter, Article XX(g) of the GATT granted protection to the conservation of “exhaustible natural resources”.\textsuperscript{142} Notably, the term “natural resources” was understood to include “raw material”, while the term “exhaustible natural resources” covered “stock resources”, including metal or “oil”.\textsuperscript{143} Hence, it can be deduced that energy trade in general was intended to be subject to the disciplines of the ITO and the GATT, unless a particular kind of energy trade was targeted by a measure aimed at conserving exhaustible natural resources, according to Article 45 of the Havana Charter and Article XX(g) of the GATT.

b. Energy Tradable Products

Following the demise of the ITO, the GATT became the binding multilateral trade treaty, which had a general application and governed trans-boundary trade in commodities between GATT parties.\textsuperscript{144} Generally, any product eligible as tradable, through export or import, was subject to


\textsuperscript{142} See Article XX(g) of the GATT.


the GATT. Thus, all tradable energy products, in principle, qualified as tradable products capable of being exported and imported. In fact, during the entire life of the GATT, since 1947, enormous volumes of energy products, specifically oil, coal and gas, have been traded internationally. Therefore, it can be assumed that, to the extent that energy resources were tradable products, all trade in energy products, similar to other tradables, are subject to the GATT.¹⁴⁵

c. Energy Trade was not Excluded from the GATT

One of the main reasons supporting the applicability of GATT rules to trade in energy relates to the fact neither energy as a trade sector nor energy products as commodities were ever explicitly excluded from the application of the GATT.¹⁴⁶ Indeed, none of the provisions of the GATT agreements, protocols or other related legal documents approved by the contracting parties has excluded energy products from GATT coverage, unlike the case of certain products, such as agricultural goods and textiles. These commodities, which were important for some of the GATT drafters, such as the US and certain European States, were granted special treatment within the GATT regime to the extent that the general provisions of the GATT did not apply to them.¹⁴⁷ Additionally, the GATT discipline granted affirmative exemptions from the coverage of its rules to certain kinds of measures, activities or situations. These exemptions were provided to GATT contracting parties through a variety of specific as well as general GATT exceptions. According to the various exceptions, measures and activities would be exempt from compliance with general GATT rules if they met the specific requirements of whichever GATT exceptions were applicable.


Therefore, it may be concluded that the GATT drafters intended to apply GATT rules to all goods that were not explicitly excluded from the coverage of the GATT. Secondly, when the GATT drafters intended to exempt an activity or a measure from compliance with GATT rules, they did so by designating certain exceptions. Accordingly, energy products were among those general non-excluded tradable products. Thus, in principle, their international trade was subject to GATT rules unless a measure related to their trade was eligible, by a party taking that measure, to invoke one of the potentially applicable GATT exceptions. However, this argument’s premise relies on the questionable assumption that energy products belonged to the same pool of products as other traded products. Accordingly, as long as energy products were not explicitly left out of this pool, they, like other products, were subject to GATT rules. Nevertheless, this argument, through its inclusive interpretation of the GATT coverage, ignores the possibility that energy products might not have been intended at all to belong to the general pool of tradable products.

d. GATT Negotiations

Although trade in energy in general and trade in petroleum in particular were not clearly and directly included in any of the GATT provisions, according to GATT history, the contracting parties discussed energy-related matters during various rounds of GATT negotiations. Importantly, subsequent to the wave of nationalization of the petroleum industry by several Middle East and North African countries in the early 1970s, as well as due to the oil embargo and first oil shock in 1973, the US attempted to raise the issue of energy trade export restrictions and export taxes relating to energy during the Tokyo Round (1973-1979). Ultimately, the opposition of developed and developing countries led to the failure of this initiative. Despite rejecting this initiative, during the Tokyo Round, several issues indirectly relevant to oil were negotiated. The Tokyo Round resulted in the creation of special agreements (Codes), which included, inter alia, subsidies, antidumping and technical barriers. Notably, these agreements

---

included new rules with potential impacts on energy products and policies applied by energy exporting countries.\textsuperscript{151} Even though these agreements were the result of a multilateral round of the GATT, they were conceived not as binding but “optional” agreements. However, almost two decades later, with the establishment of the WTO, the optional agreements became part of the WTO binding agreements.\textsuperscript{152}

It is worth noting another issue relating to energy vis-à-vis the GATT, which arose directly out of the Tokyo Round, i.e., the issue of the dual pricing practice. The GATT parties were required to formally discuss the dual pricing practice at the GATT Ministerial Meeting in 1982. This issue had emerged at that meeting since the GATT Council was requested to provide arrangements to serve toward the study of the dual pricing practices.\textsuperscript{153} No substantive decision was taken in this regard and this specific practice continued until recently with regard to the negotiations around Russia’s accession to the WTO, given Russia’s practice of pricing gas exported and gas consumed domestically at different rates.\textsuperscript{154}

e. Accession of Energy Exporting Countries to the GATT

During the GATT era, some energy exporting countries became signatories to the GATT, such as Indonesia (1950), Nigeria (1960), Kuwait (1963), Mexico (1986) and Venezuela (1990).\textsuperscript{155} Among these energy exporting countries, it is important to focus on the accession of Mexico and Venezuela. The accession of these two countries to the GATT casts light upon the link between the GATT discipline and trade in energy. More essentially, their accession to the GATT highlights how these two energy exporting countries perceived the interplay between GATT and energy trade and the implications of their GATT accessions for their energy trade.

\begin{footnotesize}
\begin{enumerate}
\item See Leebron, “The Uruguay Round,” 18–25; Andrea Jiménez-Guerra, ”The World Trade Organization and Oil,” at 16.
\end{enumerate}
\end{footnotesize}
Mexico became a contracting party to the GATT in 1986, and a founding member of the WTO in 1995. At the time of joining the GATT, Mexico was one of the most important oil producing and exporting countries in the world. Notably, when Mexico negotiated its accession to the GATT, one of the most important energy trade issues came to the fore, i.e., the issue of export restriction practices that energy producing and exporting countries used to impose over the production or exportation of energy products, essentially over crude oil. In order to preserve its sovereignty and apply certain export restrictions with regard to its natural resources in general and energy products in particular, Mexico sought to maintain its rights through Paragraph 5 of the Protocol of Accession to the GATT. Paragraph 5 of Mexico’s Protocol of Accession states:

“Mexico will exercise its sovereignty over natural resources, in accordance with the Political Constitution of Mexico. Mexico may maintain certain export restrictions related to the conservation of natural resources, particularly in the energy sector, on the basis of its social and development needs if those export restrictions are made effective in conjunction with restrictions on domestic production or consumption.” (emphasis added)

On the contrary, a few years later, in 1990, Venezuela joined the GATT without retaining any right to regulate its energy trade. Venezuela is one of the leading energy producing and exporting countries and one of the five founding members of the Organization of Petroleum Exporting Countries (OPEC) in 1960. With regard to the practices of production or export restriction, it is important to mention that in 1985 OPEC countries transformed their coordination practices from setting oil prices directly to imposing production ceilings or quotas. Thus, at the

time of becoming a contracting party to the GATT, this new practice was very relevant to Venezuela as a GATT signatory because of Article XI:1 of the GATT, which bans imposing quantitative restrictions on imports and exports. In fact, Mexico’s Protocol of Accession specifically included a reservation in Paragraph 5 allowing for the retention of its ability to regulate trade in energy.

It was expected that Venezuela would include a similar text or paragraph in its accession documents, especially bearing in mind the new quota restrictions it imposed as a member of OPEC, which could be in infringement of Article XI:1 of the GATT. However, unlike the Mexican case, it appears that Venezuela did not feel the need to incorporate any wording in its Protocol of Provisional Application (PPA) or even in the report of the Working Party to maintain its ability to apply production or export restrictions to its oil sector. In fact, Venezuela relied on the general exception of the GATT and, in particular, on Article XX(g) of the GATT. This article provided a valid defense to measures related to the “conservation of exhaustible natural resources”. Indeed, Venezuela did not request the inclusion of any additional and specific text to the PPA for the sake of maintaining its oil production and export policies. Therefore, it is obvious that Venezuela considered the text in Paragraph 5 of Mexico’s Protocol of Accession to be no different than Article XX(g) of the GATT and as not containing any particular advantage. Also, it can be concluded that Venezuela considered GATT law to include an internal mechanism, i.e., Article XX(g), that allowed regulating the exploitation of natural resources, including energy resources.

In this respect, two substantially different situations have to be addressed concerning the issue of GATT (in)applicability to energy trade issues: the first deals with excluding trade in energy initially from the GATT discipline; the second focuses on exempting energy trade from one or more GATT rules through invoking GATT methods. The first situation implies that all types of trade in energy are conducted fully outside the scope of the GATT, and both rules and exceptions have no validity over this sector of trade. Conversely, the starting point of the second situation highlights the full applicability of GATT rules to trade in energy matters. However, according to the latter situation, if a certain issue, activity or measure of energy trade meets the

163 See UNCTAD, Trade and Energy, 20; Andrea Jiménez-Guerra, “WTO and Oil”, 22-23.
requirement of one of the GATT exceptions, this specific item will be exempt from the GATT discipline. All other activities, issues or measures related to energy trade will continue to be subject and bound by GATT rules.

Although the approaches of Mexico and Venezuela differed in their accession to the GATT, it can be implied that both treated the GATT discipline as being applicable to trade in energy, following the second situation mentioned above. It is through the specific reservation in Paragraph 5 of its Protocol of Accession that Mexico kept “certain export restrictions” outside the scope of GATT rules. Meanwhile, Venezuela referred to Article XX(g) of the GATT to defend a similar practice. Admittedly, the reservation within the Protocol of Accession as well as Article XX(g) of the GATT are both precisely GATT methods. These GATT methods were an inherent part of GATT law and were provided to GATT contracting parties or acceding States by GATT law. Consequently, the reliance on and the usage of GATT methods to exempt certain energy trade practices undoubtedly emphasize the coverage of the GATT discipline to all energy trade issues, except those exempted by GATT exceptions or reservations in Protocols of Accession. In other words, using GATT methods to invalidate the GATT discipline over particular energy practices means, first and foremost, accepting the applicability of this discipline to all other non-exempt energy trade issues.

f. The Uruguay Round

During the Uruguay Round (1986-1994), different groups of countries held discussions that had a clear impact on energy matters. For instance, some of the countries participating in the Negotiating Group on Natural Resources-Based Products, called attention to certain problematic practices pertinent to energy products issues. Among those debatable issues were dual pricing, export restrictions, and trade distortions due to governmental ownership and control practices. Objecting countries claimed that these practices caused variations of energy prices favoring domestic markets, hence, resulting in trade distortion.

---

164 See Uruguay Round, Group of Negotiations on Goods, Negotiating Group on Natural Resource-Based Products, meeting of 11 February 1987, note by the GATT Secretariat, MTN.GNG/NG3/, 26 February 1987; UNCTAD, Trade and Energy, 15 at footnote 6, mentioning the submission of the US in MTN.GNG/NG3/W/2, MTN.GNG/NG3/W/13 and MTN.GNG/NG3/W/23, as well as the submission of the European Communities in MTN.GNG/NG3/W/37.

165 See paras. 11-11 of the Uruguay Round Meeting of 11 February 1987; UNCTAD, Trade and Energy, 15–16.

166 See paras. 10-11 of the Uruguay Round Meeting of 11 February 1987; UNCTAD, Trade and Energy, 16; Andrea Jiménez-Guerra, “WTO and Oil,” 17.
However, the opponents to this argument stressed that these practices were outside the scope of the mandate of the Negotiating Group on Natural Resources-Based Products.\textsuperscript{167} Additionally, within the Negotiating Group on Subsidies and Countervailing Measures, attempts were made to address subsidies issues relating to energy. These attempts were also opposed for being “outside the terms of reference of the Negotiating Group on Subsidies and Countervailing Measures”.\textsuperscript{168} Finally, this initiative failed to incorporate energy-related texts in the Chairman’s draft text of the Agreement on Subsidies and Countervailing Measures.\textsuperscript{169}

g. The WTO Coverage

The outcome of the Uruguay Round was the creation of the WTO with its set of binding agreements. Indeed, the WTO encompasses rules relevant to trade in goods, services and intellectual property rights. Although the WTO agreements do not specify either an independent agreement addressing energy matters or any particular provisions relating to energy, the premise is that the WTO covers a multitude of energy trade issues.\textsuperscript{170} For example, all trade in energy products is covered by GATT rules; likewise, all trade in energy services should be conducted according to GATS rules.\textsuperscript{171}

Moreover, the Doha Round, which began in 2001 and is an ongoing multilateral round of negotiations,\textsuperscript{172} contains few implications for energy trade. It neither addresses energy trade as a


\textsuperscript{169} Ibid. See also UNCTAD, \textit{Trade and Energy}, 18–19.


separate or independent area of negotiations nor does it highlight its critical issues. This is despite the fact that there are three major areas of negotiations in the Doha Round with relevance to trade in energy issues: liberalizing trade in environmental products and services (climate friendly goods and services), energy services, and trade facilitation (energy transit). The fact that the Doha Round includes energy issues, even if treated only as sub-matters rather than major areas of negotiation, stresses the existence of energy trade issues in the WTO.

h. Accession of Energy-Endowed Countries to the WTO

The accession of energy-endowed countries to the WTO strengthens the argument that trade in energy is subject to the WTO discipline. In contrast to the GATT era, the WTO seems to attract more energy-endowed countries to become full members of this multilateral trade organization. The most prominent energy producing countries that joined the WTO are: Qatar (1996), United Arab Emirates (1996), Angola (1996), Oman (2000), China (2001), Saudi Arabia (2005), and Russia (2012). In order to properly answer the question of the applicability of GATT/WTO disciplines to trade in energy, another significant milestone should be examined, namely the accession of the energy-exporting countries to the WTO, and particularly, the accession of the biggest energy producing-exporting countries, i.e., Saudi Arabia and Russia, which joined the WTO in 2005 and 2012, respectively. Both countries have been considered for decades the biggest energy producing and exporting countries worldwide. The accession of these two countries to the WTO constitutes a landmark event in the history of the WTO in relation to trade in energy. In addition, other significant energy-endowed countries are in the process of negotiating their accession to the WTO, and in the meantime have observer status. This group of


175 For an account of the major oil producing countries as of 2009, see http://aspousa.org/peak-oil-reference/peak-oil-data/production-and-peak-dates-by-country/.

observers includes Iran, Iraq, Libya, Algeria, Kazakhstan, and Azerbaijan. Accordingly, it is assumed that the dynamics of the WTO may well be changed due to the accession of energy producing countries. The more energy-endowed countries join the WTO, the more energy trade becomes subject to the WTO.

However, if the presumption were that energy trade was outside the scope of GATT/WTO disciplines, then it may be incorrect to claim that accession of energy-producing countries to the WTO would mean the automatic application of WTO rules to energy trade. An argument based solely upon accession is weak compared to the previous arguments. In the context of applying the WTO discipline to energy trade, using the accession to the WTO of energy producing countries entails linking this argument to other substantial aspects of accession, such as: the negotiation agenda and process; energy-related issues raised and negotiated de facto between the negotiations’ parties; notes from the WTO Working Party reports referring to energy matters; commitments agreed between the WTO and an acceding State in the ultimate protocols of accession and whether these protocols integrated energy issues or not. Therefore, a reliance only on the mere fact and act of accession with no clear reference to the negotiated and agreed issues, pertaining to energy, would not be a sufficiently convincing argument.

2. Unresolved Energy Trade Issues

There are unresolved issues which lie at the intersection between international trade rules and trade in energy. Although WTO law applies to all other trade aspects, its application to the energy sector has been unclear. Besides, WTO law, with all of its agreements, rules, obligations and exceptions, was not originally drafted to address and tackle energy issues. It should also be noted that the WTO discipline is based heavily on rules that ban WTO members from acting in certain ways. It lacks rules imposing positive obligations on WTO members,
which are necessary to regulate significant issues of trade in energy.\(^{182}\)

Energy resources have always been potent geopolitical and strategic tools in the world order.\(^{183}\) However, when the GATT was first negotiated in the 1940s, liberalizing global trade in energy was not considered to be a ‘political priority’.\(^{184}\) However, rising global energy needs\(^{185}\) combined with factors including the recent accession to the WTO of several ‘energy-significant’ economies\(^{186}\), the increased centrality of energy in environmental and climate change-related discussions\(^{187}\), and the proliferation of private-sector involvement in energy\(^{188}\) have resulted in a reconsideration of this view today.\(^{189}\) As a result, the role of the WTO in regulating global trade in energy goods and services has increasingly come into question.\(^{190}\)

In response, this section focusses on the relationship between trade in energy and the rules currently existing under the WTO regime. It addresses the distinctive nature of trade in energy and the resulting complexities associated with its regulation under existing WTO rules; it considers whether existing WTO rules are capable of operating to cover the sector; and it concludes the discussion with a critical comment of this coverage, or lack thereof.

a. Energy vis-à-vis other goods and services

The intuitive difficulties in reasoning that the WTO agreements \textit{ipso facto} apply to trade in energy stem from the existence of a number of features – that characterize energy trade – which

\(^{182}\) See Cossy, at p. 114 (mentioning some of the limited or missing rules from the WTO discipline, such as rules for obliging WTO members to act and ban anticompetitive activities by monopolies, or rules pertinent to access and use of “transport facilities” in the energy sector).


\(^{186}\) By this term, reference is made to both significant energy-exporters as well as consumers (for example, Russia, a major energy exporter, joined the WTO in August 2012).


are absent from trade in other goods and services. These distinctive features can broadly be grouped into two inter-related categories – based on physical features and political considerations.

In the first category falls the ‘peculiar’ physical form of energy goods which are often difficult to store and volatile. This results in the necessity for special infrastructure and methods to store, transport and distribute them. Further, energy goods are naturally finite and often non-renewable,¹⁹¹ form an ‘essential intermediate input for almost all economic activity,’ and have a ‘direct impact on the welfare of end-users’.¹⁹² These distinctive ‘physical’ features result in a number of unique political and economic considerations coming into play, as explained in Section III above. For instance, price, quality, availability, marketability, transport and other conditions of purchase or sale.¹⁹³

As for the second category, based on political considerations, a number of monopolies in exploitation exists in the sector. These result either from an unequal distribution of energy resources across countries by nature or due to the strategically motivated dominance of vertically-integrated state-controlled enterprises in the energy industry of a particular country.¹⁹⁴ Another distinct issue is the dependence of the sector on capital-intensive fixed infrastructures.¹⁹⁵ These raise dual considerations in terms of the frameworks in place to regulate investments in such infrastructures and, subsequently, the conditions of access to the same.¹⁹⁶ In contrast, manufactured products can be stored and distributed in settings that are not dependent on infrastructures to which access may be restricted or conditional.¹⁹⁷

¹⁹³ Article 14.d of the Subsidies and Countervailing Measures Agreement.
¹⁹⁷ Manufactured products can be stored and distributed by means such as trucks, ships or trains, which only depend on unconditionally accessible ‘public’ infrastructure, such as road, water or rail.
Thus, it becomes clear that energy products possess characteristics which evidently differentiate them from trade in other commodities and manufactured goods. The question that logically follows is whether the differentiation is substantial enough to render the WTO agreements *in limine* inapplicable to the sector.

**b. Trade in Energy under the existing WTO Regime**

Given the discussion above, a preliminary question is whether – given the uniqueness of trade in energy – the WTO agreements can at all apply to trade in energy. The traditional conception has been that the sector is one that is ‘largely not covered by the WTO’ and did not fall within the ambit of its agreements. However, for the reasons outlined above, this assumption has, in recent times, come under enhanced scrutiny. Today, the position is rather uncontroversial with there being a broad consensus that there is nothing in the WTO framework that prevents its application to energy trade. In other words, it has been for reasons that are political, strategic and security-related, rather than legal, that states chose to address issues affecting trade in energy “outside” the realm of the WTO. Given this lack of a *de jure* exclusion of energy trade from the WTO, some of the most important issues that arise when WTO norms are made to apply to trade in energy have been outlined below.

**i. Definitional/Classification issues**

There is a number of yet unresolved issues that arise when it is attempted to apply the provisions of the GATT to global energy trade. At the outset is the lack of a definitive classification of energy goods and energy services. Neither term is definitively defined – with the latter only being provisionally listed. Another challenge is the difficulty associated with distinguishing clear elements of services and goods in energy trade – with most of the trade possessing elements
of both.\textsuperscript{202} Similarly, there is no unanimity on whether ‘electricity’ should be categorized as being either a good or a service under WTO norms.\textsuperscript{203} Finally, the nature of energy products brings up many questions of interpretation of specific questions, including whether different types of energy products (such as ‘renewable’ and ‘non-renewable’) can be treated as being ‘like products’ and whether the freedom of transit would apply to fixed infrastructures, such as pipelines.\textsuperscript{204}

\textit{ii. General Agreement on Tariffs and Trade}

A fundamental issue concerning the applicability of GATT Articles I and III – concerning MFN and national treatment, respectively – relates to the test of “likeness” of energy products. An example of a potential issue is whether renewable energy goods compete with non-renewable energy goods and, therefore, whether they should be treated by law in the same manner.\textsuperscript{205} There are additional issues regarding the interaction of these articles with prevailing practices in energy trade. For example, Article III may be violated when WTO Members grant preferential distribution network (e.g., pipeline) access to vertically-integrated state-run monopolies. The freedom to transit goods without interference through a WTO Member’s territory is enshrined under Article V. While such a provision would have definite applications for cross-border energy trade, it is in doubt whether the provision covers transport through pipelines or wires under ‘traffic in transit.’\textsuperscript{206} It has also been argued that Article 7 of the Energy Charter Treaty (ECT) would offer a more robust provision for energy-related cases where applicable.\textsuperscript{207} Article XI of


\textsuperscript{203} Robert Howse and Elisabeth Turek, “The WTO Negotiations on Services: The regulatory state up for grabs,” CANADA WATCH, Vol. 9, No. 1-2, pp. 3-9, at 4 (September 2002): “With respect to energy, the situation is even more complex because some WTO members view electricity as a good, [...] while others view the generation of electricity and the operation of power plants as a service”. Others view it differently: in case C-393/92 Almelo v Energiebedrijf Lisselnie[1994] ECR-I-1477 [28] and case C-158/94 Commission v Italy [1997] ECR I-5789 [17], the European Court of Justice ruled that electricity should be treated as a good.


\textsuperscript{207} Article 7 ECT enshrines rights relating to transit; WTO, Communication from the European Communities, ‘WTO Trade Facilitation – Strengthening WTO Rules on GATT Article V on Freedom of Transit,’ G/C/W/422 (30
the GATT prevents quantitative border restrictions. A possible issue here is the interaction of this provision with the imposition of conditions of access or licensing requirements for oil and gas pipelines of a WTO Member.

**iii. General Agreement on Trade in Services**

In addition to the definitional problems above, considering ‘energy services’ under the GATS also raises a number of unresolved issues. Article II seeks to ensure MFN status for all services of all WTO Members, without discrimination. Article VI, concerning ‘domestic regulation,’ would be crucial to a sector that is often the subject of heavy regulatory oversight by governments. Of particular relevance to the energy sector is Article VIII, addressing ‘monopolies and exclusive services suppliers’. This provision lays down specific conditions for the operation of monopolies and will have important implications for the energy sector, where state-run monopolies are not uncommon. The stricter regulations on monopolies will translate into healthy competition which, in turn, benefits energy consumers and enhances energy security globally.

**iv. Agreement on Technical Barriers to Trade**

The Technical Barriers to Trade Agreement is a step towards harmonization of technical regulations and product standards. The Agreement would be applicable to a number of energy-trade variables, including technology efficiency requirements and standards.

**v. Agreement on Subsidies and Countervailing Measures**

The application of the Subsidies and Countervailing Measures (SCM) Agreement to energy trade will raise a number of issues to be settled. Article 8 of the SCM Agreement – which expired in 1999 – deemed ‘non-actionable’ certain government schemes that provided ‘assistance to promote adaptation of existing facilities to new environmental requirements.’ With the expiry of this provision, government subsidies aimed at encouraging the adoption of green energy technology would be called into question. Another question concerns the applicability of the

September 2002), at 5: “WTO members may wish to evaluate whether freedom of transit for such goods is effective and whether there is any need or scope for reassessing GATT Article V to take account of the special nature of this form of transit.” See also Danae Azaria, ‘Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade’, *Journal of Energy and Natural Resource Law*, Volume 27, No.4 (2009), at 574.

208 Article 2.6, Agreement on Technical Barriers to Trade.

209 Article 8.2(c) of the SCM Agreement.
The SCM Agreement to the common industry practice of ‘dual-pricing’. If the specific conditions laid down in the SCM Agreement are met, the practice may, in fact, be illegal.

**vi. Exceptions**

A number of WTO agreements, including the GATT and GATS, provide for exceptions to a WTO Member’s obligations under WTO law. These, when implemented in accordance with the relevant rules provided therewith, would exclude a WTO Member from having to respect its obligations under the respective agreement. Exceptions that may apply to the energy sector include:

(i) the necessity to protect human, animal or plant life or health;

(ii) relating to the conservation of exhaustible natural resources;

(iii) essential to the acquisition or distribution of products in general or local short supply;

and

(iv) the national security exception – given the clubbing of energy with the national security of states.

Moving forward, it will be important to evolve guidelines on the invocation of these exceptions in relation to energy trade so that WTO Members do not avoid obligations based on subjective interpretations of broad provisions.

**c. Final Remarks**

In light of the above discussion, it is clear that the existing regime under the WTO does in fact cover trade in energy. However, the status quo is far from ideal, with a number of ambiguities and uncertainties prevailing – including those detailed above. In light of these, the necessity of the hour is clarity in applying WTO norms to the international energy market. This may be

---


211 Article XX(b) of the GATT; Article XIV(b) of the GATS; Article 2.2, TBT Agreement; Article 27(2), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

212 Article XX(g) of the GATT.

213 Article XX(j) of the GATT.

214 Article XXI of the GATT; Article XIV bis of the GATS; Article 73 of TRIPs.
achieved either through a specific WTO Agreement on Energy or through *ad-hoc* interpretations of the various WTO agreements by the WTO’s DSU. However, given the lack of political will in bringing in an international energy governance framework, it would seem that the latter is the most feasible model in the short and medium-term. To avoid conflicting norms from developing, there is also a growing need to study the relationship between the ECT – a multilateral effort aimed at governing energy-related investments – and the existing WTO structures.

**VI. Conclusion**

This article has reviewed the treatment of trade in energy in the GATT/WTO regime, raising the question whether such a regime applies to trade in energy. It acknowledges that there are various factors which explain why international trade in energy has been treated differently from other trade sectors and products in the world trading system. However, no GATT/WTO provision expressly provides that energy trade is not applicable to the GATT/WTO disciplines. In fact, a combination of multiple substantial factors and arguments upholds the applicability of the GATT/WTO disciplines to trade in energy. Therefore, it can be concluded that the GATT/WTO legal regime applies to trade in energy.