

WTO AND ENERGY TRADE IN LIGHT OF RECENT DEVELOPMENTS

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Introduction

Historically, neither GATT nor the WTO Agreement were considered as including in their scope of application trade in energy (UNCTAD, 2000). However, there is nothing in the provisions of GATT/WTO law that explicitly excludes trade in energy, although energy regulation within this context remains fragmented. In the Doha negotiations, energy was discussed as a specific services sector, while at the same time discussions evolved around the export taxes and restrictions on energy resources, as well as their environmental impact.

No definition of **energy goods** in the WTO. Production of energy goods falls within the scope of GATT, whereas energy related services, including transmission and distribution, fall within the scope of GATS. (Electrical energy, despite its intangible character, is considered as “good” and not “service”, therefore it is subject to the rules of GATT (See, HS Nomenclature). The same applies in EU law (C-393/92, *Almelo v. Energiebedrijf IJsselmij* [1994] ECR I-1477, at par. 28; C-158/94, *Commission v. Italy* [1997] ECR I-5789, at par. 17).

Energy services encompass the exploration, development, drilling, extraction, construction, engineering, production, processing, refining, generation, transportation, transmission, distribution, storage, marketing, etc. (Zarrilli, 2003). No special section for energy services. Energy-related activities are “services incidental to mining, rendered on a fee or contract basis at oil and gas fields” and “services incidental to energy distribution” in “Business services” and “transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas” in “Transport services.”

Canada—Renewable Energy/Feed-in-tariff Highlights

Distinction between electricity from certain renewable sources and other generation with the view to define the relevant market

“consumers are ready to purchase electricity that results from the combination of different generation technologies, even if this is more expensive than electricity that is produced exclusively from conventional generation sources”(5.177) → implications concerning the issue of “like” products and PPMs: Asbestos criteria (*EC—Asbestos*, 113): two products should be distinguished to the extent that they are recognised by the consumers as two different products.

Classification of Feed-in-Tariffs (FITs) as subsidy

The FIT was an investment measure and was trade-related based on its minimum local content requirement. The local content provision violated III:4 GATT and therefore it was *ipso facto* violation of 2(1) TRIMS.

No determination whether FIT contracts constituted a subsidy under the SCM Agreement. → The status of renewable energy support measures remains unclear.

WTO DSB Case-law related to trade in energy

US—Standards for Reformulated and Conventional Gasoline, DS2

US—Standards for Reformulated and Conventional Gasoline, DS4

China—Raw Materials, DS394

Canada — Certain Measures Affecting the Renewable Energy Generation Sector , DS412

Canada — Measures Relating to the Feed-in Tariff Program, DS426

Pending Disputes before the DSB

China—Measures concerning wind power equipment, DS419

India—Certain Measures Relating to Solar Cells and Solar Modules, DS456

Selected bibliography: T. Epps and A. Green, *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change*, Edward Elgar, 2010; K. Kulovesi, *International Trade Disputes on Renewable Energy: Testing Ground for the Mutual Supportiveness of WTO Law and Climate Change Law*, 23(3) *RECIEL* 353 (2014); A. Cosbey and P.C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, 17(1) *JIEL* 11 (2014); R. Pal, *Has the Appellate Body’s Decision in Canada-Renewable Energy/Canada-Feed-in Tariff Program Opened the Door for Production Subsidies?*, 17(1) *JIEL* 125 (2014); T. Cottier *et al.*, *Energy in WTO Law and Policy*, NCCR Trade Regulation, Working Paper No. 2009/25; M. Cossy, *Energy Trade and WTO Rules: Reflections on Sovereignty over Natural Resources, Export Restrictions and Freedom of Transit*, in C. Herrmann and J.P. Terhechte (eds.), *EYIEL*, Vol. 3 (2012); R. Leal-Arcas and E.S. Abu-Gosh, *Energy Trade as a Special Sector in the WTO: Unique Features, Unprecedented Challenges and Unresolved Issues*, Volume VI *IJIEL* 1 (2014); S. Charnovitz and C. Fischer, *Canada-Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies*, Discussion Paper: Resources for the Future 2014.

Other resources: WTO, *Energy Services*, Background Note by the Secretariat, S/C/W/52 of 9 September 1998; Communication from Canada—Initial Negotiating Proposal on Oil and Gas Services, S/CSS/W/58 of 14 March 2001; WTO Services Sectoral Classification List, MTN.GNS/W/120, July 10, 1991; WTO, Committee on Subsidies and Countervailing Measures, Replies to Questions Posed by India to the United States, G/SCM/Q2/USA/61 (2014).



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