

How do the current WTO disciplines apply to the trade of energy goods and services?

A discussion paper

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1. Introduction

Recently the Economist reported that exports of oil and gas “are largely not covered by the WTO”¹. This may be reflective of past trade practices, but technically it is not correct when considering the legal framework provided by the WTO for the regulation of trade in goods and services. Nothing in this framework excludes energy *per se* from its regulatory scope.

One reason why trade in energy goods was dealt with “largely” outside the WTO was because a number of oil and gas producing nations were until recently not party to the WTO Agreement. This is changing as more energy exporting countries become Members of the WTO. Many of the major crude oil and natural gas producing countries only joined the GATT/WTO after 1989 or are still in a process of accession to the WTO². The energy sector remains also a strategic industry and governments wanted to ensure sufficient policy space to regulate their energy industries.

Another reason provided for the shyness in the WTO system to deal with issues related to cross border trade in energy is the fact that it is not always clear what constitutes energy goods as opposed to energy services. Electricity is a typical example.

The aim of this discussion paper is to introduce and provide an overview of the more topical issues currently being discussed within the context of WTO regulation of cross border trade in energy goods and services. It will consider a selected number of aspects within WTO agreements of relevance to the energy sector.

2. Defining energy goods and services within the context of WTO regulation

Before turning to the more topical issues to be addressed, it may be helpful to define the term “energy” for purposes of this discussion.

¹ See Economist of June 20th 2009 on page 31.

² See Appendix 1 for a list of Top-20 countries with proved recoverable crude oil and natural gas liquids reserves at end-2007 with WTO membership/observer status and/or OPEC membership.

1. Energy goods

Coal, other natural mineral fuels, petroleum oils and gases (such as liquefied natural gas) and oils obtained from bituminous minerals as well as their distillation products are classified under Chapter 27 of the Harmonised Commodity Description and Coding System “the Harmonised System”. An optional heading is provided for “electrical energy” under tariff code 27.16. As previously mentioned, the GATT and now the WTO leave it up to Members to decide whether to classify electricity as a good or a service.

Alternative sources of energy in the form of biofuels are classified under tariff heading 3824 for biodiesel (in the case of South Africa) and bio-ethanol under tariff 2207 (in the case of South Africa).

2. Energy services

The WTO, unlike its predecessor, the GATT, regulates trade in services. The classification of services for the purpose of the General Agreement on Trade in Services (GATS) is contained in document MTN.GNS/W/120 dated 10 July 1991 which is based on the United Nations Central Product Classification (CPC)³. No specific provision is made within this classification for a dedicated services sector related to energy.

One of the reasons provided for this is that at the time when the negotiations for the classification of services took place many energy services and energy related services were conducted “in –house” by vertically integrated state own energy companies. Since then the structure of the energy market has changed as a result of unbundling and privatization. Technological developments⁴ have taken place so that services related to the production and distribution of energy are now performed by different services providers⁵.

³ See “GATS Energy Services Negotiations and Energy Market Regulation and Liberalisation in South Africa”, Trade and Industrial Policy Strategies (TIPS) Working Paper 9 of 2003 on page 5.

⁴ See Communication by Venezuela S/CSS/W/69 dated 29 March 2001.

⁵ The United States identified the following services activities in the energy value chain namely (i) Activities related to the development and redevelopment of the energy resource; (ii) Activities related to the operation of an energy facility; (iii) Activities related to energy networks (e.g. energy transportation, transmission and distribution); (iv) Activities related to wholesale markets in energy; and (v) Activities related to the retail supply of energy (residential, industrial and commercial) – See Communication from the United States, S/CSC/W/27 dated 18 May 2000.

Some of the services related to energy are to be found amongst the twelve main services sectors provided for in document W/120.⁶ The following are examples where provision is made for energy related services:

- “*Business Services*”

Provision of “engineering design services for industrial processes and production which includes design services related to oil and gas recovery, treating and storage facilities and other oil field facilities”⁷;

Provision of services incidental to mining which includes “services rendered on a fee or contract basis at oil and gas fields, e.g. drilling services, derrick building, repair and dismantling services, oil and gas well casings cementing services”⁸;

Provision of services incidental to energy distribution i.e. transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam”⁹; and

Provision of geological, geophysical and other scientific prospecting services as they relate to the location of oil and gas.¹⁰

- *Construction and related engineering services*

Provision of services related to the construction of long distance pipelines and power lines (cables) overland or submarine¹¹;

⁶ These twelve sectors are: *Business Services* (professional services; computer and related services; research and development services; other business services); *Communication Services* (postal services; courier services; telecommunication services; audiovisual services; other communication services); *Construction and Related Engineering Services* (general construction work for buildings; general construction work for civil engineering; installation and assembly work; building completion and finishing work; other services); *Distribution Services* (commission agents’ services; wholesale trade services; retailing services; franchising; and other distribution services); *Educational Services* (primary education services; secondary education services; higher education services; adult education; and other educational services); *Environmental Services* (sewage services; refuse disposal services; sanitation and similar services; and other environmental services); *Financial Services* (all insurance and insurance-related services; banking and other financial services; and other financial services); *Health related and Social Services* (hospital services; other human health services; social services; and other services); *Tourism and Travel related Services* (hotels and restaurants (incl. catering); travel agencies and tour operators services; tourist guides services; and other services); *Recreational, Cultural and Sporting Services* (entertainment services; libraries, archives, museums and other cultural services; sporting and other recreational services; other services); *Transport Services* (maritime transport services; internal waterways transport; air transport services; space transport; rail transport services; road transport services; pipeline transport services; services auxiliary to all modes of transport; other transport services); and *Other Services Not Included Elsewhere*.

⁷ See CPC 86725.

⁸ See CPC 883.

⁹ See CPC 88700.

¹⁰ See CPC 86751.

¹¹ See CPC 51340.

Provision of services related to the construction of local gas pipelines and local power transmission cables, including construction of ancillary works such as transformer stations and substations within local boundaries;¹² and

Provision of services related to the construction of electricity transmission towers;¹³

- *Transport services*

Provision is made for the transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas¹⁴.

Countries like the United States¹⁵ and the European Communities¹⁶ have submitted proposal for the establishment of a separate category for energy services. However there are differences in opinions amongst WTO Members on the matter. Some Members have argued that creating a separate classification for energy services may result in an unbalance with respect to the classification of other services sectors as many energy related services cut across several other services sectors. Examples of these would be legal services, consulting and management services. Moreover, some services are so closely related to the production of a specific energy resource that those services could be seen as taken up in the product produced. Such services would therefore fall outside the scope of GATS.

An attempt has been made to distinguish between services constituting core and non-core energy processes in the energy chain. Core-services would be those services directly involved in the main processes of the chain. Non-core energy processes would include those services which provide support to the core energy processes¹⁷.

Some of the proposals call for the classification of services to be neutral as to the source of energy so that it applies to energy whether produced from oil, coal, gas etc. In addition, it has been suggested that the classification should be neutral towards the technology used to produce energy to allow energy producers to benefit from technological advances¹⁸. There

¹² See CPC 51350.

¹³ See CPC 51550

¹⁴ See CPC 71310.

¹⁵ See Communication from the United States, S/CSS/W/24 dated 18 December 2000.

¹⁶ See Communication from the European Communities, S/CSS/W/60, dated 23 March 2001.

¹⁷ See footnote 4.

¹⁸ See footnote 15.

appears to be broad agreement that the classification of services does not affect the issue of state ownership over natural resources nor the state's right to regulate its energy industry.

3. A selection of topical issues related to the energy sector under relevant WTO agreements

This section will provide an overview of *some* of the topical issues forming part of the trade and energy discourse. To this end the issues will be discussed within the context of certain WTO agreements.

1. The General Agreement on Tariffs and Trade (GATT)

i. The issue of border tax adjustments – Article II:2(a)

A number of WTO Members are considering border tax adjustment measures (i.e. carbon equalisation measures) as part of their green house gas emission reduction policies and to avoid carbon and job leakage. This is to ensure that their energy intensive industries can compete with products imported from jurisdictions not imposing similar costly environmental standards. A recent example of this is the Waxman – Markey Bill currently being considered before the US Congress.

Article II:2(a) of the GATT allows a Member to impose a tax on imported product equivalent to an internal tax imposed on like domestic products. Furthermore, a Member may also impose a tax on an article from which the imported product has been manufactured either in part or in whole. Imposing a tax on hydrocarbons used in the production of a product would qualify as “an article” for the purpose of Article II:2 (a). Not so clear however is whether a tax can be imposed on CO₂ emissions resulting from the production process¹⁹. It is not unlikely that carbon equalisation measures imposed by Members will form the subject of future disputes in the WTO²⁰.

¹⁹ See Selivanova Y. *The WTO and Energy – WTO Rules and Agreements of Relevance to the Energy Sector*, International Centre for Trade and Sustainable Development, Issue Paper No.1, August 2007 (“The WTO and Energy”) on page 28.

²⁰ See printed statement by Professor Joost Pauwelyn during his testimony before a hearing on trade aspects of climate change legislation of the Subcommittee on Trade of the House Committee on Ways and Means, March 24, 2009 (“Joost Pauwelyn”) on page 17 available at <http://waysandmeans.house.gov>.

ii. The issue of national treatment – Article III

The obligation imposed on WTO Members under Article III concerns the treatment afforded to imported products once inside the borders of the importing country. Any tax, charge, law, regulation and requirement affecting, for example, the transportation and distribution of energy products should not be applied so as to provide protection or favour domestic production of energy resources over imported like products.

Market access restrictions in the form of tariffs imposed at the border are often not posing obstacles to cross border trade in oil or gas. Once inside the borders of the importing state however, access to transportation and distribution networks poses far greater obstacles to energy exporters²¹. Providing large incumbent vertically integrated energy monopolies more favourable access to transmission pipelines and electricity grids compared to the access provided for imported energy products constitute a violation of the national treatment obligation. Similarly, imposing a carbon equalisation measure at the border with respect to imported energy goods which is more costly compared to the measure imposed with respect to like products of domestic origin amounts to a national treatment violation²².

iii. The issue of transit rights – Article V

Usually cross border trade of gas and electricity takes place on a regional basis. This is due to the nature of the products concerned i.e. electricity cannot be stored whereas gas is transported via pipelines. Often these energy products need to cross the territory of a third state by making use of the grid or pipelines within the territory of that state. A well-known example is Russian gas which crosses the territory of Ukraine feeding into the gas networks of Western Europe.

Article V of GATT makes provisions for the freedom of transit of goods over the territory of a WTO Member. Every Member of the WTO shall allow energy goods in transit to cross its territory along routes most convenient for international transit. Moreover, the Article provides that “no distinction shall be made which is based on the flag of vessels, the place of

²¹ See “The WTO and Energy on page 22.

²² See “Joost Pauwelyn” on page 14.

origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.”.

Article V²³ imposes a most-favoured-nation obligation on the transit state, being a WTO Member, to afford treatment to energy products in transit to or from another WTO Member no less favourable than the treatment it affords to goods coming from any other third country (which includes non WTO Members). This obligation relates to all charges, regulations and formalities related to the transit. Finally, a WTO Member is to treat a consignment that was imported via a WTO transit Member no less favourable than the treatment it affords to a direct consignment (i.e. a consignment that moved directly from its country of origin to the country of importation)²⁴.

The transit state is not allowed to charge any customs duties or other charges on the goods in transit. It may however charge fees commensurate with the cost for services rendered or with administrative expenses as well as transportation fees²⁵. Other than that no fees or charges are to be imposed. Tariffs charged by the transit state for the use of its pipelines are therefore allowed for as long as it is reasonable²⁶.

Any regulation imposed on energy goods in transit shall not cause unnecessary delays²⁷ or restrictions and in any event should be reasonable.

The problem facing hydrocarbons in transit is that it often crosses the territories of countries not members of the WTO. These countries are not bound by the provisions of Article V. The Energy Charter Treaty, with its Secretariat based in Brussels, applies and expands the scope of the provisions of Article V of GATT to countries not members of the WTO²⁸. For those Members of the WTO also party to the Energy Charter Treaty this could provide some relief.

²³ See paragraph 5 of Article V.

²⁴ See paragraph 6 of Article V.

²⁵ See paragraph 3 of Article V.

²⁶ See paragraph 4 of Article V.

²⁷ See paragraph 3 of Article V.

²⁸ See Article 7 of the Treaty. An example where Article 7 may be expanding the scope of Article V GATT is the introduction of an element of national treatment in paragraph 3 whereby a transit state may not discriminate against imported energy goods in favour of such materials originating in or destined for its own territory – see *Trade in Energy – WTO Rules Applying under the Energy Charter Treaty*, Energy Charter Secretariat, December 2001 on page 37.

For those not party to the Treaty it remains a potential barrier to the import or export of energy goods.

iv. The issue of import and export quantitative restrictions – Article XI

Under the provisions of Article XI no WTO Member is allowed to restrict the flow of imports into or exports from its territory of energy goods through the imposition of non-price-based measures. Quotas, import and export licenses and like measures are, in principle, prohibited. Setting minimum prices for imports and/or exports can have similar effects on volumes entering or leaving a country and is contrary to the provisions of Article XI²⁹.

Price-based measures on the other hand, in the form of tariffs, taxes and charges are allowed, provided such measures comply with the provisions of Article II (Schedule of Concessions) i.e. they do not exceed the level of duty commitments made in a Member's schedule. Export and import taxes on energy goods are therefore allowed and serve as a helpful source of revenue for some governments.

However, WTO Members are allowed to impose quantitative restrictions on exports to “prevent or relieve critical shortages of ... products essential to the exporting Member”. The imposition of these measures has to be temporary in nature. For instance, where a Member faces critical shortages of oil due to supply constraints it can impose quantitative export restrictions in an attempt to relieve the pressure on its strategic reserves. Moreover, a Member is permitted to limit imports through quantitative restrictions to “safeguard its external financial position and its balance of payments”³⁰.

An export restriction can also cause an oversupply in the local market of the particular natural resource which translates into lower domestic prices for that resource. Due to supply constraints in the global market caused by such export restrictions, the world price may increase to the detriment of foreign importers and users of the resource. Downstream users of such energy goods in the country of origin benefit from the lower input costs. This benefit can provide them with a competitive advantage over producers of like products in other

²⁹ See “The WTO and Energy” on page 15.

³⁰ See Article XII: 1 – however the imposition of these measures is subject to specific conditions stipulated in Article XII.

countries which are forced to pay more for energy goods used in the production of such downstream products.³¹

What about production restrictions, which by itself are not prohibited under the WTO, but which could amount to a *de facto* quantitative export restriction? This is an issue which is raised with respect to OPEC, which does not set export volumes or prices, but determines production volumes for its members. If a substantial portion of the oil produced by OPEC members is exported then by limiting production the effect could be similar to an export restriction under Article XI. An argument raised against such interpretation of Article XI:1 is to argue that for as long as oil is in a natural state i.e. not yet extracted, it does not qualify as a tradable product and therefore does not fall under the scope of GATT including Article XI:1³².

v. The exceptions provided for under Article XX

Article XX allows Members of the WTO to impose measures to be justified, which would otherwise be in violation of other GATT commitments. A number of pre-conditions need to be satisfied before such a violation can be justified on the basis of the *chapeau* of Article XX read with one or more of its sub-paragraphs. For example, any measure imposed should not amount to an arbitrary or unjustifiable discrimination between WTO Members where the same conditions prevail. Moreover, such measure should not be a disguised restriction on international trade.

Two sub-paragraphs of particular importance to the trade and energy discussion are sub-paragraphs (b) and (g)³³. According to sub-paragraph (b) a Member may impose a measure

³¹ The United States and the European Communities recently requested consultations with China in the WTO regarding export restrictions allegedly imposed by China in the form of *inter alia* quantitative restrictions, minimum export prices and export taxes on a number of materials including bauxite, coke and manganese. They claim that these measures are in violation of amongst others Article XI of GATT as well as China's obligations under its Protocol of Accession. See "*China – Measures related to the exportation of various raw materials*", Request for Consultations by the United States, WT/DS394/1 dated 25 June 2009; See also "*China – Measures related to the exportation of various raw materials*" Request for Consultations by the European Communities, WT/DS395/1 dated 25 June 2009.

³² See Broome SA. *Conflicting obligations for oil exporting nations?: Satisfying membership requirements of both OPEC and the WTO*, The Geo. Wash. Int'l L. Rev. Vol.38 (2006), pages 416 – 419.

³³ For an interesting comment on the role and relevance intergovernmental commodity agreements under sub-paragraph (h) of Article XX and how it may relate to hydro-carbon commodities, refer to Melaku Desta's blog posting "*OPEC as an International Commodity Agreement?*" on <http://worldtradelaw.typepad.com/ielpblog/2008/06/opec-as-an-inte.html>

necessary to protect human, animal or plant life or health. A measure will be regarded as being “necessary” if no other measure consistent or less inconsistent with the GATT can be reasonably applied in the light of the objectives pursued by the measure.³⁴ According to subparagraph (g) a measure can be imposed that relates to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. Clean air has been considered within WTO jurisprudence as constituting an “exhaustible natural resource” for purposes of this paragraph³⁵. This is of particular importance within the context of measures imposed to address environmental objectives such as limiting CO₂ emissions.

2. Agreement on Technical Barriers to Trade (TBT)

Technical regulations pertaining to energy goods shall not be more trade restrictive than necessary to fulfil a legitimate objective. The protection of the environment is an example of such an objective.³⁶ This is of particular relevance to energy trade where both the process and method of production of energy as well as downstream energy consuming products are subject to various forms of regulations³⁷.

The concept of “likeness” is central to the non-discrimination provision contained in Article 2:1 of the Agreement. Imported products from any WTO Member shall not be treated less favourable in the application of technical regulations compared to the treatment afforded to “like” domestic products or “like” products imported from any other country (not necessarily a WTO Member). According to para.1 Annex 1 of the Agreement a technical regulation lays down product characteristics “or their related processes and production methods”, for which compliance is mandatory.

Based on this, there is support for a view that only where the process and production method used affect the product characteristics of the final product, will it impact upon the comparison of likeness³⁸. An example would be where two products are compared as regards their

³⁴See the Report of the Panel in *European Communities – Measures affecting asbestos and asbestos-containing products*, WT/DS135/R) at paragraphs 8.169-172.

³⁵ See the Report of the Panel in *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R at paragraphs 6.36-6.37.

³⁶ See Article 2:2 of the Agreement on Technical Barriers to Trade.

³⁷ See “The WTO and Energy” on page 30.

³⁸ See “The WTO and Energy” on page 31.

likeness where the one was produced using hydro-electricity and the other from electricity produced using coal. If the point is taken that “likeness” is only compromised if the process and production methods used in manufacturing the final product alters the characteristics of the final product, then the two products being compared should be regarded as like products – all other factors being equal. If the process and production methods used, by itself could affect the likeness of the two products being compared, then they may well be regarded as being unlike.

3. Agreement on Subsidies and Countervailing Measures (SCMA)

A financial contribution made by a government (or any public body) that confers a benefit to a specific enterprise or industry or group of enterprises or industries could amount to a prohibited or actionable subsidy – depending on the particular circumstances³⁹.

An example would be where electricity is subsidised by a government. If this benefit is available to all users of electricity in the domestic market it is unlikely that it will amount to an actionable subsidy under the SCMA as it lacks the requirement of specificity⁴⁰. Whether this is the case will not only depend on a *de jure* assessment of the circumstances, but also whether *de facto* the benefit is actually accruing to more than just a number of downstream users.

Article 2 of the SCMA provides for a list of factors that may be considered when making a determination of *de facto* specificity. Examples of such factors are: (i) where a subsidy programme is used only by a limited number of certain enterprises, or (ii) a predominant use of such programmes by certain enterprises, or (iii) the disproportionately large amounts of the subsidy being granted to certain enterprises etc.

Many governments’ aim as part of their energy policies is to become less dependent on fossil fuels (as part of security of supply concerns) and to mitigate CO₂ emissions in pursuit of environmental objectives. The support provided to the establishment of renewable energy and bio-fuel industries could well fall within the definitions of a subsidy as provided for in the SCMA.

³⁹ See Article 1 of the SCMA.

⁴⁰ See Article 1:2 of the SCMA.

For example, where a subsidy provided to a certain group of enterprises producing ethanol is made contingent upon the use of locally produced maize (corn), such support would amount to a prohibited subsidy.⁴¹

Whether the government itself provides such a financial contribution or directs a private body to provide for direct transfers of funds (e.g. grants, loans and equity infusion)⁴² it will still amount to a subsidy if a benefit is thereby conferred on such group of enterprises.⁴³

Export subsidies provided on energy goods or final products using energy goods in their production is prohibited.⁴⁴ Annex 1 of the SCMA lists a number of examples of what constitutes “export subsidies” for the purpose of that Agreement. Where a public body ensures that pipeline tariffs charged for the transmission of oil or gas destined for export is lower than the tariffs charged for the transmission of those products for local consumption, it will qualify as an export subsidy (or a subsidy contingent on export).

However, prior-stage cumulative indirect taxes⁴⁵ levied on energy, fuels and oil⁴⁶ used in the production process (i.e. inputs that are consumed in the production of the exported product), may be exempted, remitted or deferred on exported products even if not so exempted, remitted or deferred on like products sold for domestic consumption.

4. General Agreement on Trade in Services (GATS)

The classification and definition of energy services have already been addressed elsewhere in this paper. This section will shortly look at the various modes of supply of particular relevance to the energy industry as well as the role of monopolies and exclusive service suppliers in the energy sector.

⁴¹ See Article 3:1(b) of the SCMA .

⁴² See Article 1:1 (a)(1)(i) of the SCMA.

⁴³ See Article 1:1(a)(1)(iv) of the SCMA.

⁴⁴ See Article 3:1(a) of the SCMA.

⁴⁵ See footnote 58 of Annex I of the SCM Agreement - (value added, turnover or sales tax levied on goods used in the making of a product without a mechanism for subsequent crediting of the tax if the goods or services subject to the tax at one stage of production are used in a succeeding stage of production)

⁴⁶ See footnote 61 of the SCM Agreement read with paragraph (h) of Annex 1 and Annex II (Guidelines on Consumption of Inputs in the Production Process)

Trade in energy services, similar to other services, takes place through the four modes of supply provided for in the GATS⁴⁷. Of the four modes of supply, mode 3 and mode 4 are of particular relevance to the energy sector. Mode 3 provides for services to be supplied through commercial presence in the host country. Usually this takes the form of a representative office of the service supplier. Services are supplied through mode 4 in the form of cross-border movement of natural persons. Energy projects often involve and require the skills of technicians and other highly trained personnel. Service delivery takes place when these persons temporarily enter the host country to perform certain functions in the operation and maintenance of for example an energy plant.

Both modes of supply are subject to the horizontal and sector specific commitments scheduled by a Member in its Services Schedule. Horizontal commitments cut across all service sectors included in a Member's Schedule. An example of a horizontal commitment will be where foreign ownership of a company in the host country is limited to 49% of shareholding. Specific market access and national treatment commitments may also apply to certain energy services sub-sectors. As mentioned before, many energy services or energy related services are closely integrated with the production of energy goods. Without sufficient liberalisation of these services it would constrain foreign direct investment in energy projects.

The supply of energy services in a host country often has to compete with monopoly service providers. In the energy value chain, services related to product/generation may be liberalised (e.g. services related to exploration, extraction and refinement), whereas services related to the transport or transmission of oil/gas or electricity through pipelines and grids are regulated by a monopoly service provider. At the end of the value chain, on the distribution side, the market may well be liberalised, but it is the behaviour of a monopoly service provider in the middle of the energy chain that can severely restrict market access for foreign services providers.

The GATS addresses⁴⁸ the matter in a limited way by placing an obligation on Members to ensure that monopoly service providers in their territories act in accordance with the most favoured nation commitments under Article II of GATS as well as specific commitments

⁴⁷ See Article I:2 of the GATS.

⁴⁸ See Article VIII of the GATS.

related to market access⁴⁹ and national treatment⁵⁰. Moreover, monopoly service providers shall not abuse their position in the market with respect to the supply of services not falling within the scope of their monopoly rights.

Finally, the GATS allows⁵¹ a host Member to act contrary to its commitments made under the GATS where it concerns measures necessary to protect human, animal or plant life or health, if it complies with the conditions similar to those found in Article XX of GATT.

4. Conclusion

There is nothing in the WTO that excludes the energy sector, including goods and services, from its regulatory framework. For various reasons, more political and strategic than legal, the practice has been to deal with energy “largely outside” the WTO and its predecessor, the GATT.

This discussion paper has provided a short overview of some of the more pertinent issues related to energy goods and services which are covered by WTO disciplines. The question arises whether these disciplines adequately address specific issues of concern for the energy sector. No provision has been made for a separate sector classification for energy services under the GATS; limited provision is made for the regulation of monopolistic behaviour of large energy companies; legal uncertainty exists with respect to border tax adjustment measures taken for purposes of environmental protection as well as the effect which energy intensive process and production methods have on the determination of “likeness” between end products for purposes of national treatment obligations under various WTO Agreements.

These are some areas where the regulatory framework provided by the WTO could be strengthened and clarified to ensure better predictability and greater competitiveness in cross border energy trade. Moreover, the importance of energy production and use in the global climate change debate highlights the need for clarity and more sector specific regulation of cross-border trade in energy goods and services.

⁴⁹ See Article XVI of the GATS.

⁵⁰ See Article XVII of the GATS.

⁵¹ See Article XIV of the GATS.

Appendix 1

List of proved recoverable crude oil and natural gas liquids reserves at end -2007: Top-20 Producing Countries

Country	Crude oil and natural gas liquids: proved recoverable reserves at end-2007 (in million tonnes)	GATT Signatory (date)	WTO Status (date)	OPEC Member (date)
Saudi-Arabia	34 542	-	Member (2005)	(1960)
Iran (Islamic Rep)	18 450		Observer – Accession Working Party established (2005)	(1960)
Iraq	15 478	-	Observer – Last Accession Working Party meeting (2008)	(1960)
Venezuela	13 997	(1990)	Member (1995)	(1960)
Kuwait	13 679	(1963)	Member (1995)	(1960)
United Arab Emirates	12 555	(1994)	Member (1996)	(1967)
Russian Federation	10 700	-	Observer – Draft Accession Working Party Report (2004)	-
Libya/GSPLAJ	5 634	-	Observer – Accession Working Party established (2004)	(1962)
Kazakhstan	5 038	-	Observer – Draft Accession Working Party Report (2008)	-
Nigeria	4 860	(1960)	Member (1995)	(1971)
United States of America	3 717	(1948)	Member (1995)	-
Canada	2 818	(1948)	Member (1995)	-
Algeria	2 731	-	Observer – Draft Accession	(1969)

			Working Party Report (2006)	
China	2 466	-	Member (2001)	-
Qatar	1 853	(1994)	Member (1996)	(1961)
Brazil	1 706	(1948)	Member (1995)	-
Mexico	1 645	(1986)	Member (1995)	-
Angola	1 282	(1994)	Member (1996)	(2007)
Norway	1 013	(1948)	Member (1995)	-
Azerbaijan	950	-	Observer – Draft Accession Working Party Report (2008)	-

Sources: WEC: www.worldenergy.org; WTO: www.wto.org; OPEC: www.opec.org

Compiled by Lambert Botha (2009)