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FAIR ACCESS TO ENERGY RESOURCES, MARKET TRANSFERS AND CLIMATE CHANGE IN THE WTO

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I. *Introduction.*

The problem of global security of energy supply has increased in importance in the international agenda in recent years due to the escalation of the political conflict between the Russian Federation and Ukraine and the emergence of new actors dominating global energy demand. In this rapidly changing and often disrupted energy landscape, fossil fuels still account for 82 per cent in the global energy mix (1). As such resources are heavily geographically concentrated, trade represents the only viable means to ensure fair access to foreign energy supplies for import-dependent countries (2). In this vein, the recent accession of major energy-exporting countries such as Saudi Arabia and the Russian Federation to the World

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(1) International Energy Agency (2013), *World Energy Outlook 2013*, available at http://www.worldenergyoutlook.org/publications/weo-2013/.

(2) P. Lamy, 'Energy, Trade and Global Governance', in J. Pauwelyin (ed.), *Global Challenges at the Intersection of Trade, Energy and the Environment* (Geneva: CEPR, 2009), at 15.

Trade Organization (WTO)([3]), as well as the prospective accession of many more energy suppliers (e.g. Kazakhstan, Azerbaijan, Algeria, Libya, Iran, Iraq, and Sudan) ([4]) have contributed to make energy security issues prominent in the multilateral trading system.

Yet, existing WTO rules were not originally drafted having energy in mind ([5]), and may thus not always be best-suited to tackle energy-specific trade distortive practices. The process of WTO accession of energy-producing countries has moreover shed light on the reluctance of newly acceded WTO Members to accept substantive 'WTO-plus' obligations capable of compensating for relevant regulatory gaps ([6]). This reluctance can partially be explained by the fact that the energy sector has traditionally been a major area of government intervention. High regulation and fragmented governance have long been the rule in the energy sector ([7]), and WTO Members — particularly richly endowed countries traditionally depending on energy resources-led development — jealously retain control over such resources in the attempt to defend their key economic interests.

At the same time, fossil fuels represent the main source of energy-related greenhouse gas (GHG) emissions and are primarily responsible for the energy sector being accountable for two thirds of global GHG emissions ([8]). Trade distortive practices in the energy sector are therefore detrimental from a climate change perspective to the extent that they stimulate excessive production and consumption of fossil fuels. In 2012, fossil fuel consumption subsidies amounted to USD 544 billion, corresponding to an incentive of USD 110/tonne of CO_2 ([9]). Fossil fuel production subsidies account for other USD 100 billion per year ([10]). The

([3]) See WT/ACC/SAU/61, *Report of the Working Party on the Accession of Saudi Arabia*, 1 November 2005 and WT/ACC/RUS/70, *Report of the Working Party on the Accession of the Russian Federation*, 17 November 2011.

([4]) For more information concerning the state of the accession process of these countries see the WTO accession webpage, available at http://www.wto.org/english/thewto_e/acc_e/acc_e.htm.

([5]) See, for all, G. Marceau, 'The WTO in the Emerging Energy Governance Debate', in J. Pauwelyin (ed.), *Global Challenges*, at 25.

([6]) WTO-plus obligations are commitments that exceed the obligations arising out of WTO Multilateral Trade Agreements, which are negotiated in the context of the accession process of new WTO Members with existing WTO Members. See H. Horn *et al.*, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements', 33 *The World Economy* (2010), at 1567.

([7]) The energy sector has traditionally been regulated through a "sovereignty-based approach". See J. Pauwelyn, 'Global Challenges at the Intersection of Trade, Energy and the Environment: An Introduction', in J. Pauwelyn (ed.), *Global Challenges*, at 2-3.

([8]) International Energy Agency (2013), *World Energy Outlook Special Report 2013: Redrawing the Energy-Climate Map*, available at http://www.worldenergyoutlook.org/media/weowebsite/2013/energyclimatemap/RedrawingEnergyClimateMap.pdf, at 15.

([9]) *Ibid.*, at 93.

([10]) Global Subsidies Initiative (International Institute for Sustainable Development), *Fossil Fuels - At What Cost?*, available at http://www.iisd.org/gsi/fossil-fuel-subsidies/fossil-fuels-what-cost.

International Energy Agency estimated that if fossil fuel subsidies were completely eliminated by 2020, global primary energy demand would decrease by 5 per cent and CO2 emissions by 5.8 per cent ([11]).

This article focuses on two main government trade distortive practices affecting the energy sector, namely dual pricing and export restrictions. These measures fall within the definition of so-called 'market transfers' in that they are government policies that create a wedge between the price paid by domestic energy consumers and the prevailing international price ([12]). These measures may thus not only affect fair access to energy resources by creating market distortions to the detriment of foreign energy consumers, but also have negative climate change impacts inasmuch as they encourage excessive consumption of fossil fuels in the countries applying such measures. In other words, by lowering the price paid by domestic energy consumers, these government practices de facto produce the same economic effects of 'classical' fossil fuel consumption subsidies ([13]).

As measures affecting trade in energy goods, both instruments are conventionally addressed under the General Agreement on Tariffs and Trade (GATT) despite the paucity of the relevant rules contained in this WTO agreement. Major energy-producing countries acceding to the WTO after its entry into force have therefore been required to undertake additional commitments by incumbent WTO Members in the attempt to fill the gaps of existing disciplines. This exercise, however, has produced ambitious results. The conclusion of country-specific obligations furthermore has come at the detriment of regulatory coherence and further increased the overall fragmentation in the WTO regulation of energy trade.

Against this backdrop, this article explores whether a more coherent and effective approach could be reached by tackling such practices under the WTO Agreement on Subsidies and Countervailing Measures (ASCM). The following sessions are organized as follows: Section II explains the basic functioning of dual pricing and export restrictions, stressing the comparability of their economic and climate change impacts. Section III examines existing GATT disciplines on dual pricing and the relevant WTO-plus obligations negotiated by newly acceded WTO Members in

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([11]) International Energy Agency (2011), *World Energy Outlook 2011*, available at http://www.worldenergyoutlook.org/publications/weo-2011/, at 507.

([12]) The main reason why governments intervene with measures which lower the domestic price of primary energy resources to the benefit of domestic consumers instead of directly subsidizing them is that market transfers do not formally have a direct budgetary impact. R. Steenblik, 'Subsidies in the Traditional Energy Sector', in J. Pauwelyn, *Global Challenges*, at 185.

([13]) I. Espa and S. Rolland, 'Subsidies, Clean Energy and Climate Change', E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015, at 6-7.

their accession protocols and/or Working Party reports. Section IV gives an overview of current GATT disciplines on export restrictions and explores the relevance of the existing WTO accession regime on the use of export duties from an energy-specific perspective. Section V discusses possible avenues to address such practices under the ASCM to the extent that they distort domestic energy prices and subsidize consumption of cheap fossil fuels. This is followed by final conclusions in Section VI.

II. *Economic and environmental impacts of market transfers in the energy sector. .*

Dual pricing schemes and export restrictions are widely used in the energy sector. On a general level, they have the effect of reducing the domestic price of primary energy supplies, thus creating a price differential with respect to the export/world prices of such resources borne by international competitors. In the case of dual pricing, the domestic price of primary energy products is artificially regulated at a level below the market-determined level of world and export prices mainly by means of price controls or ceilings or through sales of energy inputs by STEs at preferential rates ([14]). In the case of export taxes and export restrictions in general, the domestic price reduction is a consequence of the diversion onto the domestic market (the 'supply-side' effect) of the volume of exports which get contracted because of the 'trade effect' of the restriction ([15]). When the imposing country is 'large', moreover, export restrictions also induce an increase in world prices by affecting the availability of world supply ([16]).

Dual pricing and export taxes or other restrictions are therefore comparable in terms of their economic effects. The only difference is that, in the case of dual pricing practices, governments intervene directly at the level of prices, while in the case of export restrictions the effect on prices is more indirect, and results out of the trade effects of the measures. Because of their impact on domestic prices, these measures (more or less

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([14]) V. Pogoretskyy, 'Energy Dual Pricing in International Trade: Subsidies and Anti-dumping Perspectives', in Y. Selivanova Y (ed.), *Regulation of Energy in International Trade Law: WTO, NAFTA and the Energy Charter* (The Netherlands: Kluwer Law International, 2012), at 183.

([15]) In the case of an export tax, the trade effect and the supply-side effect are triggered by the imposition of a price on exports (so-called 'price effect'), whereas quantitative restrictions on exports do not directly operate on prices but rather by restricting the volume of exports. The effects on prices of export taxes are thus more directly predictable and measurable than those of quantitative export restrictions such as export quotas. For a thorough analysis of the economic effects of export restrictions see R. Piermartini, 'The Role of Export Taxes in the Field of Primary Commodities', ERSD, WTO Staff Paper, 2004.

([16]) 'Large' countries are conventionally considered 'price setters' for their ability to influence world prices. Export restrictions can be a means for large countries to exercise this control. *Ibid.*, at 3.

explicitly) purport to benefit domestic downstream processing sectors by providing cheaper energy inputs [17]. Their declared rationale, however, is often different. Dual pricing policies are normally justified as measures applied to advance social goals and achieve re-distributional effects [18]. However, they most often apply across-the-board, not only to low or middle-income households but also to all other sectors of the economy (i.e. including downstream processing and energy-intensive manufacturing sectors) [19]. Export restrictions are commonly defended as measures aimed at increasing government revenues in countries relying on energy resources trade for a substantial part of their GDP [20] or at achieving non-economic public policy goals such as the conservation of scarce resources and the minimization of public health and environmental impacts linked to the operation of extractive industries [21]. Such justifications rely on the standard economic theory of export restrictions, according to which the domestic price reduction induced by an export restriction in the imposing country would ultimately reduce domestic production [22]. However, even in such cases, export restrictions remain ambiguous in their effects, as the provision of below-the-world-price energy inputs to domestic industries stimulates the expansion of downstream production, thereby impeding the desired domestic production decline and thus the achievement of the environmental objective [23].

As dual pricing schemes and export restrictions operate by lowering the domestic price of inputs compared to their world price, they de facto result into an indirect form of subsidization of fossil fuels to the benefit of domestic downstream producers [24]. Inasmuch as the provision of cheap energy inputs incentivizes an excessive consumption of fossil fuels, these

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(17) R. Quick, 'Export Taxes and Dual Pricing: How Can Trade Distortive Government Practices Be Tackled?', in J. Pauwelyn (ed.), *Global Challenges*, at 194-195.

(18) International Energy Agency, Organisation for Economic Cooperation and Development and The World Bank (2009) *The Scope of Fossil Fuel Subsidies in 2009 and a Roadmap for Phasing Out Fossil-Fuel Subsidies*, available at http://www.oecd.org/env/cc/46575783.pdf, at 11-13.

(19) V. Pogoretskyy, 'Energy Dual Pricing' at 186-188.

(20) M. Radetzski, *A Handbook of Primary Commodities in the Global Economy* (Oxford University Press, 2010), at 71.

(21) B. Fliess and T. Mard, 'Taking Stock of Measures Restricting the Export of Raw Materials: Analysis of the OECD Inventory Data', OECD Publishing 2012, at 16.

(22) R. Piermartini, 'The Role of Export Taxes', at 5.

(23) A substantial body of literature has warned against the adequacy of export restrictions to achieve environment-related goals. See, e.g., WTO Trade Policy Review - Report by the Secretariat, China, WT/TPR/S/230/Rev.1, 5 July 2010, Box III.1, at 44; M. Ruta and A. Venables, 'International Trade in Natural Resources: Practice and Policy', Oxcarre Research Paper No. 84/2012, at 16; J. Korinek and J. Kim, 'Export Restrictions on Strategic Raw Materials and their Impact on Trade and Global Supply', in OECD (2010), *The Economic Impact of Export Restrictions on Raw Materials*, at 103-129.

(24) R. Piermartini, 'The Role of Export Taxes', at 5; V. Pogoretskyy, 'Energy Dual Pricing', at 199.

practices also have detrimental climate change effects because they specifically alter the terms of competition between fossil fuels and renewable energy and discourage investment in cleaner forms of energy ([25]).

III. *WTO disciplines on dual pricing*

Several WTO instruments may apply to energy dual pricing, although they do not cover the issue specifically. Under the GATT, a few provisions may be considered to be relevant and applicable to the issue of preferential regulation of domestic prices. However, the general formulation of such provisions and their limited effectiveness in tackling dual pricing have led WTO Members to address the issue of dual pricing during the accession negotiations of the first energy-producing countries joining the WTO ([26]). This approach, however, produced ambitious results, while it significantly contributed to increase the overall fragmentation of WTO disciplines relevant to energy trade. 1.

GATT relevant provisions on dual pricing.

In the GATT, the only provision addressing the issue of price controls is Article III:9 on maximum price control measures, according to which:

> "The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects".

Article III:9 does not contain a substantive obligation but it is a rather general provision formally requiring that a member pays due regard to the interests of exporting members prior to applying the measure. Moreover, its wording refers specifically to importing countries implementing pricing policies which could potentially harm the interests of exporters, and does not mention the reversed situation.

To the extent that dual pricing is implemented through the sale of energy inputs by state trading enterprises (STEs) to domestic consumers at preferential rates, Article XVII of the GATT 1994 on 'State Trading Enterprises' may apply ([27]). Article XVII:1 states, in the relevant part:

([25]) *Ibid.*, at 184-186; J. Korinek and J. Kim, 'Export Restrictions on Strategic Raw Materials and their Impact on Trade and Global Supply', at 110-115.

([26]) P. Milthorp and D. Christy, 'Energy Issues in Selected WTO Accession', in Y. Selivanova (ed.), *Regulation of Energy in International Trade Law*, at 259-302.

([27]) Article XVII GATT is relevant to dual pricing inasmuch as the enterprise providing for energy resources at preferential rates can be qualified as a state trading enterprise. Although no specific definition of STE is included in Article XVII, various guiding instru-

"(*a*) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act *in a manner consistent with the general principles of non-discriminatory treatment* prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

(*b*) The provisions of subparagraph (*a*) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales *solely in accordance with commercial considerations*, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(*c*) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (*a*) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (*a*) and (*b*) of this paragraph" (emphasis added).

Based on existing WTO jurisprudence, Article XVII:1 requires that STEs act in accordance with the principle of non-discrimination ([28]). However, it is not clear from the text of the provision whether Article XVII:1 is meant to cover both standards of the non-discrimination principle (that is, the most-favoured nation and the national treatment requirement). Although in *Korea - Various Measures on Beef* the Panel seemed to suggest that this might be the case ([29]), the negotiating history of Article XVII indicates that it was intended to cover cases of discrimination

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ments such as the WTO Background Paper on STEs and the Uruguay Round Understanding on the Interpretation of Article XVII suggest that a determination in this respect should be made on a case-by-case basis having regard to two fundamental criteria: (i) the level of government ownership and its ability to exercise control over a given enterprise; (ii) the ability of a given enterprise to influence trade flows based on the esclusive or special privileges granted to it. WTO, Operations of State Trading Enterprises as They Relate to International Trade, Background Paper by the Secretariat, G/STR/2, 26 October 1995, para. 95; Understanding on the Interpretation of Article XVII GATT of the GATT, available at http://www.wto.org/english/docs_e/legal_e/08-17_e.htm. In addition, the indication that a given enterprise is a state trading enterprise within the meaning of Article XVII could be indicated in WTO Members' accession documents or in the notification to the WTO Council for Trade in Goods in accordance with Article XVII:4 (a) GATT. For these aspects see V. Pogoretskyy, 'Energy Dual Pricing', at 193-196.

([28]) See in particular GATT Panel Report, *Canada - Administration of the Foreign Investment Review Act (FIRA)*, BISD 30S/140, adopted on 7 February 1984; WTO Appellate Body Report, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted on 27 September 2004.

([29]) WTO Panel Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted on 10 January 2001, para. 753. However, in that occasion the Panel was concerned with the case of a STEs detaining an *import* monopoly.

between different WTO Members only (i.e. the MFN standard) ([30]). Under this scenario, Article XVII would not capture the practice of dual pricing inasmuch as the use of different prices in export and domestic markets does not entail MFN violations ([31]). Even admitting Article XVII covers the national treatment requirement, moreover, it is uncertain to what extent this would ensure an adequate regulation of dual pricing: the national treatment rule as laid down in Article III GATT, in fact, applies uniquely to imports ([32]), while the practice of dual pricing affects the export side.

2. *The landscape of 'WTO-plus' commitments on dual pricing undertaken by newly acceded energy-producing Members.*

In the attempt to reinforce GATT obligations on dual pricing, the issue of dual pricing was specifically addressed during the accession negotiations of the first energy-producing countries that joined the WTO, although with mixed results. Saudi Arabia undertook in its Working Party Report legally binding commitments on energy dual pricing. These obligations are quite limited in scope as they cover only natural gas and NGLs (that is, waste products associated with the extraction of natural gas and used an inputs to produce fertilizers):

"In response to concerns expressed by a member of the Working Party, the representative of Saudi Arabia stated that producers/distributors of NGLs in Saudi Arabia would operate, within the relevant regulatory framework, on the basis of normal commercial considerations, *based on the full recovery of costs and a reasonable profit.* He confirmed that his Government's policy was to ensure that these economic operators, in respect of their supplies of NGLs to industrial users, would fully recover their production and investment costs (fractionation, overheads, financing charges, transportation, maintenance and upgrade of fractionation and distribution infrastructure) and make a profit in the ordinary course of business" ([33]).

This commitment is not simply a reiteration of existing requirements set out in Article III:9 GATT; it constitutes a WTO-plus obligation inasmuch as Saudi Arabia agreed to fix prices in a manner that permits the full

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([30]) V. Pogoretskyy, 'Energy Dual Pricing', at 197-198.

([31]) Moreover, it is noteworthy that, according to the Ad Note to the Article XVII:1 GATT, "[t]he charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provision of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets". In other words, a given STEs may still charge different prices in different foreign markets as long as this is justified by commercial reasons.

([32]) S. Defilla, 'Energy Trade under the ECT and Accession to the WTO', 21 *Journal of Energy and Natural Resources Law* (2003), at 431.

([33]) WT/ACC/SAU/61, *Report of the Working Party on the Accession of Saudi Arabia*, 1 November 2005, para. 33 (emphasis added).

recovery of costs and a reasonable profit. [34] In addition, Saudi Arabia committed to

> "apply its price regulations and profit controls in a WTO consistent fashion taking into account the interests of exporting WTO Members as provided for in Article III:9 of the GATT 1994 and in Article VIII of the General Agreement on Trade in Services (GATS) [as well as to] *publish the price and profit controls of goods and services* listed in Annex A, as well as any modifications or additions, in the official gazette" ([35]).

The level of commitment agreed upon by the Russian Federation on dual pricing in its Working Party Report is again limited to the pricing of natural gas only, and much more ambiguous. On the one hand, Russia seems to claim the legitimacy of its dual pricing policies as generally considered:

> "the representative of the Russian Federation stated that underground resources within the territory of the Russian Federation, including subsoil domain and mineral resources contained therein, energy and other resources, were the property of the State. The Russian Federation exercised its sovereign rights over the resources. He added that the current practice of regulation of energy and natural gas prices in the Russian Federation was not different from similar practices of many WTO Members, who continued to regulate energy prices. Similar to the practice of other countries, energy and natural gas price regulation in the Russian Federation was aimed at prevention of abuse of monopoly position and protection of consumers' interests from monopoly price increases" ([36]).

On the other hand, with respect to the regulation of natural gas prices, Russia expressed its intention to modify State regulation of gas prices and develop market-pricing principles for the domestic gas market ([37]), and clarified that:

> "the basic principle of price-setting was to ensure economically viable production and recovery of costs, including, *inter alia*, the cost of production, overheads, financing charges, transportation, maintenance and upgrade of extraction and distribution infrastructure, investment in the exploration and development of new fields done or planned, and reasonable profits" ([38]).

However, in a way similar to Saudi Arabia, the Russian Federation

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([34]) P. Milthorp and D. Christy, 'Energy Issues in Selected WTO Accession', at 275.
([35]) WT/ACC/SAU/61, *Report of the Working Party on the Accession of Saudi Arabia*, 1 November 2005, para. 37 (emphasis added).
([36]) WT/ACC/RUS/70, *Report of the Working Party on the Accession of the Russian Federation*, 17 November 2011, para. 123.
([37]) *Ibid.*, para. 120.
([38]) *Ibid.*, para. 126.

agreed that "upon accession, producers/distributors of natural gas in the Russian Federation would operate, within the relevant regulatory framework, on the basis of normal commercial considerations, based on recovery of costs and profit" ([39]).

The constellation of WTO-plus obligations undertaken by newly acceded energy-producing WTO Members on dual pricing shows that the existing WTO Membership attempted to compensate for the shortcomings of relevant GATT disciplines. In this perspective, and in light of the numerous energy-producing countries currently negotiating their accession to the WTO, it is reasonable to assume that the practice of dual pricing would then be specifically addressed within many more accession packages. However, as in the case of Saudi Arabia and the Russian Federation, the level of commitment sought by current WTO Members could impair the inclusion of widely formulated energy pricing commitments and rather induce the acceptance of narrowly tailored commitments only.

In conclusion, the WTO disciplines on dual pricing are fragmented and result out of varying, narrowly tailored country-specific commitments agreed upon during the accession of major energy-producing countries, while original WTO Members are solely bound by GATT obligations whose scope and effectiveness are relatively limited. This is even more regretful if one considers the significant lack of commitments in the area of export duties on energy products, which are one of the instruments through which governments de facto maintain dual pricing schemes ([40]).

IV. *WTO regulation of export taxes and other restrictions.*

The WTO rulebook includes generally applicable disciplines on export restrictions under the GATT that may be relevant for trade in energy resources. These rules are overall weaker and less comprehensive than those applicable on import barriers. This circumstance can, on the one hand, be traced back to the historically strong focus on market access for foreign exporters in the conception phase of the multilateral trading system ([41]) and to the original 'marginality' of energy, much more affected by barriers on the exportation, in such system ([42]). On the other hand, it

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([39]) *Ibid.*, para. 132.

([40]) G. Marceau, 'The WTO in the Emerging Energy Governance Debate', at 36.

([41]) The GATT architecture was inspired by the assumption that the removal of import barriers, which had caused countries to close up against each other during the period between the two wars, would be pivotal to prevent disasters linked to trade warfare such as the Second World War. R.W. Staiger, 'Non-Tariff Measures and the WTO', Working Paper, Ersd, 2012, at 8-9.

([42]) As explained by Professor Joost Pauwelyn, "[w]hen it comes to energy, [...] import restrictions is not the issue (few countries impose import duties on oil). Rather, what matters is 'production management' and price stability [...] for energy *exporters*, and access to foreign supplies (or production, export and transit restrictions) for energy *importers.* Consequently, reflects the strong divide between net-importing countries, interested in greater access to supplies, and net-exporting countries, determined to defend the principle of permanent sovereignty over natural resources, which has so far impeded any attempt to reassess relevant WTO disciplines (43).

As in the case of dual pricing, the efforts to reinforce WTO disciplines have thus taken the form of varying country-specific 'WTO-plus' obligations undertaken by newly acceded WTO Members in the context of their accession negotiations. However, the reach of such additional commitments is quite limited when it comes to regulating the use of export barriers – export duties in particular – in the energy sector. Hence, energy-exporting countries prevented from resorting to dual pricing policies by the terms of their WTO-plus commitments could achieve the same distortive effect by introducing an export tax (44). The paucity of WTO rules on export duties thus ultimately limits the overall effectiveness of WTO regulation of government trade distortive practices leading to excessive consumption of fossil fuels.

1. *Export duties and quantitative export restrictions under Article XI:1 GATT.*

Article XI:1 GATT, labelled 'General Elimination of Quantitative Restrictions' outlaws both export "prohibitions" and export "restrictions other than duties, taxes or other charges ... whether made effective through quotas, export... licenses or other measures". The Article clearly distinguishes between export duties or taxes and any measures prohibiting or restricting exports.

The latter category of measures is outlawed by terms of Article XI:1 GATT. A consistent body of WTO existing case law has broadly interpreted the scope of this obligation, in a way as to include any measures imposing "a limitation on action, a limiting condition or regulation" (45)

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in a GATT club worried about '*how can I export more*', the central question of '*how can I import more*' (or can I maximise the return on my energy resources) was not addressed". J. Pauwelyn, 'Global Challenges at the Intersection of Trade', in J. Pauwelyn (ed.) *Global Challenges*, at 3. This explains why major energy-producing countries originally did not find economically advantageous to join a system biased towards market access issues.

(43) The issue of export restrictions was taken up in various fora dating back to the Tokyo Round, but the opposing interests of different categories of WTO Members have consistently hampered any concrete action. See GATT Doc. MTN.GNG/NG2/W/40, 'Export Restrictions and Charges', Background Note by the Secretariat, 8 August 1989.

(44) Export restrictions have been denounced as inducing a dual pricing regime by means of deteriorating the terms of competition for net-importing countries. European Commission (2010), 'Report of the Ad-hoc Working Group on Defining Critical Raw Materials', Annex V, available at ec.europa.eu/enterprise/policies/raw-materials/files/docs/annex-v_en.pdf, at 130 and 209.

(45) In *China - Raw Materials*, in particular, the Panel clarified that "the very *potential*

irrespective of their legal status, their de iure or de facto nature and independently of whether they actually or potentially impeded trade (46). In this respect, energy-producing countries seeking to use export restrictions on energy resources in order to ‘substitute’ dual pricing policies would thus encounter the obstacle of Article XI:1 and be obliged to remove them unless they were to meet the conditions set out under Article XI:2 (a) GATT — the shortage of essential product clause — or Article XX GATT. It is more uncertain, however, whether production quotas such as the ones operated by OPEC Members among its range of supply management policies could be considered to constitute a “restriction...on the exportation” within the meaning of Article XI:1 GATT (47).

Article XI:1 GATT expressly allows, in contrast, export “duties, taxes or other charges...on the exportation”. The exclusion of such measures from the scope of application of Article XI:1 reflects the traditional preference of the GATT for ‘tariffs’ over quantitative restrictions as the lawful means of restricting imports and exports. However, a framework à la Article II:1 (b) is not envisaged in the GATT to regulate the use of export duties similarly to import tariffs. Article II:1(a) GATT simply leaves the possibility for Members to negotiate commitments other than import tariffs “in the appropriate Part of the appropriate Schedule annexed to this Agreement”. The negotiations of export concessions could in principle

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to limit trade to constitute a ‘restriction’ within the meaning of Article XI:1 of the GATT 1994”. WTO Panel Report, *China - Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted on 5 July 2010, para. 7.1081 (original emphasis).

(46) So far, export restrictive measures were challenged under Article XI:1 GATT in six GATT/WTO disputes and, in all cases, were considered them to fall within the scope of Article XI:1. See GATT Panel Report, *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 - 35S/98, adopted on 22 March 1988; GATT Panel Report, *Japan - Trade in Semi-Conductors*, L/6309 - 35S/116, adopted on 4 May 1988; WTO Panel Report, *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted on 16 February 2001; WTO Panel Report, *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted on 16 February 2001; WTO Appellate Body Report, *China - Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted on 31 January 2012; and, WTO Appellate Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted on 29 August 2014. For a synthetic yet complete overview of the WTO case law relating to export restrictive measures see I. Espa, ‘International Trade in (Sustainable) Energy Resources and the WTO: Key Challenges in Light of the Strategic Interests of the European Union and China’, in E. Baroncini (ed.), *The EU-China Trade Relations Between Classic Trade Disputes and Sustainability Issues: A Legal Analysis* (Berlin: Springer, forthcoming).

(47) See, e.g., T. Cottier *et al.*, ‘Energy in WTO Law and Policy’, in T. Cottier and P. Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (Cambridge University Press, 2011), at 211. For a full account see I. Espa, ‘Resource Nationalism and Sustainable Development in the WTO: The Case of Energy Export Restrictions’, in F. Seatzu, A. Bonfanti and F. Romanin Jacur (eds.), *Natural Resources Grabbing: Erosion or Legitimate Exercise of State Sovereignty*? (Leiden: Brill, forthcoming).

occur in the exact same way they take place for import tariffs. Article XXVIII (*bis*), in fact, encourages "negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports *and exports*". No WTO Member has however engaged in such negotiations so far except for Australia, which bound the export duties applicable to a narrow set of mineral resources in its GATT schedule (48). Members exclusively bound by GATT obligations as to their use of export restraints are thus free to introduce and/or maintain export taxes on any product.

2. *WTO-plus obligations on the use of export duties assumed under post-1994 accession protocols*

A selected number of new WTO Members acceding to the Organization after its entry into force have assumed additional obligations on the use of export duties within their protocols of accession and the associated Working Party's reports (49). The scope and coverage of the 'WTO-plus' obligations agreed upon by these countries is quite uneven and only in few cases these commitments concern the use of export duties in energy resources (50). This holds true also for the major energy-producing or transit countries having acceded to the WTO so far, namely Saudi Arabia, Ukraine, and the Russian Federation. Saudi Arabia and Ukraine, in particular, have agreed to either eliminate or phase down and bind the export duties applied on a very limited set of products, not including any energy product (51). This means that, notwithstanding the greater or lesser stringency of these countries' obligations on dual pricing, they remain free to resort to export taxes on energy products, including those products already subject to specific commitments on dual pricing. This circumstance most probably reflects, on the one hand, an underestimation of the role of export

(48) See J. Qin, 'Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection', 46 *Journal of World Trade* (2012), at 1152. Coal also appears among the eight listed products.

(49) Ten newly acceding WTO Members have undertaken WTO-plus commitments on export duties out of the thirty-two countries that have acceded to the WTO to date (Mongolia, Latvia, Croatia, China, Saudi Arabia, Vietnam, Ukraine, Montenegro, the Russian Federation and Tajikistan).

(50) For a thorough analysis of the panorama of existing WTO-plus commitments on the use of export duties see J. Qin, 'Reforming WTO Discipline on Export Duties', at 1153-1154..

(51) Saudi Arabia agreed not to impose any export duty on iron and steel scrap. See WT/ACC/SAU/61, *Report of the Working Party on the Accession of Saudi Arabia*, 1 November 2005, para. 184, incorporated into the Accession Protocol by virtue of paragraph 315. Ukraine undertook to phase down and bind, pursuant to a detailed timetable contained in Table 20 (b) of its Working Party Report, the export duties applied at the time of accession on a wide range of non-ferrous scrap metals. See WT/ACC/UKR/152, *Report of the Working Party Report on the Accession of Ukraine*, 16 May 2008, para. 240, incorporated into Ukraine's Accession Protocol by means of paragraph 512.

restrictions as a distortive trade instrument, whose effects are comparable to dual pricing, on the part of WTO Membership ([52]). On the other hand, it may be considered the result of the acceding countries' concern over the apparent 'rigidity' of the commitments contained in access protocols and related documents ([53]).

Recently, the Russian Federation chose to incorporate its export duties through the creation of a new 'Part V', specifically devoted to export duties, within its GATT Schedule of Concessions, and it bound therein over 700 tariff lines including many energy primary products ([54]). The legal technique used by the Russian Federation de facto implements what the GATT already admitted by terms of Article II:1 (a) and Article XXVIII (*bis*) GATT. Importantly, the incorporation of Russia' export duty concessions into the GATT framework allows it to reserve its right to renegotiate and/or modify these commitments in accordance with GATT rules, including the rules on deconsolidation of scheduled concessions under Article XXVIII GATT and the general exceptions recognized under Article XX GATT..

Until now, however, the Russian Federation' precedent has remained isolated. Other net-exporting energy producers, be it original WTO Members, whose obligations arise only from the GATT, or newly acceded energy-producing countries joining the WTO before the completion of the Russian Federation's accession in 2011, have not abided by specific obligations on the use of export duties on energy inputs. Such systemic lack of significant commitments on the part of major energy-producing and –exporting countries is detrimental to energy security and potentially admits use of such measures as instruments which hamper fair access to energy resources and subsidize fossil fuels-generated energy.

V. *Dual pricing and export restrictions under the ASCM.*

The panorama of WTO disciplines on dual pricing and export duties or taxes is highly fragmented and overall deficient at least when assessed from an energy-specific perspective. Failing a consensus on the terms of a

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([52]) Export restrictions were reported to be the "fastest growing component" among the new trade-restrictive measures adopted during the economic and financial crisis by WTO in 2011 (WTO Doc. WT/TPR/OV/14, at 17) and export taxes, in particular, ranked fifth among the new restrictive trade measures in 2012. See S. J. Evenett, 'Débacle: The 11th GTA Report on Protectionism', (Geneva: CEPR, 2013), available at http://www.globaltradealert.org/11th_GTA_report.

([53]) Accession protocols do not contain any provision relating to amendment. Accordingly, scholars dissent as to whether or not this circumstance should be interpreted as preventing accession terms to be renegotiated and modified. See J. Qin, 'Reforming WTO Discipline on Export Duties', at 1157-1158.

([54]) Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, 17 November 2011.

system-wide reform of relevant GATT rules, the WTO Membership attempted to compensate for the shortcomings of existing disciplines by way of requesting that newly acceding energy-producing Members undertake additional country-specific obligations on dual pricing and export taxes. As shown by the analysis of the constellation of such WTO-plus obligations, however, this approach has generated a 'race-to-the-bottom' effect, with acceding countries negotiating narrowly tailored commitments in view of defending their key economic interests as major energy-producing economies. While a system-wide reform of existing GATT disciplines remains a first-best solution (55), an interim solution capable of tackling dual pricing and export taxes in the energy sector could be consist in addressing such practices under the ASCM, as measures functionally equivalent to fossil fuel subsidies.

1. *Applicability of ASCM disciplines to energy dual pricing.*

Some authors have underlined that "[t]he SCM Agreement has been the principal instrument used to evaluate the WTO compliance of dual-pricing policies of acceding energy-producing countries" (56). The ASCM has accordingly been suggested as the WTO Agreement under which such a practice should be best regulated (57). The adequacy of the ASCM to effectively tackle dual pricing is however far from being established. The Agreement does not specifically tackle market transfers, and ASCM disciplines may thus not prove sufficient depending on how dual pricing schemes are implemented. In other words, although dual pricing has the same economic effects of a subsidy when the regulated domestic price of energy inputs is set a level which does not allow for the full recovery of costs and a reasonable profit, it could trigger a violation of the ASCM only inasmuch as it constitutes a 'subsidy' within the meaning of the Agreement. Under Article 1 ASCM, a 'subsidy' must fulfil the following definitional elements: (i) it must provide a contribution by a government or any public body within the territory of a Member under Article 1.1 (a) (1) or any form of income or price support in the sense of Article XVI GATT under Article 1.1 (a) (2); (ii) it must confer a benefit to the recipient under Article 1.1 (b). Under Article 2, a financial contribution must be 'specific' within the meaning of Article 2 ASCM.

Many authors have argued that dual pricing may fulfil the first defini-

(55) A specific analysis of the constitutive elements of such a reform is given in I. Espa, 'Export Restrictions in Relation to Extractive Industries', E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015.

(56) See G. Marceau, 'The WTO in the Emerging Energy Governance Debate', at 36.

(57) See, for instance, S. Zarrilli, 'Dual Pricing Practice and WTO Law', 3 *OGEL* (2005).

tional element, either by qualifying as a governmental "provision of goods" under Article 1.1.(a)(1)(iii) ([58]), or by being considered functionally equivalent to a form of governmental "entrustment" or "direction" to private operators to sell energy inputs to domestic users at a price that is below market prices under Article 1.1.(a)(1)(iv) ([59]). Finding the existence of a 'benefit' seems also in principle possible although the identification of the relevant product market and the proper price benchmark may practically be difficult to pursue from an economic viewpoint ([60]). While the existence of different prices for the domestic and the export markets arguably improves the competitive position of the recipients in comparison to what would have happened under market conditions, according to Article 14 (d) ASCM a benefit is bestowed insofar as the provision of goods occurs at a less than adequate remuneration, to be measured based on "prevailing market conditions... in the country of provision...(including price, quality, availability, marketability, transportation and other conditions of purchase or sale)". In the case of energy dual pricing, however, domestic market conditions would not be of use as a benchmark for the purpose of determining the existence of a benefit. Based on the Appellate Body Report in *US - Softwood Lumber IV*, alternative cross-border benchmarks for the determination of adequate remuneration could be considered when there is no 'adequate' domestic market because the government plays a predominant role in the supply of the goods ([61]). This circumstance may be considered to apply in the case of dual pricing practices, and alternative benchmarks may include proxies derived from the world price for similar goods ([62]) or production costs, or the "prices for the same inputs in

([58]) S. Ripinsky, 'The System of Gas Dual Pricing in Russia: Compatibility with WTO Rules', 3 *World Trade Review* (2004), at 463-481; Y. Selivanova, 'World Trade Organization Rules and Energy Pricing: Russia's Case, 38 *Journal of World Trade* (2004), at 559-602.

([59]) For a discussion on the possible legal difficulties in defending such claims see I. Espa and S. Rolland, 'Subsidies, Clean Energy and Climate Change', at 6-7. The case for dual pricing constituting a financial contribution within the meaning of Article 1.1 (a) seems easier to advocate when STEs are performing the sale to domestic consumers at preferential prices.

([60]) V. Pogoretskyy, 'Energy Dual Pricing', at 203-208.

([61]) WTO Appellate Body Report, *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted on 19 January 2004, para. 90. For the Appellate Body, the role of the government is predominant when "it effectively determines the price at which the private suppliers sell the same or like products". *Ibid.*, paras. 87-96 and para. 101.

([62]) However, in the case of energy resources such as natural gas or electricity, due to the market configuration there is no such price. It is not clear to what extent the price benchmark could be determined based on the price of similar goods in local/regional markets. V. Pogoretskyy, 'Energy Dual Pricing', at 207. Possibly to solve this problem, some authors suggested that export prices could constitute the benchmark. Some G. Marceau, 'The WTO in the Emerging Energy Governance Debate', at 36.

economies at a similar stage of development with a similar resource base" (63).

Dual pricing schemes would also need to be 'specific' within the meaning of Article 2 ASCM unless they constitute a prohibited subsidy under Article 3 ASCM (64). However, dual pricing schemes often equally apply to all sectors to the general benefit of the domestic manufacturing sector (65), and therefore do not grant any benefit to any enterprise or group of enterprises, or industry or groups thereof, or specific sectors as required under the specificity criterion laid out under Article 2 ASCM. As dual pricing schemes do not fall under the category of prohibited subsidies under Article 3 ASCM, the specificity requirement represents a major obstacle for tackling such government practices under the ASCM. Nevertheless, dual pricing could arguably be defended as a de facto specific subsidy under Article 2.1 (c) inasmuch as low energy prices confer a disguised advantage to certain enterprises or industries due to their particular needs (e.g. energy-intensive sectors such as fertilizers) (66). In *US – Softwood Lumber IV*, the panel interpreted the de facto specificity test rather loosely by saying that the specificity requirement is not only met when the government deliberately limits the access to a subsidy to a certain number of enterprises or industries, since it is sufficient that the subsidized good is particularly useful only to certain enterprises (67). This approach seems to leave a quite significant margin of manoeuvre to WTO dispute settlement bodies.

2. *The treatment of export restrictions on energy products under the ASCM.*

The status of export restraints under the ASCM is unclear. The Appellate Body has not yet been confronted with a claim over an export tax or other form of restriction under the Agreement. In one occasion, the panel was confronted with the issue of whether certain export restraints

(63) Y. Selivanova, *Energy Dual Pricing in the WTO: Analysis and Prospects in the Context of Russia's Accession* (London: Cameron May, 2008), at 123.

(64) Provided they fall within the definition of subsidy under Article 1 ASCM, subsidies that are de jure or de facto contingent on export performance (Article 3.1(a) ASCM) or on the use of domestic goods over imported goods (Article 3.1(b) ASCM) fall under the category of prohibited subsidies and are deemed to be specific within the meaning of Article 2 ASCM. See P. C. Mavroidis, *Trade in Goods* (Oxford University Press, 2012), at 549.

(65) R. Quick, 'Export Taxes and Dual Pricing', at 195. See, for instance, the WT/ACC/SAU/61, *Report of the Working Party on the Accession of Saudi Arabia*, 1 November 2005, paras 29-33 and the Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, 17 November 2011, paras 124-133.

(66) V. Pogoretskyy, 'Energy Dual Pricing', at 210-212.

(67) WTO Appellate Body Report, *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted on 19 January 2004.

constituted a 'subsidy' under the ASCM, but it concluded that export restraints, *in the sense used in the dispute* (68), did not constitute a 'financial contribution' within the meaning of Article 1.1(a)(1)(iv) ASCM (69).

On a more general level, finding the existence of a governmental financial contribution could indeed be difficult in the case of an export restriction inasmuch as the government does not provide itself the cheaper input material. To the extent that the effect of the export restriction is that the government entices private operators to provide the material to domestic users as opposed to foreign buyers at a price that is below market prices, it could be argued that such a measure may fall under the category 'governmental provision of goods' under Article 1.1(a)(1)(iv) ASCM, associated with the last category "the government entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above". The main difficulty in this respect is to demonstrate that the government's 'encouragement' is actually a form of "entrustment" or "direction" within the meaning of point (iv) above. Existing relevant WTO case law seems to require that the government is in a position to control the private suppliers and to command them to sell the input material to domestic users (70). Depending on the facts of the case, this may be possible if the export tax is associated with sales or purchases by domestic state-trading enterprises, controlled and/or directed by the government, of the product subject to the restriction.

According to Article 1.1(a)(2), however, another way to establish the existence of a subsidy is if a measure provides "any form of income or price support in the sense of Article XVI of GATT 1994". Article XVI of the GATT does not specify the notion of 'income or price support', but it adds that the subsidies it addresses are those which "operate directly or indirectly to increase exports of any product from [the Contracting Party which grants the subsidy], or to reduce imports of any product into [the Contracting Party which grants the subsidy]". WTO adjudicators have not yet interpreted this definitional element, and it remains much of an open question whether export taxes or restrictions could be considered to fall

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(68) The definition of export restraint referred to by Canada for the purpose of the dispute was: "a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or takes the form of a government-imposed fee or tax on exports of the products calculated to limit the quantity of export". WTO Panel Report, *US - Measures Treating Export Restrictions as Subsidies*, WT/DS/194/R, adopted 29 June 2001, section 4 (a), para. VIII.3. The definition therefore did not comprehend export taxes.

(69) *Ibid.*, section 4(d)(*ii*), para. VIII.5.

(70) See WTO Appellate Body Report, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted on 27 June 2005, paras. 141-198.

under the scope of this definition (71). However, such measures have on domestic consumers the same effects of 'price support' mechanisms on domestic producers. They both induce a price differential between domestic and international prices of energy inputs and have a tangible effect on the international markets.

Under the second definitional element of subsidy set out in Article 1.1(b) ASCM, a financial contribution by a government or an income or price support measure must provide a 'benefit' to the recipient. As discussed above, according to Article 14 ASCM and based on a substantial body of consistent case law, the existence of a benefit is defined in relation to normal commercial conditions applicable in a given market (that is, a measure must improve the competitive position of the recipient as compared to what would be its situation in the market absent the measure). Although export restrictions amount to a subsidy in the economic sense, it may be hard to prove the existence of a 'benefit' since the imposition of an export tax is a government intervention which distorts the market. Depending on the criteria used to determine the relevant product market and the price benchmark, export restrictions may not be subject to ASCM disciplines. For instance, if the benchmark is the price before the export restrictive measure was implemented, then there would be a benefit. If the benchmark is determined as the price existing in the market at the time of purchase of domestic inputs by downstream producers, finding the existence of benefit would be more likely. The same holds true in the case the benchmark used is the world/export price. The specific criteria used on a case-by-case basis to apply the benefit test will thus be critical to determine whether export restrictions may be treated within the purview of the ASCM.

3. *The potential of the ASCM to address de facto fossil fuel subsidies.*

While the scope of dual pricing and export taxes or other restrictions is arguably broader than the legal definition of 'subsidy' adopted under the ASCM, the two previous sections showed that a considerable margin of discretion remains in the hands of WTO adjudicators should they be confronted with a government trade distortive practice functionally equivalent to a subsidy. It is argued that this margin of manoeuvre could be used to tackle such practices, at least provisionally, failing for the time being a system-wide WTO framework capable of effectively regulating the use of dual pricing schemes and export duties in the energy sector.

Although perhaps not in line with the historical intention of the ASCM provisions defining the scope of the Agreement, such an approach would

(71) V. Pogoretskyy, 'Energy Dual Pricing', at 202-203.

be in keeping with the sentiment of some WTO Members as recently expressed in the context of the Doha Round negotiations on Rules. In particular, the Negotiating Group on Rules has discussed possible avenues to rethink existing WTO disciplines on subsidies to adequately tackle dual pricing ([72]). Some WTO Members suggested improving the de facto specificity test under Article 2.1 (c) ([73]). Others proposed including dual pricing practices within the category of prohibited subsidies ([74]). According to such proposal, Article 3.1 ASCM should cover "the provision, by the virtue of government action, of goods to domestic production on terms and conditions more favourable than those generally available for such goods when destined for export" ([75]). These ideas have not progressed further as the Doha Negotiations on Rules were suspended in 2011. Yet, they implicitly show that WTO Members are aware of the limits of relevant GATT disciplines and of the potential of the ASCM to provide for a system-wide framework in principle applicable to all dual pricing schemes functionally equivalent to a subsidy, and thus capable of resolving the fragmentation linked to the existence of multiple country-specific (and narrowly tailored) commitments assumed under post-1994 accession protocols.

Mutatis mutandis, the same applies for export taxes. The deficient and fragmented constellation of WTO-plus obligations on export duties undertaken by newly acceded energy-exporting WTO Members adds in fact very little to the absence of any obligations on the use of such measures existing as per the GATT. Moreover, because of the fundamental comparability of export taxes with dual pricing, tackling the former as effectively as the latter is just as important given that the same effects may be pursued by either measure, and countries may tend to abuse of the type of measures exposed to the less burdensome regime. Addressing export taxes under the ASCM could thus represent an opportunity to fill a visible gap in existing WTO disciplines and at the same time ensure a more symmetrical treatment of such measures between original and newly acceded WTO Members.

Under this approach, WTO Members affected by energy dual pricing schemes or export taxes not covered by existing GATT rules or relevant WTO-plus obligations could still challenge such practices before the WTO dispute settlement bodies by claiming a violation of the ASCM. While the respondents would certainly argue that such measures do not constitute a

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([72]) A. Yanovich, 'WTO Rules and the Energy Sector', in Y. Selivanova (ed.), *Regulation of Energy in International Trade Law*, at 22.

([73]) V. Pogoretskyy, 'Energy Dual Pricing', at 222-223.

([74]) WTO/RL/GEN/94, *Expanding the Prohibited 'Red Light' Subsidy Category*, United States Proposal, 16 January 2006; WTO/TN/RL/GEN/135, *Submission of the European Communities on Subsidies*, European Union Proposal, 24 April 2006.

([75]) *Ibid.*

'subsidy' within the meaning of the ASCM, there is no Appellate Body examination on the issue endorsing such conclusion and the ASCM provisions leave the WTO adjudicators with a significant margin of discretion to potentially conclude in favour of the ASCM applicability. It is argued that the complainants could put emphasis on the climate change impacts of such practices as measures stimulating excessive consumption of fossil fuels. The most recent WTO case law shows in fact that the Appellate Body has already 'forced' existing subsidies disciplines in the attempt to distinguish between 'good' and 'bad' subsidies and avoid a climate change-unfriendly interpretation of ASCM provisions (76).

Moreover, and most importantly, WTO Members would still be left with the possibility to impose unilaterally a countervailing duty against the effects of such practices without having to wait for the multilateral track to run its course (77). This prospect could arguably exert a deterrent effect with respect to both WTO Members resorting to such practices and prospective energy-exporting WTO Members, possibly contributing to raise the level of ambition of their accession negotiations.

VI. *Conclusions*.

This paper addressed the issues of dual pricing and export restrictions in the energy sector and assessed the adequacy of existing relevant WTO disciplines under the premise that an efficient regulation of these practices would contribute ensuring fair access to energy resources while at the same time tackling fossil fuel subsidies having negative climate change implications. It showed that relevant GATT disciplines are overall deficient in the case of dual pricing and export taxes, while the panorama of relevant WTO-plus obligations consists of a network of narrowly tailored commitments with the only exception of the export concessions negotiated by the Russian Federation on a number of primary energy products. Accordingly, it suggested an alternative provisional approach for tackling such practices under the ASCM. This solution still represents a second-best compared to a system-wide reform of existing GATT disciplines but could still provide with an opportunity to compensate for existing regulatory gaps while at the same time ensuring the mutual supportiveness of trade and climate change.

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(76) See WTO Appellate Body Report, *Canada - Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R, WT/DS426/AB/R, adopted on 6 May 2013. For a comment on the interpretative approach used by the Appellate Body, which in the case at issue aimed at avoiding an explicit standing on the (il)legitimacy of clean energy subsidies (in particular, a feed-in tariff scheme) under ASCM rules, see 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 *Journal of International Economic Law* (2014), at 11-47.

(77) In the cases of export taxes, furthermore, countervailing duties would be relatively easy to calculate.