China's Energy Interest in Africa: Devising an appropriate International Framework

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Introduction

China has recently developed from being a net oil exporter in the early 1990s, to becoming the world's third-largest net energy importer behind the United States and Japan. Despite the global economic slowdown, China's demand of energy resources remains extremely high, compelling it to push into new energy markets, particularly in Africa. Although the Middle East remains the largest source of China's oil imports, Africa is not far behind. In 2009, China imported nearly 30 percent of its total crude oil imports from Africa. Angola is currently the biggest African oil supplier to China, followed by the Republic of Congo, Equatorial Guinea and the Sudan.

In order to secure access to African energy resources, China has developed a two-pronged energy investment strategy, with the intention of competing with Western oil companies which have had close business ties with the leading oil producers in Africa, namely Nigeria and Angola. First, China has pursued exploration and production agreements with small countries with a relatively low visibility such as Gabon, Guinea and the Republic of Congo. Second, it has signed a number of trade deals with oil producing countries offering generous market access and also substantial aid packages. As a result of this deliberate policy, China has secured new contracts and made huge investments in the energy sector eclipsing established Western firms in some of these oil-producing countries.

Without any uniform and coherent international rules governing trade and investment in the energy sector, the agreements concluded between energy importing countries, including China and African countries are not always consistent and tend to reflect the interests of the former. Some of them are driven by political considerations which in the medium to long term do not serve the interests of either party. To ensure security of supplies and also adequate economic benefits for energy producing countries, it is clear that a coherent international legal framework is needed. While the Doha Round would address some contemporary issues in international trade, it would not address some of the contentious issues in energy trade, including dual energy prices, export restrictions, and uniform multilateral disciplines on investment in the energy sector.

Notwithstanding the absence of multilateral disciplines, there are a plethora of regional trade agreements (RTAs) regulating energy trade and investment. With energy security in mind, some of these agreements contain very clear obligations for exporters and importers of energy products, and also have elaborate provisions on dispute settlement. With respect to the Africa, the ECOWAS Energy Protocol provides the legal and regulatory framework for all regional energy integration initiatives among ECOWAS Member states. It is modeled on the Energy Charter Treaty (ECT), which by far is the most comprehensive and far-reaching international regulatory instrument on energy trade and investment.

However, with the real possibility of conflicting rules in energy trade at the national, regional and international level, coherence is imperative. This contribution examines the limits of current WTO rules

and explores the benefits offered by regional disciplines on energy trade and investment rules with a particular focus on the legal disciplines relevant to the burgeoning trade and investment relations between China and Africa, and suggests possible ways through which the overlaps could be bridged with a view to enacting effective multilateral disciplines which would contribute to the growth of this sector by ensuring security and predictability, while at the same time encouraging innovation and competition.

The Chinese Trade and Investment Involvement in the Energy Sector

China's global economic strategy is largely shaped by its national development objectives and its demand for energy and other natural resources to power its economy. Its fixation on security of oil supplies has led it in search of new suppliers in Africa and elsewhere. Energy security is an integral part of China's overall security as reflected in a White Paper published by the Chinese Ministry of Defense in 1998[1].

The high concentration of China-Africa trade in the energy sector has recently reached new heights. Approximately 70 per cent of registered African exports to China consist of crude oil, with other raw materials accounting for nearly 15 per cent. For countries such as Angola and Sudan, their entire exports to China consist of crude oil and other oil products. China's FDI policy in Africa is driven largely by its own economic interests.[2] For the period between 2003 and 2007, the main recipient of Chinese investments was Nigeria which attracted nearly a fifth of total Chinese investments in Africa.[3] According to the Financial Times, China National Offshore Oil Company (CNOOC), a State-owned enterprise and one of the three major energy players in China, is negotiating with Nigeria to acquire one sixth of its oil reserves[4]. The bilateral relationship between Angola and China also underscores the latter's commitment to play a leading role in the energy sector in Africa. Since the end of the civil war in Angola in 2002[5], bilateral trade has increased significantly. From around US$ 1 billion in 2002, it reached US$25.3 billion in 2008. In 2006 Angola displaced South Africa as China's major trading partner in Africa. Chinese oil imports represented 88 per cent (US$22.3bn) of the bilateral trade volume in 2008.

It appears from China's trade and investment patterns that priority is being given to "niche countries", where the energy sectors are characterized by limited competition, because Western multinational companies have only limited access for political reasons and because the countries are relatively new or

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[1] Jane's Intelligence Review, *China struggles to fulfill spiraling energy demands*, vol. 16, n. 7, 2004, pp. 56–7.
[2] Kaplinsky, R. and Morris, M. "Chinese FDI in Sub-Saharan Africa: Engaging with Large Dragons", *The European Journal of Development Research*, Vol.21, No. 4, 2009, pp.551- 569.
[3] Nigeria was followed by South Africa (19.8%), Sudan (12.3%), Algeria (12%) and Zambia.
[4] Burgis T., "Chinese Seek Huge Stake in Nigeria Oil", *Financial Times*, 29 September 2009.
[5] AA.VV. "Oil, Energy and Power in Sino-Angolan Relations" in The China Monitor, Issue 54, August 2010, The Centre for Chinese Studies, Stellenbosch University, available at http://www.ccs.org.za/wp-content/uploads/2010/09/China_Monitor_AUGUST_2010.pdf

emerging oil producers offering significant opportunities. In exchange for access to oil supplies, China has been offering diplomatic protection and also a range of economic incentives such as grants, soft loans, credit lines and infrastructural projects. [6].

With new discoveries of oil in countries such as Ghana and Uganda, it is clear that China would continue to play a major role in the development of the energy sector in Africa. To ensure a mutually beneficial relationship, it is imperative that multilateral disciplines on trade and investment in the energy sector are agreed. While there is a patch work of bilateral and regional trade agreements regulating trade and investment in this sector, they are often not comprehensive and entirely consistent. The development of multilateral disciplines would guarantee uniformity and promote the interests of exporters and importers alike.

The importance of a multilateral regulation of the energy sector: an appraisal of WTO Rules

Against this background of expanding energy trade and investments between China and the African continent, a key question is how to devise an optimal international regime which would ensure access to energy resources and also further the interests of energy-producing countries. Currently, the regulation of energy under international economic law is highly fragmented and risks being legally incoherent. Given that WTO rules are applicable to all forms of trade, they also applicable to trade in energy goods and services, even if not there are no dedicated rules.

The current WTO rules were not negotiated with the specificities of the energy sector in mind, and as such cannot be expected to appropriately address all peculiarities of the energy market. Energy goods have peculiar physical characteristics that affect their means of storage, transportation and distribution preventing them from falling neatly into the WTO rules which draw a sharp distinction between goods and services. This constitutes a challenge for the energy sector, where it is not always easy to categorize transactions as “goods” or “services” trade due to their essential characteristics. Even if the classification is straightforward in the case of oil and solid fuels which can easily be stored and traded across borders, it is less evident in the case of natural gas and electricity. The non-storability of electricity, for example, makes it difficult to classify it as a commodity. This difficulty is reflected in the optional nature of the electrical energy entry in the HS classification. However, it has been recognized that the production of primary energy (i.e. renewable natural resources and nuclear energy production) and secondary energy (i.e. combustion of oil and other fuels) do not constitute services but result in goods, whose trade is subject to the GATT provisions.

Apart from the distinction between good and services, energy products easily fall under the broad definition of natural resources, sharing the typical features of exhaustibility, uneven distribution across the countries, negative externalities, and price volatility (even if the broad category of natural resources

[6] Besada, H., Wang, Y. and Whalley, J., *China‘s Growing Economic Activity in Africa*, Working Paper n. 14024, National Bureau of Economic Research, Cambridge, 2008.

is difficult to identify precisely especially in the context of international trade) . Moreover, these features of natural resource markets, facilitating the creation of various forms of market power, introduce dynamics of imperfect competitions that should be taken into consideration in the analysis of WTO rules related to energy markets. First of all, the geographical concentration of natural resources, combined with the scarcity of many energy sources, makes the energy markets particularly prone to cartelization, with few producers in few countries generally account for a large proportion of the world supply. Moreover, the high fixed costs of extraction, production and supply, as well as the dependence on networks for distribution can easily turn the market into monopolistic structures. For this reason, cross-border energy movement (imports, exports and transport) and supply of energy have been traditionally considered a "natural monopoly", establishing a strong connection between energy supply, monopoly and public interest. Natural monopolies require not only regulation to protect consumers from unproductive monopolist rents, but also, in order to foster competition and greater diversity of suppliers, access by outside producers/importers of energy (electricity and gas) to the energy facility (interconnector, transport, storage and distribution) owned and controlled in the form of a natural monopoly.

A wide range of policy measures impact on energy trade, including export taxes, quotas and prohibitions, applied and bound most-favoured nation (MFN) tariffs, non-tariff measures as well as national consumption taxes and subsidies. On the other hand, it has been also showed that the number of mergers and acquisitions between firms involved in the natural resource sector increased, as an alternative measure to secure access to scarce energy supplies. In this context of the perspective of progressive liberalization of the energy sector, the mere lifting of import barriers may not be enough. Pro-active measures aimed at providing a predictable access to competitive energy networks and to limit the monopolistic structure of the energy market seem more and more necessary, together with a framework for the increasing number of investments.

2.A Export control regulation in the WTO

While not directly regulating trade in energy products per se, the GATT/WTO nevertheless has some rules which are relevant to energy trade, particularly those regulating the right of countries to impose import and export restrictions on energy products. The most relevant substantive rules are provided under Article I guaranteeing most-favoured nation treatment, Article II mandating that import tariffs not exceed the level provided in a Member's schedule of concessions, Article XI prohibiting the imposition of quantitative restrictions, Article XIII on the non-discriminatory administration of quantitative restrictions, and Article XXVIIIbis on the renegotiation of tariffs, as well as Article XVII on state trading enterprises. These rules lay down the broad parameters of measures that may be adopted by WTO Members to support or regulate an industry or sector, including the energy sector. There are certain measures, including export taxes, which are the instruments of choice to guarantee energy security in hydro-carbons producing societies, whose status are not clearly defined under GATT/WTO rules.

The absence of any elaborate rules is seized upon by energy-producing countries to buttress their claim that it is within their rights to impose export taxes on energy products, provided they respect certain cardinal principles, including the non-discrimination principle. By contrast, energy-importing countries do not generally share this view. They believe that in the absence of any specific rules authorizing the imposition of such taxes, it should be assumed that they are prohibited. However, there is broad agreement that energy-producing countries would be within their rights if they imposed export duties on energy products. Where such duties are inscribed in a Member's Schedule of Concessions, that Member cannot impose any duty in excess of what is inscribed in the Schedule. For energy-importing countries, this binding of tariffs assures security and predictability of market access. They are also comforted by the fact that they can always renegotiate to bring down the export tariffs just as they can with import tariffs. According to Article XXVIII *bis*, WTO Members can engage in negotiations for the reduction of the general level of tariffs and other charges on exports, with a view to recording them in the schedules of concessions, which, in accordance with Article II:7, are an integral part of the GATT . It should be noted, however, Articles II:1(b) and (c) only refer to "importation" and to the result of "import tariffs" negotiations prompting the question whether these provisions are also applicable to export duties.

Another relevant provision is Article XI GATT, which prohibits WTO Members from imposing measures that limit or restrict exports. It relevantly provides that "*no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party*." As developed in the WTO jurisprudence, in addition to quantitative restrictions, Article XI also applies also to price-based prohibitions or restrictions on both imports and exports. For example, in *Japan—Trade in Semi-Conductors*, the adoption of minimum prices for imported products was found to be inconsistent with Article XI:1 i. In the limited situations where a Member can impose quantitative restrictions, they are enjoined by GATT Article XIII to administer the restrictions in a non-discriminatory manner.

2.B General exceptions

Other relevant provisions touching on Members' ability to impose export controls are Articles XX(g) and Article XXI of the GATT 1994, otherwise entitled general exceptions and security exceptions, respectively. Under the former, energy-exporting countries can adopt restrictive measures provided the objective is to conserve exhaustible natural resources. These measures must, however, be made effective "*in conjunction with restrictions on domestic production or consumption*". It cannot be disputed that mineral energy resources such as coal and crude oil are "exhaustible natural resources". They cannot neither be replenished nor manufactured, once they have run out. In the application of this Article, WTO panels and the Appellate Body have insisted that the measures must not exclusively target exports, but that similar measures to restrict domestic production or consumption must also be enacted. Furthermore, the measures must also comply with the requirements in the chapeau of the Article XX in

the sense that they must neither be discriminatory nor arbitrary or constituting a disguised restriction on trade.

Due to the relevance of national security concerns in energy law and policy, the exception set out in Article XXI is particularly relevant to trade restrictions on energy goods. Article XXI was not drafted with energy security concerns in mind, but arguably the phrase “security” could be interpreted broadly to allow countries which depend overwhelmingly on energy revenues to take restrictive measures to limit exports of energy goods. The key question would be what constitutes an “emergency in international relations”. It cannot be doubted that an energy-exporting country would be justified in halting exports to a country which is deemed to be an aggressor in a conflict by the United Nations, particularly where the products concerned are aiding in the war effort.

2.C Freedom of transit in the WTO

The WTO disciplines on energy trade are not limited only to export control measures such as export tariffs and quantitative restrictions, but also the entitlement of countries to the most direct route of transit for their imports and exports. For energy dependent countries, the security of supplies is vital, while for exporting and transit countries the right to market access and income, respectively are paramount. The main transport-related obligation in the GATT is Article V, which is based on the 1921 Barcelona Convention and Statute on Freedom of Transit. Article V provides that "*there shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, or vessels or of other means of transport*" (Art. V: 2). In order to achieve freedom of transit, Member States shall accord MFN treatment to goods in transit to all Members, and countries must not impose "unnecessary delays or restrictions" and unreasonable charges or transit duties, having regard to the conditions of traffic.

However, Article V GATT was not negotiated with the specific concerns of energy transit in mind. First of all, GATT Article V applies only to energy goods, such as oil, gas and coal. However, the main controversial aspect of Article V relates to its possible application to fixed infrastructure, such as electricity grids and pipelines. Furthermore, Article V:5 contains an MFN obligation with respect to charges, regulations and formalities imposed on transit goods, while it provides only for a limited national treatment obligation, prohibiting in particular the discrimination between foreign and national goods in transit. There is, in fact, no specific requirement to treat goods in transit like goods destined for or originating in the domestic market. Further, one of the strongest limitations of Article V is the fact that the provision is an inter-state obligation. It may be difficult to argue that governments can be required to oblige private energy companies, whose influence is drastically increasing in energy transport, to comply with GATT transit disciplines.

The scope of Article V has never been really determined. In the recent case of *Colombia – Indicative Prices and Restrictions on Ports of Entry*, the Panel provided some interpretative guidance. It should be mentioned, however, that several proposals have been tabled by WTO members within the framework of

the negotiations on trade facilitation. It has been proposed, for example, by The Former Yugoslav Republic of Macedonia, Mongolia, Switzerland and Swaziland, to extend the application of Article V to fixed infrastructure, such as pipelines and electricity grids, as well as to assure a full national treatment protection to goods in transit, together with the obligation for Members states to assure that private enterprises involved in the transit should act in a manner consistent with Article V.

On the other hand, the importance of compliance with WTO obligations relating to the transit of goods has been recently raised in accession negotiations. In particular, in the case of Ukraine, the Working Party Report contains a specific reference to energy: "*Ukraine would apply all its laws, regulations and other measures governing transit of goods (including energy), such as those governing charges for transportation of goods in transit, in conformity with the provisions of Article V of the GATT 1994 and other relevant provisions of the WTO Agreement*".

2.D Dual pricing, Investment and Competition policy

Another major policy issue in the energy field, and in particular in the petroleum sector, is the "dual pricing" for natural resources. Governments of energy producing countries keep an artificially lower domestic price and higher export prices, with the aim of ensuring sufficient and cheap supply of raw materials for their domestic manufacturing industries, in order to promote industrialization and attract foreign investment. Notwithstanding the attempts by the US and other industrialized countries to have this issue addressed in the Uruguay Round, there are no specific disciplines in the WTO Agreement on Subsidies and Countervailing Measures and the DSB has not yet had the opportunity to shed any light on the issue.

Dual pricing, by having the same economic effect than an export tax, could probably be regarded as a prohibited "subsidy" within the meaning of the ASCM if conditional on the export of a good, or an actionable subsidy if it causes adverse effects to other Members. In the context of the Negotiating Group on Rules, in 2006 the EU tabled a submission aiming at clarifying the discipline of dual pricing with a change in the letter of Article 3 of the SCM Agreement, in order to tackle the granting of loans below costs (or another suitable benchmark) could be adequately tackled. Moreover, the issue of dual pricing practices has also recently been addressed in the context of WTO accession negotiations. The Protocol of Accession of Saudi Arabia was the first accession package to have incorporated an explicit commitment by an acceding government on energy pricing in the Report of the Working Party. It is also understood that it is one of the thorniest issues in the accession negotiations of the Russian Federation.

The practice of dual pricing and other trade-distorting practices in the energy sector cannot be analyzed within the WTO legal framework without taking into consideration the importance of the existence of natural monopolies, and the role of state-owned enterprises in the energy market. The economic activities in the energy sector, in fact, have traditionally been left to state-owned companies or monopolized private enterprises, even if the process of privatization in developed countries begun in the 1990s. Article XVII of the GATT, which deals with state-trading enterprises, is very relevant for international trade in energy insofar as it prohibits discriminatory behavior in the selling and purchase of goods and also condemns inadequate and unfair opportunities for competition for foreign enterprises.

However, in the specific case of energy, in many circumstances it is difficult to determine with precision whether certain energy companies fulfill the definition of a state trading enterprise. For example, it is not clear if energy companies not been entirely privatized and not fully government-owned can be subjected to this provision. It is also not clear whether Article XVII can also be extended to energy companies that control transportation and distribution networks. It is also disputable if state monopolies that maintain domestic prices for natural gas at a level below their long-term marginal costs of production are in violation of Article XVII. However, under Article XVII GATT several important state-trading enterprises relating to energy resources have been nevertheless notified, as in the case of the Brazilian ITAIPU Binacional in the electrical energy sector or the Bolivian Republic of Venezuela on Petroleos de Venezuela S.A. and its subsidiaries in the hydrocarbons field.

The specificity and complexity of the energy sector raise particular challenges for the multilateral trading system, especially due to the fact that the WTO is lacking appropriate, comprehensive disciplines in the area of competition and investment policy, which are not being addressed under the current Doha Round negotiations. In particular, the energy sector is a capital-intensive industry that requires significant investments in infrastructure. The WTO legal framework does not deal with investment policy per se but only prohibits those investment measures identified as inconsistent with GATT Articles III (National treatment) and XI (General elimination of quantitative restrictions), such as local content and trade balancing requirements. The TRIMs Agreement does not, for example, have provisions safeguarding foreign investments or guaranteeing the rights of foreign investors. Issues such as nationalization, compensation and the settlement of investment disputes are not addressed by the agreement.

Moreover, the fact that government procurement disciplines apply only to a fraction of the membership may also be seen as a weakness of the WTO framework, due to the considerable involvement of local and central government bodies in the purchase of energy goods and services.

2.E GATS and Energy liberalization

The WTO disciplines on services are *par contra* extremely pertinent in the energy context: the GATS Agreement applies to all measures that affect trade in energy services. Moreover, due to the fact that the energy sector is dominated by integrated state-owned monopolies, the GATS general rules on monopolies and exclusive services suppliers (Article VIII) are of particular relevance to energy services. For example, Article VIII is especially significant to gas transportation and distribution services, requiring Members to ensure that the incumbent natural monopolist in the transportation and distribution market does not act in a manner inconsistent with the MFN principle and with that Member's specific commitments.

However, the WTO "Services Sectoral Classification List" (W/120 list) does not include a separate comprehensive entry for energy services and does not fully reflect the commercial reality of the energy supply system, particularly in the oil and gas fields. Important energy services (transport, distribution, construction, consulting, engineering, etc.) are covered by the respective horizontal categories in the W/120 list, with an exception represented by 11(G)(a) "pipeline transportation of fuels", listed as a

separate sub-sector of transport services. Meanwhile, some energy related services are listed as separate subsectors. For example, 1(F) "Other business services" cover some energy related services like technical testing and analysis services, (h) services incidental to mining, (j) services incidental to energy distribution, (m) related scientific and technical consulting services, (n) maintenance and repair of equipment. As energy service is not registered as a separate entry in the W/120 list, each Member is free to easily modify the sectorial coverage of its specific commitments on energy services and such commitments are very limited and sparse. The large bulk of commitments in the energy sector have been undertaken by acceding countries, reflecting the dynamics of the WTO accession process and the fact that energy-related activities have started attracting more attention after 1995.

Energy services are also an essential aspect of negotiations in services of the ongoing Doha Round negotiations, and in particular, the classification of energy services has been one of the key topics of debate amongst various interest groups. The U.S and Norway proposed a dedicated Reference Paper for energy services, based on the Reference Paper on the GATS Agreement on Basic Telecommunications Services, with a view to developing a set of specific rules for cross-border energy trade.

The development of regional disciplines to govern the energy sector

Apart from disciplines imposed by the WTO, international energy trade is increasingly subject to regional norms. The RTAs' regulation of the energy sector is essentially built on the GATT/WTO fundamental principles of non-discrimination, transparency and a commitment to the progressive liberalization of international trade. However, the regional regulatory framework for international energy regulation has the double advantage of not only providing a specific and detailed framework for trade in energy goods and services, but also for the regulation of energy-related investments. Some RTAs have comprehensive provisions covering energy goods, services and investments, with some laying down minimum standards of treatment - often formulated as "full protection and security" and "fair and equitable treatment" clauses, and other internationally - accepted standards.

The most prominent and detailed regulations in the energy field have been established in the North American Free Trade Agreement (NAFTA) and in the Energy Charter Treaty (ECT). Chapter 6 of the NAFTA contains a series of legal obligations for the treatment of trade in energy and basic petrochemicals goods and cross-border trade in services, incorporating all relevant GATT rights and obligations to North American trade in energy goods and services. On the European side, the Energy Charter Treaty (ECT) is a unique multilateral treaty specific to the energy sector based on the GATT/WTO pillars of non-discrimination, national treatment and access to markets on an open and transparent basis. It is therefore highly significant in the development of rules and disciplines outside the WTO context.

The ECT is not only the most comprehensive and far-reaching regulatory instrument on energy trade and investment, but it has been particularly influential to subsequent regional agreements addressing the energy sector. The ECT constituted the basis for the regulation of the energy relations between the EC

and parties to the European Charter Conference. Moreover, the ECOWAS Energy Protocol (signed in 2003 and entered into force in 2006), which provides the legal and regulatory framework for all regional energy integration initiatives among ECOWAS Member states, is basically drafted on the basis of the ECT structure and provisions. As compared to WTO regime, the ECT, NAFTA and ECOWAS regimes offer comprehensive and focused disciplines far more suited to the regulation of the energy sector. They have dedicated provisions on a broad range of export controls, freedom of energy transit, energy-related investment protection, energy efficiency and the environment.

3.A Market access provisions on export restrictions

An important feature of energy-specific regional agreements is the emphasis on access to supplies. Unlike the GATT/WTO, which puts a lot of emphasis on market access, these agreements tend to have explicit disciplines on export controls in order to ensure energy security for countries that rely on imported energy resources.

NAFTA Chapter 6 incorporates the GATT provision on quantitative restrictions in Article 603 applying it to trade in energy and basic petrochemical goods, and interpreting these provisions narrowly. For example, in addition to the prohibition on minimum import and export prices, Article 603.2 also imposes prohibition on maximum import and export prices. Furthermore, Article 604 NAFTA introduces a specific separate provision explicitly prohibiting the use of export duties. It also extends the national treatment and the most favoured nation principles to the imposition of export taxes, requiring that, "*no party may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good to the territory of another party, unless such duty, tax or charge is adopted or maintained on: a) exports of any such good to the territory of all other Parties…"*. With respect to other non-duty export restrictive measures, NAFTA (in Article 605) also tightens the requirements for invoking exceptions similar to those in GATT Articles XI: 2, XX and XXI[7].

The ECT Treaty, on the other hand, adopts a symmetrical approach, in Articles 28 and 29 as regards the prohibition of both import and export restrictions. In a radical departure from the WTO system that does not prohibit the use of export duties, Article 29(4) of the ECT (mirrored in Article 29 of the ECOWAS Protocol) provides that "*each Contracting Party shall endeavor not to increase any customs duty or charge of any kind imposed on or in connection with importation or exportation: ... (b) in the case of the exportation of Energy Materials and Products listed.., and that of their importation if the Contracting*

[7] For example, NAFTA Chapter 6 restricts the use of the GATT exemptions under Article XX, further conditioning them by three constraints. First any restriction imposed must "not reduce the proportion of the total export shipments of the [energy] good made available to the other Party relative to the total supply of that good of the Party maintaining the restriction" (Article 605(a)). Moreover, the restriction on exports cannot be accomplished through the imposition of an export price higher than that charged for the good domestically and the restriction must "not require the disruption of normal channels of supply to other Party or normal proportions among goods" (Article 605(c)).
The NAFTA also significantly limits the use of the GATT national security exception (Article XXI) as a justification for restrictions on imports or exports of energy goods. Such restrictions can only be imposed where necessary "to supply a military establishment ... or enable fulfillment of a critical defense contract" or to "respond to a situation of armed conflict".

Party is not a member of the WTO, above the level most recently notified to the Secretariat...". Paragraph (6) further provides that "*no such Contracting Party shall increase any customs duty or charge of any kind imposed on or in connection with importation or exportation of Energy Materials and Products listed ... above the lowest of the levels applied on the date of the decision by the Charter Conference to list the particular item in the relevant Annex. ...*".

Although couched in hortatory language, it still represents a considerable development over the GATT norm which only prohibits the imposition of import duties in excess of the bound level in a Member's schedule of concessions. It has been suggested that the language used in the ECT reflects the delicate balance struck between the economic interests of exporting countries and the energy security of importing countries. Whereas under the GATT, the primary objective is ensuring access to foreign markets and hence the emphasis on market access and the regulation of import duties, in the case of energy, the predominant concern appears to be access to supplies resulting in the strengthening of the disciplines on export restrictions.

3.B Regional regulation of energy transport

Apart from the disciplines on import and export restrictions, RTAs also incorporate and elaborate on other WTO provisions of crucial importance to energy trade. The provisions on freedom of transit under ECT Article 7 (also Article 7 of the ECOWAS Treaty) appear to go further than GATT Article V. It relevantly provides that Contracting Parties should facilitate the transit of energy on a non-discriminatory basis consistent with the principle of freedom of transit, including an obligation to promote also the construction of new pipelines and transmission lines. Article 7(3) further introduces a national treatment obligation, not found in Article V GATT, namely establishing that a transit country may not treat energy materials and products in transit in a less favorable manner than such materials and products originating in or destined for its own territory.

Taking into consideration the role played by private entities in energy transit, Article 7.2, represents an important improvement compared to Article V GATT, which only regulates State-State relations. In particular Article 7.2 ECT states that Contracting Parties "*shall encourage relevant entities to cooperate in*" transit measures, including "*measures to mitigate the effects of interruptions in the supply of Energy Materials and Products*" and "*facilitating the interconnection of Energy Transport Facilities*."

Another innovative feature of the ECT is its explicit coverage of grid-bound energy transport. The Treaty clearly specifies the concept of "transport facilities" through which transit takes place, including in the application of the Article high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines; crude oil transmission pipelines; coal shipping pipelines; oil product pipelines; and other specific fixed energy facilities, notably port facilities.

In order to guarantee the effective supply and the regular flow of energy materials and products among ECT Members, Article 7.6 (also Article 7.6 ECOWAS) provides that, in the event of a dispute over any matter arising from transit, the Party whose territory is involved in the transit of energy material and products "*shall not ... interrupt or reduce, permit any entity subject to its control to interrupt or reduce,*

or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7)". Furthermore ECT Contracting Parties are obliged to take all necessary measures to facilitate transit of energy, to promote the modernization, development and operation of inter-regional transport facilities, as well as the development of internal and cross border interconnection facilities.

Several other concerns related to transit, such as the growing dependence on imported energy, the development of specific guidelines, criteria or rules for transit fees, the protection of international energy swaps etc. which were not addressed in Article 7, are being considered in the negotiations of the Transit Protocol, which formally started in 2000. Unfortunately the Transit Protocol, which could have been an innovative regulation of energy transit, has never been finalized and was suspended in 2006. One of the reasons behind the impasse of the negotiations of the Transit Protocol is in fact the inclusion of the energy issue especially transit in the bilateral consultations between EU and the Russian Federation in the context of the Russian WTO accession.

3.C Third-Party Access to Energy

Closely aligned to the transit of energy goods and services is the notion of "third-party access" (TPA). Third party rights consist of the right of new entrants to use the platform of existing owners to engage in a range of activities, from the generation, to the supply or the distrubution, upon the payment of a reasonable fee and on practical technical terms. The access regime for third parties is defined by the degree of control of transmission operators in a given market. They usually have monopoly rights or are in a dominant position enabling them to dictate the terms for market entry. This is still the case in some countries even after the progressive liberalization of a number services sectors following the Uruguay round. For this reason, access of third-parties is an essential pre-requisite for the creation of competitive national cross-border energy markets limiting the distortive effects linked to the operations of natural monopolies in the energy sector.

Third-party access regulation is generally disciplined in national competition laws which could either set access conditions ex-ante or imposes ex-post administrative or judicial controls to sanction alleged abusive practices by monopolistic operators. It is extremely rare to identify a norm in international law that guarantees third-party access, apart from the EU Treaty competition rules and bilateral agreement that concern cross border transport facilities. Moreover, the main difficulty for the effective application of the third party access indirect regulation under the ECT consists in the fact that this type of access obligations essentially addresses private entities, whereas international law is primarily concerned with states' obligations.

The only regional legal instrument in which the important issue of third party access has been specifically addressed is the Energy Charter Treaty. The 1991 European Energy Charter and the earlier drafts of the ECT had language that could have been clearly interpreted as obliging governments to grant TP. However, the language was modified following pressure by energy monopolists, including Gazprom, EDF and Ruhrgas. Notwithstanding the hortatory language used in the ECT Final Act, the rights of third parties are adequately protected under the Charter because of the broad reach of the non-

discrimination principle. Monopolies or companies in a dominant position as far as energy transport is concerned are required to provide access to third parties on reasonable terms and conditions. In fact, the non-discrimination obligation as contained in ECT Article 10(1), when read together with ECT Articles 22 and 23 regarding the application of the ECT to state companies and special and privileged enterprises, indisputably prevents such companies from discriminating against foreign investors by either refusing access or granting access on discriminatory terms.

While GATS Article VIII, relating to monopolies and exclusive services suppliers, has a similar intent, its terms are not broad nor explicit enough to guarantee a stable and fair access to energy networks. For this reason, it has been proposed to include specific provisions assuring non-discriminatory third party access to network, grids and essential energy infrastructures. The United States and Norway have tabled a proposal aimed at creating dedicated disciplines for energy services, modeled on the Reference Paper for telecommunication services.

3 D Regional promotion and protection of energy-related investments

The most comprehensive disciplines on the promotion of trade and the protection of investments in the energy sector are to be found in regional trade agreements. The disciplines are not limited to prohibiting trade-related investment measures inconsistent with the non-discrimination principle as under the TRIMs Agreement, but also extend to other areas currently not regulated by the WTO.

A major difference between the WTO and the NAFTA system is the inclusion of a general provision on foreign investment, even if it does not specifically address the energy sector. Chapter XI of the NAFTA is based on four fundamental principles: national treatment with respect to investments by NAFTA Parties (Article 1102); MFN treatment for foreign investors from other Parties (Article 1103); minimum international standards of “fair and equitable treatment” for investments (Article 1104) and a prohibition on the use of performance requirements with respect to NAFTA investors (Article 1105). The investment chapter also includes provisions designed to facilitate investment-related transfers, including profits and other revenues flowing from investments (Article 1109), provision prohibiting expropriating or nationalizing measures unless done for a public purpose, on a non-discriminatory basis, in accordance with due process of law and on payment of appropriate compensation (Article 1110)[8].

While the ECT regime is modeled on NAFTA Chapter XI, it has the objective of creating a “level playing field” for energy sector investments. As such, a clear distinction is made between the pre-investment phase of making an investment and the post-investment phase relating to investments already made. While the provisions concerning the pre-investment phase primarily set up a “soft law” regime of good practice indications, the ECT establishes a “rigid” regime for the post-investment phase with binding obligations on the Contracting States.,

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[8] Notwithstanding this detailed framework for the regulation of foreign investment, NAFTA does have some important exceptions, particularly in the energy sector, with the most significant being those accorded to Mexico to perform a range of energy-related activities, and to refuse investment in the areas of exploration and exploitation of crude oil and natural gas. Consequently, it is only the non-basic petrochemical sector which is to open to foreign investment.

The Treaty provides for minimum standards of protection based on the non-discrimination principle. In that context, existing foreign investments made by investors (nationals and other legal entities) from other Contracting Parties in the energy sector must be treated fairly and on a non-discriminatory basis. The most-favoured-nation treatment is assured for all activities related to the investments, including management, maintenance, use, enjoyment and disposal, which should not be impaired by "unreasonable or discriminatory measures". The contracting parties undertake to accord to the investments of investors of other Contracting Parties fair and equitable treatment, enjoying the "most constant protection and security".

Further, the ECT provides a number of other investment protection measures that are partially reflected in the principles contained in various EU Bilateral Investment Agreements. Article 12 requires Contracting Parties to accord investors MFN and national treatment for losses suffered as consequence of armed conflicts and civil disturbance, while Articles 13 and 14 guarantee the right of foreign investors to repatriate earnings without delay in case of expropriation and nationalization[9]. To understand the importance of the innovative system of promotion and protection of foreign investment in the ECT, Part III of the ECT needs to be read together with ECT Article 26, which establishes a particularly strict enforcement mechanism in Investor-State Arbitrations. If a dispute concerning the application or the interpretation of a provision in Part III of ECT cannot be settled amicably within three months, the dispute shall be resolved in a forum elected by the investor, which could be the national court or administrative tribunal in the contracting party where the investment is made, a previously agreed dispute settlement procedure, or international arbitration (the ICSID, the ICSID Additional facility, an arbitral tribunal established under the UNCITRAL Arbitration Rules or the Arbitration Institute of the Stockholm Chamber of Commerce).

This Investor-State dispute settlement mechanism is distinguished by the acceptance of the parties of compulsory arbitration, pursuant to which they give their "unconditional consent" to submit a dispute arising to international arbitration: foreign investors from member states can sue the host state directly, before an international arbitral tribunal, without the need for a specific arbitral agreement to be concluded. Furthermore, compulsory arbitration applies even when proceedings have already begun, or even concluded, in one of the Contracting Parties, in clear contradiction of the principle of *res judicata* and the notion of arbitration as a consensual process of dispute resolution. For this reason, the combination of the detailed discipline of the Investment protection in ECT Part III, with the investor-State arbitration mechanism set in Article 26 ECT, creates an energy innovative investment protection regime, unique in the international arena, not only for the broad scope of covered issues but also for the number of countries that subscribed and made use of this arbitration system.

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[9] Article 13, assures the principle of full compensation following expropriation of investments made by investors from other contracting parties. It pertinently provides that investments "*shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation except where such expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation*".

ECT Article 26, in fact, has been also the subject of interpretation by a number of tribunals creating a well-established jurisprudence on the application of the principle of national treatment and fair and equitable treatment in energy investment cases. Twenty cases have thus far been brought by investors to international arbitration pursuant to ex Article 26[10].

3.E Energy efficiency and related environmental aspects in the ECT

While energy security has dominated the discourse both at the national and international level, energy efficiency is increasingly receiving attention due to environmental concerns, particularly climate change and global warming and the interface with competitiveness of firms.

The NAFTA does not have a dedicated environmental chapter, but contains a number of environment-related provisions which are relevant for the energy sector. Chapter 11 mandates that investment activities should be undertaken in a manner sensitive to environmental concerns. The relevance of this provision is reflected in NAFTA jurisprudence on investment in the field of health and environment, as highlighted in the following cases: Ethyl Corporation, Desona and Metalclad. In the regulation of the energy sector, the ECT explicitly includes the innovative concept of sustainable development, the precautionary principle and the polluter pays principle, already introduced in some multilateral environmental treaties. Moreover, the ECT takes an expansive view of what constitutes an environmental impact, to include effects on cultural heritage and socio-economic effects.

In practice, the ECT also provides a forum for sharing experiences on energy efficiency issues through the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA). The Protocol pays particular attention to policies which are the core of an effective national energy efficiency strategy, including taxation, pricing policy and environmentally-related subsidies and other mechanisms for financing energy efficiency objectives. For example, Article 18(1) ECT requests its Contracting Parties to take environmental factors into account in formulating energy policy, to “promote market-oriented price formation and a fuller reflection of environmental costs and benefits throughout the Energy Cycle”, to promote the use of cleaner fuels and renewable energy sources, and to promote transparent and early environmental assessment of energy projects.

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[10] There has been only one award on jurisdiction (Ioannis Kardossopoulos v Georgia) and seven final awards mostly on the obligation of fair and equitable treatment of investors, Article 10 (1); (Nykomb Synergetics Technology Holding AB v the Republic of Latvia; Petrobart Limited v the Kyrgyz Republic; Ukraine and Plama Consortium Limited v Republic of Bulgaria; Amto (Latvia) v. Ukraine; Azpetrol International Group (the Netherlands) v. Azerbaijan; Cementownia "Nowa Huta" S.A. (Poland) v. Republic of Turkey; Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey) have been issued under the ECT .

The optimal WTO regime or possible improvements

As pointed out earlier, while several WTO provisions, including those relating to transit, state-monopolies, subsidies and a broad range of energy-related services are relevant to energy trade, the WTO does not have a comprehensive framework which would fully address the energy security concerns of its members. It is in this context that efforts are being made in the Doha negotiations specifically in the negotiations on trade facilitation (transit), in the NAMA negotiations (export taxes), and in the services negotiations (energy-related services, including pipeline services) to develop disciplines which would further enhance the rights of energy-importing and exporting countries. However, a key aspect of the international debate on energy in the WTO context is identification of the appropriate framework for the development of energy-related disciplines.

Arguably comprehensive negotiations, focused on the specific needs of energy trade, are needed to fill the gaps in the WTO framework with a view to promoting energy-related investment and competition within and among countries. For this reason, the adoption of a "decision" clarifying how WTO rules apply to some specific energy sectors does not appear to be the most efficient and effective solution given the sketchy nature of the WTO rules and the fact that there are no multilateral disciplines on investment and competition policy.[11].

A new “Energy Agreement”, multilateral or plurilateral that would include a series of specific sectorial rules on energy could represent an optimal solution to be introduced within the WTO framework. The negotiations would afford Members the opportunity to address all the pertinent problems, ranging from issues of classification of goods and services, to disciplines on subsidies, to issues of competition policy and state trading, as well as intellectual property rights and government procurement. An integrated approach would ensure uniformity in the application of standard rules and promote competition in all energy sectors, from oil, gas, coal, wood, electricity to atomic energy and renewable forms of electric energy production (solar, wind, wave, tidal), as well as biofuels.

In particular, a separate agreement would have the distinct advantage of addressing the specificities of energy trade, taking into consideration the peculiarities of the energy market. For multilateral liberalization of cross-border energy (in particular electricity and gas) trade will not be able to achieve its full potential if there is not secure and predictable access to energy networks. A parallelism could be established with the telecommunications market where access of competing providers to the networks of established state-owned companies is the key to improving telephony services and reducing cost. There are examples where the WTO has been able to conclude dedicated sectoral agreements to further liberalize trade. A case in point is the WTO negotiations on basic telecommunications (1994-1998),

[11] An interpretative decision, in fact, could be adopted by consensus by the General Council, with a much simpler process than an amendment. Also, a decision would have the important advantage to interpret the application of the general rules and principles founding the multilateral trading system, to the specific needs and specific requirements of an opportune international regulation of trade in energy products, assuring at the same time coherence and accuracy in the discipline. However, an interpretative declaration is, in fact, not helpful in the case of a clear gap in the WTO discipline, as in the case of export restrictions.

whose results were consolidated into the Fourth Protocol of the General Agreement on Trade in Services (GATS) and entered into force in February 1998. The Reference Paper for the Telecommunication Protocol is also another successful dedicated agreement concluded by WTO Members and adopted on 24 April 1996 to promote competition in the telecommunications sector[12]. As to whether it would be possible for a dedicated agreement on energy to be adopted by WTO Members in the context of the Doha Round is doubtful considering that there is no mandate at present and also considering the difficult political context. Progress in the Doha Round has been very slow, so Members would not like to introduce new and difficult issues which can only complicate efforts to conclude the Round. The opposition of several developing countries, including oil-producing countries, to commencing negotiations on the so-called Singapore negotiations (competition policy, trade and investment and government procurement) is a harbinger of the difficulties that lay ahead in negotiating dedicated disciplines for the energy sector. The oil-exporting countries entertain the fear that multilateral disciplines would encroach upon their sovereign rights over their natural resources.

It is undeniable that the evident discrepancy in the balance of rights and obligations of energy-importing and energy-exporting countries in the WTO system reflects the priorities and differences in the interests of these two groups of countries. The limited membership of the major oil-producing countries in the GATT/WTO until recently contributed to the partial treatment of the energy sector within the WTO legal framework. Having a comprehensive framework for the liberalization of not only energy trade but also international investment related to energy would be of very interest to most countries, if the agreement strikes a careful balance between the rights of energy-exporting and energy-importing countries While specific trade rules are important to encourage energy trade flows, investment rules are necessary to attract investments in energy infrastructures, which are also indispensable for energy trade flows. Given the importance of the energy sector to developing countries, they stand to gain immensely from multilateral disciplines. They will be able to attract new technologies, which should help to increase production in an environmentally friendly manner.

In crafting multilateral disciplines on energy trade and investment, it would be advisable for WTO members to look at how the rules have evolved regionally, especially considering the comprehensive rules in the ECT and NAFTA. The integration of the regional regimes into the multilateral trading system could represent an optimal solution in that it would combine the advantages of tested regional energy disciplines with the structural benefits offered by the WTO legal framework However, before the new comprehensive WTO rules on energy are agreed or become fully operational, it would be important to have detailed rules to govern the relationship between current WTO rules that are relevant for the

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[12] In order to guarantee the respect of competition concerns, under paragraph 5 of the Annex on Telecommunications to the GATS, each Member is required to ensure that the service suppliers of other Members are given access to and use of "public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions". Moreover, Paragraph 5(g) of the Annex also permits developing country Members to place reasonable conditions on access to and use of telecommunications network in order to strengthen their domestic capacity, introducing a clause that could be extremely important if applied or extended to energy networks.

energy sector and those in bilateral and regional trade agreements in the event of a conflict, so as to ensure the orderly development of uniform multilateral rules.

The interface between the WTO and RTAs in the energy sector represents, in fact, a growing area of potential conflicts and overlaps of jurisdictions. The RTAs regulating the energy sector have established sophisticated enforcement regimes with specific dispute settlement mechanisms to resolve State-State and Investor-State disputes, which have developed an impressive body of case law. A case in point is the dispute settlement system of NAFTA. The process begins with government-to-government consultations. Should consultations fail to resolve the dispute between the parties, it is then referred to a meeting of the ministerial level Free Trade Commission, and thereafter referred to a formal arbitral panel[13]. Other RTAs, including the ECT and ECOWAS also have specific mechanisms for resolving disputes between the contracting parties. They envisage recourse to a panel system along the lines of the WTO Dispute Settlement system, should the parties fail to resolve their dispute through bilateral diplomatic channels.

This overlap between RTAs and WTO disciplines creates the basis for what is called a "double breach" jurisdictional overlap between the two dispute settlement systems, in cases where the same measure is challenged at the same time in both forums. To the extent that these RTAs are WTO compatible, then WTO members, who are parties to such RTAs, can have recourse to the internal dispute settlement mechanisms to enforce the agreed norms. It would be advisable to have agreed procedures to handle WTO-RTA conflicts of jurisdiction problems, so as to prevent confrontational challenges which could compromise the ability of WTO Members to agree on multilateral disciplines for the energy sector.

Conclusion

Notwithstanding the importance of the energy sector, the WTO does not have comprehensive rules which strike a careful balance between the rights of energy exporting and importing countries. The lack of a coherent multilateral framework has spurred the conclusion of bilateral and regional trade agreements, some of which contain dedicated disciplines for the energy sector. For African countries, many of whom are rich in hydrocarbons which have attracted the interest of established firms in Western countries and new entrants from emerging economies, particularly China, it would be important to have multilateral disciplines owing to their weak negotiating capacities which compromise their ability to derive significant economic benefits from their natural resources.

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[13] The consistency between the NAFTA and the WTO dispute settlement mechanisms is assured because of Article 2002 NAFTA, which provides a forum selection clause and an exclusive forum clause. Disputes regarding any matter arising under both NAFTA and the WTO Agreements may be settled in either forum at the discretion of the complaining party. An exception is made in respect to claims involving environmental, SPS, and technical standards matters, for which the responding Party may demand that the matter may be settled by a NAFTA panel.

Ensuring security of supply, guaranteeing the protection of investors and addressing climate change mitigation needs are priorities which should guide any multilateral effort to establish dedicated disciplines for the energy sector. Given the differing interests of energy exporting and importing countries, it would not be easy to achieve an agreement. However, WTO Members do not have to start from a blank slate. They can build on the disciplines on energy trade and investment established in a number of regional trade agreements, including the ECT, NAFTA and the ECOWAS treaty. Some of these RTAs have incorporated GATT rules and disciplines and gone further by enacting dedicated rules for energy goods, services and investment, backed by specific dispute settlement mechanisms. Pending the full implementation of any multilateral disciplines to regulate the energy sector, it would be important to have detailed rules and procedures for handling potential conflicts that may arise as a result of inconsistencies between current WTO rules relevant for the energy sector and relevant RTA rules. If the WTO does not seize the moment to enact comprehensive rules for the energy sector, it could soon be asked by its members to adjudicate disputes arising out of existing WTO rules that were not negotiated with the energy sector in mind. A comprehensive multilateral agreement would address the uncertainty surrounding energy trade and investments, enhance production and security of supplies for the benefit of both energy exporting and importing countries. It would also bolster the influence of the WTO and strengthen its position as the principal forum for the negotiation of multilateral trade rules.

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